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RAYMOND v. GLOVER et al. (L. A. 1,282.)*

(Supreme Court of California. Sept. 1, 1904.)

APPEAL—DECISION—LAW OF THE CASE—SUBSEQUENT APPEAL—FINDINGS—CONFLICTING EVIDENCE—CONCLUSIVENESS.

1. Where, on a prior appeal, the appellate court held that there was such a substantial conflict in the evidence as to preclude it from disturbing the finding of the trial court that defendant bank purchased a note secured by mortgage from plaintiff's agent, which in fact belonged to plaintiff, with notice of plaintiff's right, but the judgment was reversed on another ground, such decision was conclusive on a subsequent appeal, and precluded the Supreme Court from reversing a contrary finding on identically the same evidence on a retrial of the case.

Department 2. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Ellen D. Raymond against Sarah J. Glover and others. From a judgment in favor of defendant savings bank, plaintiff appeals. Affirmed.

Frank James and Lee & Scott, for appellant. Walter Bordwell and Chapman & Hendrick, for respondent.

LORIGAN, J. The plaintiff brought this action to obtain a decree that a certain note and mortgage were held by the defendant the German-American Savings Bank as trustee for her, or, in lieu thereof, have a decree establishing a vendor's lien in her favor upon the lands described in said mortgage. This is the third time this cause has been here on appeal. Upon both the former appeals, which were taken by the defendant bank from a decree in favor of plaintiff, the cause was remanded, with the same directions to the court below "to find whether or not the bank took the note as security without notice of the facts showing the equities in favor of the plaintiff. This fact may be found upon the evidence already taken, with such further evidence as the parties may see fit to submit. If the court finds that the appellant took the note as security without notice of the facts showing such equities, judgment should be rendered giving to the appellant (the bank) a first lien upon the property for the amount of its claim, and to the plaintiff a second lien thereon to the extent of thirteen hundred dollars and interest, as provided in the contract of sale." Raymond v. Glover, 37 Pac. 772, 918; Raymond v. Glover, 122 Cal. 477, 55 Pac. 398. Upon the last trial of this case in the court below, out of which the present appeal arises, the cause was submitted upon the testimony taken at the two previous trials and the additional testimony of one M. N. Avery, cashier of the defendant bank, a witness called in its behalf, and the court found that the defendant bank took the note and mortgage in good faith, as security from one Munroe, without notice of any of the facts showing equities in favor of the plaintiff, and pursuant to the direction of the court, on remanding the cause, as to the decree which should be entered upon such a finding, entered one in favor of the defendant bank. The plaintiff now appeals from an order denying her motion for a new trial, which motion was based solely upon alleged insufficiency of the evidence to justify this finding; and by stipulation the bill of exceptions used on the appeal disposed of in 122 Cal., 55 Pac., above referred to, which contains all the evidence adduced on the first and second trials, together with the evidence of the witness Avery taken at the last trial, constitutes the statement on motion for a new trial, upon which the validity of such order is to be determined on this present hearing.

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*Rehearing denied September 30, 1904.

The facts, as disclosed by the record, are recited at considerable detail in the previous opinions referred to, particularly in 37 Pac. 772, and stated generally here are that plaintiff, in July, 1891, then a resident of the state of Massachusetts, owned a tract of land in Los Angeles county, this state. She had as her agent in Los Angeles one George Munroe, who, in her behalf, contracted a sale of the premises to the defendants Glover for $1,800; the sum of $500 to be paid in cash, the balance to be secured by mortgage on the property, to be executed by the Glovers in favor of plaintiff. On January 22, 1892, plaintiff acknowledged and forwarded to her agent, Munroe, a deed in favor of the Glovers, to be delivered on payment of the cash and execution in her favor by them of a note and mortgage for the balance of the contract price. Munroe, without authority, and fraudulently, inserted his own name as payee in the note, and as mortgagee in the mortgage, both of which instruments were dated February 11, 1892, and these the Glovers, deceived by him, and supposing that the papers ran to plaintiff, executed without reading, and paid the $500. About February 22, 1892, Munroe took the note and mortgage to the respondent bank, and applied for a loan of $1,000 thereon, which was made to him, the aforesaid note and mortgage being tendered to and accepted by the bank as collateral security for the loan. These facts are practically conceded as correctly presenting the general situation, and are supplemented by considerable evidence offered on the part of both plaintiff and defendant bank, bearing upon the sole question involved in the case, namely, whether the assignment of the note and mortgage so made was taken by the latter with notice of the facts showing the equities of the plaintiff. We will not particularly refer to or analyze this evidence, because, in the view we take of this case, it is unnecessary. Aside from the evidence which was before this court upon the previous appeals, and particularly the appeal disposed of in 122 Cal., 55 Pac., the only additional testimony now presented is that of the witness Avery, the cashier of the bank, who negotiated the loan to Munroe, and who testified that he never heard Munroe state to one U. S. Glover, before he took the assignment of the mortgage, that he (Munroe) had bought the mortgage in suit from plaintiff; nor did he know that plaintiff had anything to do with it, or any interest in the mortgage, until the trial of this action. This was offered in contradiction of the statement of Munroe, who had theretofore testified for plaintiff on these matters. And when this testimony of Avery upon the last trial is compared with his testimony given on the former trial, it will be found to be substantially a reiteration of such former testimony. So that for all practical purposes the evidence under which the present finding is attacked is in all respects identically the same as was before this court for consideration upon the last previous appeal. Upon that appeal, which was taken by the defendant bank, and wherein it assailed the finding then made against it that it had taken the note and mortgage in question with notice of the equities of plaintiff, the plaintiff (respondent on that appeal), in support of such finding, and upon identically the same evidence upon which it is contended for now, claimed that such evidence showed both constructive and actual notice to the bank. Particular stress was not given to the claim of actual notice, but it was elaborately and insistently argued that proof of constructive notice clearly appeared. In disposing of that appeal (122 Cal. 475, 55 Pac. 399) the court, in considering the sufficiency of the evidence (either as showing constructive or actual notice) to support the finding, set forth certain portions of it, and then said: "We think this evidence, taken together, was sufficient, if believed by the court, to warrant it in finding that the defendant bank was put upon inquiry, and, having failed to probe the facts, was, as a matter of fact, to be deemed as taking the mortgage with notice. In other words, that there was such a substantial conflict in the evidence as to preclude us from disturbing the finding of the court that appellant took the mortgage with notice of the equities in favor of plaintiff. The court below was the judge of the credit to be given to the several witnesses, and we cannot disturb its conclusions in the premises except in case of patent error." We think this conclusion of the court that there was such a substantial conflict in the evidence presented on the former appeal as not to warrant disturbing the finding of the lower court then under review is controlling in the disposition of this appeal. The same substantial conflict exists now as was found to exist then. It is of no moment that the present inquiry involves the sufficiency of the evidence as to a finding diametrically opposite to the finding then under consideration. The evidence was addressed to the same particular issue upon both the latter trials, which was, whether the bank did or did not take with notice, and this was the only matter upon which the substantial conflict occurred. The conflict which, if found to exist, precludes the appellate court from interfering with a particular finding is such a substantial and material variance in the evidence adduced upon both sides of a litigated question of fact as will sustain the determination of the lower court, no matter which way it may find therefrom. Unless the evidence presents this condition, it cannot be said to be substantially conflicting. So that to say that a finding cannot be disturbed because the evidence to sustain it as found is substantially conflicting is also to say that, if the finding was the other way, the same substantial conflict would equally preclude its disturbance by the appellate court. And this is the condition of this case on the appeal which we now have before us. The evidence is identically the same as came before the court on the former appeal as affecting the finding of notice, and which was decided to be conflicting. In the absence of any additional evidence strengthening or affecting the case, the judicial declaration that was then made that it was so substantially conflicting is, in our opinion, decisive of the point presented on this present appeal. It is true that on the former appeal there was a reversal, and the cause remanded for a new trial solely upon this issue. It was reversed, however, because the lower court failed to rule upon an objection of the bank to the admissibility of certain evidence which the court provisionally admitted, reserving a ruling on the objection, which it, however, omitted to finally make, and the effect of which failure to rule as to whether the evidence was to be definitely admitted and considered by the court or not was to afford no opportunity to the bank to rebut the evidence, if it could, and was so advised. This, however, only afforded an additional opportunity for the presentation of further evidence in the case. The decision on this point did not affect the other decision of the court that from all the evidence, taken together, as then presented, there was a substantial conflict in it. Neither, as a matter of fact, did any change in the evidence upon the last trial spring from the ruling under which the case was reversed. Whatever privileges this ruling accorded were not availed of by either side, and the record now contains exactly the same evidence as was presented and considered upon the former appeal.

Under these circumstances, then, there is nothing in the record on this appeal which presents a different condition for examination as to the only point litigated upon both trials than was presented on the former appeal, to which we have been addressing ourselves. And, as upon such former appeal, upon exactly the same evidence as is presented for consideration now, it was then held that that evidence was so substantially conflicting upon the matter as to whether the bank did or did not take the note and mortgage in question with notice that this court could not disturb a finding thereon made, we are of the opinion that the decision upon the former appeal in this point must be held controlling upon the present appeal, where the sufficiency of the present finding attacked is to be examined under the same conflicting evidence.

The order denying a new trial is for that reason affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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144 Cal. 574

SAN JOSÉ SAFE DEPOSIT BANK OF SAVINGS v. BANK OF MADERA et al. (Sac. 1,061.)

(Supreme Court of California. Sept. 2, 1904.)

MORTGAGES—FORECLOSURE—LIMITATIONS.

1. Under Civ. Code, § 2911, providing that a lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be be brought on the principal obligation, where a mortgage was given to secure a debt resting in parol, an action on the debt being barred in two years, an action to foreclose the mortgage was barred in the same time.

Department 2. Appeal from Superior Court, Madera County; J. K. Law, Judge.

Action by the San José Safe Deposit Bank of Savings against the Bank of Madera and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

See 54 Pac. 83, 85, 270.

M. K. Harris, S. L. Strother, and Robt. L. Hargrove, for appellants. Francis A. Fee, for respondent.

McFARLAND, J. This is an action to foreclose what plaintiff designates as an "equitable mortgage," and judgment went for plaintiff, as prayed for. The defendant the Bank of Madera appeals from the judgment and from an order denying its motion for a new trial, and the defendants Charles

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¶ 1. See Limitation of Actions, vol. 33, Cent. Dig. § 652.

A. Dworack and Mary Dworack appeal from the judgment.

Under our views of the case, it is not necessary to state the facts with much detail, or to consider all the points made by appellants. The facts material for the purposes of this decision are these: On March 4, 1893, defendant Charles Dworack, being the owner of the land here involved, mortgaged it to one Roberts as security for $3,000, which said Charles then owed Roberts. Afterwards, on January 10, 1894, he made a second mortgage of the premises to his mother, the defendant Mary Dworack, to secure the sum of $8,500. Afterwards Roberts commenced an action to foreclose his mortgage. During the pendency of that action, Charles Dworack made to his mother a deed purporting to convey the land to her. Afterwards the action of Roberts resulted in a decree of foreclosure, under which the land was sold to Roberts for $3,515, and he received a certificate of sale. This decree and sale were regular and valid, and no question is raised as to any of the proceedings on the foreclosure. But during the period of redemption the defendant Mary Dworack, being desirous of redeeming from the sale, procured from plaintiff, for the purpose of making the redemption, a loan of $3,750, and with this money she did accomplish the redemption. At the time of this redemption said Mary executed a certain written instrument, designated as "Exhibit E," dated February 18, 1895, to one Moultrie, who took the same for the benefit of plaintiff, and afterwards, and before the commencement of this action, assigned the same to plaintiff. By this instrument the said Mary did "grant, bargain, sell, assign, transfer, and set over" to Moultrie "all my right as redemptioner or otherwise by reason of the redemption this day made by me"; also "all sums of money of every kind, character, and description which may at any time become due or owing to me from said sheriff, or otherwise, in the event said property be at any time redeemed by any other person or persons." By this instrument she also authorized and empowered Moultrie in her name to take all steps necessary to protect his interest, and, in the event that no other redemption be effected, to obtain from the sheriff "a deed to said property in pursuance of the redemption so made and effected by me, as aforesaid." This instrument is, on its face, an absolute assignment and grant of all her interest, and gives no intimation that it is only a mortgage or lien of any kind, and contains no reference to any sum of money, and no promise to pay any money. But plaintiff alleges that it was intended as a lien to secure the payment of the said money loaned said Mary to effect the redemption, and asks to have it foreclosed as a mortgage; and the court found, upon parol evidence, that this allegation was true, and rendered judgment accordingly. Before the commencement of this action, the defendant Bank of Madera, who was the creditor of Charles Dworack, had acquired the title of Charles and Mary Dworack to the premises, although with knowledge of the foregoing facts. This action was not commenced until more than three years after the loan of the said money by plaintiff to Mary Dworack and after the execution of said Exhibit E, although within four years thereafter.

Appellants contend that the instrument does not constitute a mortgage; that at most it either merely assigned her interest as a "redemptioner" under section 701, Code Civ. Proc., which gave the assignee only a right to a sheriff's deed in the event of no subsequent redemption, or else that her right as a redemptioner merged in the legal title which she held under the deed from Charles, and thus, being a successor in interest of the judgment creditor, she, or plaintiff as her successor, was simply restored to the estate. But under our views this point, and certain other points made by appellants, need not be considered. We will assume, for the purpose of this decision, that said instrument together with the parol evidence constituted a mortgage; and so assuming, nevertheless, in our opinion, the mortgage was extinguished at the time of the commencement of this action, and appellants' plea of the two years' provision of the statute of limitations should have been sustained. We are not concerned here with the statute of limitations as applicable to an instrument similar in its character to that which used to be called a "dry" mortgage—that is, where the mortgagor incurred no personal liability, where there was no debt in the sense of an obligation that could be enforced, and where the mortgagor had merely the right to remove the lien by payment of a certain sum of money within a certain time, but could not be compelled to do so. In the case at bar it was averred in the complaint that plaintiff advanced "and loaned" to said Mary the said sum of $3,750; that Exhibit E was made to plaintiff "to secure it in the repayment" of said money, and to "secure the payment by her to it of usual banking interest thereon"; that she has never repaid the plaintiff any part of said money, "and the whole thereof, principal and interest, is still due, owing, and unpaid from her to plaintiff," and the prayer of the complaint is that it be adjudged that "said Mary Dworack is justly indebted to plaintiff in the sum of $3,750 and interest," etc.; that the mortgaged premises be sold, and the proceeds applied to the satisfaction of the amount found due; and that plaintiff "have judgment and execution against said Mary Dworack for whatever deficiency may remain after applying all the proceeds of said sale," etc.; and the court rendered judgment in accordance with this prayer. The fact that afterwards plaintiff filed what he calls a "remitter" of the deficiency judgment is immaterial. We have here, therefore, the ordinary case of a mortgage given to secure a debt; and as the debt in this case rests merely in parol, and not upon a written instrument, it was barred by lapse of time in two years, and being thus barred the lien of the mortgage sued on was "extinguished" at the time of the commencement of this action. Civ. Code, § 2911.

We have not overlooked the authorities cited by respondent, and have examined many others on the subject. There are decisions in which it has been held, in the absence of statutory provisions to the contrary, that the bar of a debt by limitation is not such a "discharge" thereof as will bar a mortgage securing it. It may be that the general law on the subject is correctly stated in Jones on Mortgages (section 899), as follows: "The rule that a discharge of a debt is a discharge of the mortgage has no application where the debt is merely discharged by the statute of limitations, or by discharge in bankruptcy." But section 2911, Civ. Code, provides as follows: "A lien is extinguished by the lapse of the time within which under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." This language precludes the construction that the bar of the statute of limitations is not a discharge within the rule, and is an answer to the case of Union Water Company v. Murphy's Flat F. Co., 22 Cal. 621, and other cases cited by respondent; although it may be said that in the Union Water Company's case there was no personal liability. In the first part of the opinion in Newhall v. Sherman & Clay, 124 Cal. 509, 57 Pac. 387, there is some language relied on by respondent which was not necessary to the decision of the case. In that case the action on the mortgage was barred by the four years' limitation, and no other question was involved. But in the latter part of the opinion it is said that "whether plaintiff's cause of action is barred depends upon when the money loaned, for which the mortgage was given as security, was due and payable. It not appearing * * * that any time was given or fixed for the payment of the loan, 'the presumption would therefore necessarily arise that it was due immediately or upon demand, and therefore was barred at the time this action was commenced,' and that the debt secured by the mortgage being barred, it necessarily follows that the mortgage is also barred." Citing numerous California cases, and section 2911, Civ. Code. The "principal obligation" in the case at bar was clearly the indebtedness, and as it was not founded on a written promise, an action on it was barred in two years after it accrued. Indeed, the asserted mortgage itself rested only in parol. The written assignment or grant was only one link in the chain which was relied upon to sustain the action. The conclusion here reached may work a hardship on plaintiff; but such a result does sometime follow a neglect to keep within the statute of limitations, which upon the whole is a beneficial law.

The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

144 Cal. 54

McCARTHY v. GASTON RIDGE MILL & MIN. CO. (Sac. 1,077.)

(Supreme Court of California. Sept. 1, 1904.)

NUISANCES — WATER COURSE — POLLUTION — VOLUNTARY ABATEMENT — EFFECT — COSTS—DISCRETION — EQUITY JURISDICTION—SUPERIOR COURT—VERDICT—VACATION—DAMAGES —ASSESSMENT BY COURT.

1. Where defendant polluted water of a creek by throwing refuse mineral matter therein so that the water used by plaintiff was offensive and unwholesome, such act constituted a nuisance, within Code Civ. Proc. § 731, providing that anything which is injurious to health, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the enjoyment of life or property, is a nuisance.

2. A suit for the abatement of a nuisance by an injunction, either prohibitive or mandatory, is within the equitable jurisdiction of the superior court, under the direct provisions of the Constitution.

3. Since in a suit to abate a nuisance the recovery of damages constitutes incidental relief only, and the defendant is not entitled to have such damages assessed by a jury as a matter of right, it was not error for the court to refuse to accept a verdict on the issue of damages in such an action on the ground that the verdict was not in accordance with the evidence, and to itself make a finding of damages.

4. The fact that at the time the court rendered its decision the nuisance had been voluntarily abated by defendant, by reason of which fact plaintiff's application for injunction was denied, did not deprive the court of jurisdiction to assess damages, since the action did not cease to be one for the abatement of a nuisance within the court's equitable jurisdiction because of such voluntary abatement.

5. A suit for the abatement of a nuisance and for damages is an action not mentioned in Code Civ. Proc. § 1022, prescribing actions in which costs are allowed of course to a successful plaintiff, and hence costs may be allowed therein in the discretion of the court, as authorized by section 1025.

Commissioners' Decision. Department 2. Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Action by John McCarthy against the Gaston Ridge Mill & Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Page, McCutchen, Harding & Knight, for appellant. J. M. Walling, for respondent.

HARRISON, C. The plaintiff is the owner of a tract of land in the county of Nevada, which he has occupied as his residence and cultivated for many years, irrigating it by means of water brought thither from the South Fork of Poorman's creek, through a ditch of which he is also the owner. The defendant, since January, 1900, has been engaged in mining and milling in that county, and has constructed a ditch through which sand and refuse matter have been carried from its works and discharged into said fork of Poorman's creek above the head of the plaintiff's ditch, and thence into and through said ditch upon the lands of the plaintiff. In his complaint herein the plaintiff alleges that by reason of these acts of the defendant the waters flowing through his ditch are rendered offensive to the smell, unwholesome, and so polluted as to be unfit for watering his stock, and that the sand caused to be deposited upon his land is injurious to it, and, if continued, will render it unfit for cultivation. He therefore asked that the defendant be enjoined from further committing said acts, and that he recover judgment for the damages already sustained therefrom. The action was commenced February 13, 1901, and on June 15th the defendant answered the complaint. The cause came on for trial October 17, 1901, and special issues as to the amount of damage sustained by the plaintiff were submitted to the jury. The jury found that the plaintiff had not sustained any damage, but the court refused to accept their verdict. After this verdict had been given, the defendant filed a supplemental answer November 16, 1901, alleging that since the commencement of the action defendant had constructed a ditch from its mine and mill to a point in said South Fork of Poorman's creek below the head of the plaintiff's ditch, into which it had, since its completion, discharged all the water used by it in the operation of its mine and mill that could in any way pollute or affect the waters flowing upon the plaintiff's land. Thereafter, January 8, 1902, the court rendered its decision, and found: "That since the 27th day of January, 1900, and until about the 18th day of October, 1901, the defendant had caused sand and tailings from its quartz mill to flow down into the South Fork of Poorman creek at a point on said stream above the head of plaintiff's ditch, and thence into and through said ditch upon the cultivated lands of plaintiff, and also filling the ditches of plaintiff with sand and débris, and contaminating the waters of plaintiff, and rendering said waters unfit for watering stock, to plaintiff's damage in the sum of fifty dollars. That since the commencement of this action plaintiff has constructed a ditch in such manner and of such capacity as to carry the sand and débris from its mill to said South Fork of Poorman creek and deposit the same in said creek at a point below the head of plaintiff's ditch, where the same will not injure plaintiff." Upon the facts found by it the court held that the plaintiff was entitled to recover judgment against the defendant for the sum of $50 for the damage sustained by its acts, and his costs expounded in the action, amounting to $137.50, but denied his application for an injunction. Judgment accordingly was thereupon entered. The defendant has appealed therefrom, bringing the appeal here upon the judgment roll, without any bill of exceptions, and presents as grounds for its reversal that the court erred in disregarding the verdict of the jury and awarding damages to the plaintiff, and also in allowing the plaintiff to recover his costs of suit. In support of its appeal the appellant contends that the complaint of the plaintiff presents merely an action at law, which it was entitled to have determined by a jury, and that, as the plaintiff recovered less than $300 damages, he is not entitled to recover his costs.

The action is one for the abatement of a nuisance and to recover damages sustained from its maintenance. The facts alleged in the complaint as the grounds for the action, and found by the court to be true, constituted a nuisance, and created a cause of action in his behalf, entitling him to a judgment for the damages sustained by him, and that the nuisance be enjoined or abated. Code Civ. Proc. § 731. The Constitution has conferred upon the superior court original jurisdiction "in all cases in equity," and also "of actions to prevent or abate a nuisance." If the plaintiff would merely seek judgment for the damages sustained by him his action may be brought either in the superior court or in the justices' court, according to the amount of damage claimed by him. If he would seek the abatement or prevention of the nuisance, he can bring his action only in the superior court. Such action may be maintained in that court whether he seeks in addition thereto to recover damages in excess of $300, or even if no damages are claimed. Whether the jurisdiction of the superior court to entertain the action is referred to the clause in the constitution giving it jurisdiction "in all cases in equity," or to the clause giving it jurisdiction "of actions to prevent or abate a nuisance" is immaterial. The prevention or abatement of a nuisance is to be accomplished by means of an injunction either prohibitive or mandatory, and an action therefor is within the equitable jurisdiction of the court, and is to be governed by the principles prevailing in that jurisdiction. Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. 965. The Constitution does not give to a party the right to have the issues in such action tried by a jury, nor is the action within those in which the Legislature has authorized a jury trial. Code Civ. Proc. § 592. The prayer for damages is incidental to the relief sought (Hudson v. Doyle, 6 Cal. 102; Courtright v. Bear R. W. & M. Co., 30 Cal. 576), and, as the action is properly brought in a court of equity, it will determine all the issues in the case (McLaughlin v. Del Re, 64 Cal. 474, 2 Pac. 244). The court may call in a jury, and ask for its judgment upon one or more issues of fact, but the verdict of the jury is merely advisory, and may be disregarded by the court. Sweetser v. Dobbins, 65 Cal. 529, 4 Pac. 540. The evidence upon the issues submitted to the jury is not in the record, and, as the appellant is not questioning its sufficiency to sustain the finding of the court, we must assume that the court was justified in disregarding the verdict of the jury and making its finding in accordance with the evidence upon that issue.

In support of its claim that the plaintiff was not entitled to recover his costs the appellant has cited Himes v. Johnson, 61 Cal. 259, and Brown v. Delavau, 63 Cal. 303. These actions were to recover damages for trespass to real property, in one of which the plaintiff failed to show that he had ever had any right to equitable relief, and in the other abandoned such claim. It was held that the mere fact that he had asked for relief in equity in addition to seeking to recover damages did not entitle him to recover the costs of his suit; that in such a case the action is to be regarded merely as an action for damages. These decisions are, therefore, inapplicable to a case where the plaintiff, in addition to asking for relief in equity, has shown his right to such relief, and the court has made a finding of fact showing that he was entitled thereto.

In the present case the direct purpose of the action was to abate the nuisance, and the damages sought were merely incidental thereto. The court has found that at the commencement of the action the defendant was maintaining the nuisance complained of, and that it continued to maintain it until a time subsequent to the submission of the issues to the jury. It has also found that after the commencement of the action the defendant constructed a ditch for the purpose of diverting the flow of water in a different direction, and that thereby it had ceased to pollute the plaintiff's land. As the nuisance had been abated at the time the court rendered its decision, the occasion for an order for its abatement had ceased, and for that reason it was proper to deny the plaintiff's application for an injunction. The suggestion of the appellant that the reason why the court did not grant the injunction is not open to investigation is untenable. The finding of the court that at the commencement of the action the defendant was maintaining a nuisance, and that it continued to maintain it until after the cause had been tried, and that the plaintiff had thereby sustained damage, gave him the right to a judgment for its abatement. The omission to give such judgment is explained only by the finding of the court that the defendant had itself abated the nuisance before the judgment was rendered. The action did not cease to be an action for the abatement of a nuisance, and within the equitable jurisdiction of the court, because, after its commencement, the defendant, of its own motion, caused its abatement. It was, therefore, one of the "other actions than those mentioned in section 1022," in which, under section 1025, Code Civ. Proc., costs may be allowed or not, in the discretion of the court.

We advise that the judgment be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

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144 Cal. 603

SCHNITTGER v. OLD HOME CONSOL. MIN. CO. et al. (Sac. 1,239.)

(Supreme Court of California. Sept. 3, 1904.)

CORPORATIONS—ACTS OF DIRECTORS—VOTING—EFFECT OF INTEREST—INFORMATION—DUTY TO DISCLOSE—INTENT.

1. A loan of money by directors of a corporation to the corporation, while voidable at the instance of the beneficiary for any violation of the directors' duties as trustees, is not ipso facto void.

2. Where a proposition to borrow money from certain directors of a corporation was carried by sufficient votes of other members of the board of directors to render the same valid without the votes of the lending directors, the fact that such lending directors were present at the meeting and voted for the transaction did not invalidate the same.

3. That directors of a corporation loaning money to it did not disclose to the other members of the board of directors the fact that they were the real parties who were loaning the money, or that the person in whose name the transaction was had was merely a figurehead, did not invalidate it, in the absence of a showing that the corporation sustained some loss by reason thereof, or that the loaning directors thereby obtained an undue advantage over the corporation.

4. That directors of a corporation, in making a loan to it, did so for the purpose of bringing suit to foreclose the mortgage securing it, and finally acquiring the title to the property of the corporation, in violation of their trust, was immaterial, the corporation having retained the benefit of the loan; since such directors could only purchase at public sale under a decree of foreclosure, the same as other stockholders or third persons.

Commissioners' Decision. Department 1. Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Action by F. Schnittger against the Old Home Consolidated Mining Company and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Robt. Ash, for appellants. F. J. Castelhun, for respondent.

HARRISON, C. The Old Home Consolidated Mining Company is a corporation organized under the laws of this state, and having a board of five directors, who, at the times herein considered, were John McKewen, George T. Emery, Walter McG. Logan, F. Hahn, and C. W. Weld. August 16, 1897, it executed to the plaintiff's assignor its prom-

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¶ 1. See Corporations, vol. 12, Cent. Dig. § 1367.

issory note for $5,000, payable two years thereafter, with interest at the rate of 1 per cent. a month, and at the same time, for the purpose of securing its payment, executed a mortgage upon certain mining property within this state. The promissory note was also indorsed by each of its directors. The execution of the mortgage was duly authorized by a vote of more than two-thirds of its stockholders at a meeting called for that purpose. Prior to its maturity the note was assigned to the plaintiff. Interest on the note was paid by the corporation up to August 16, 1901. October 8, 1901, the present action was brought against the corporation and C. W. Weld and Walter McG. Logan, two of the indorsers, to recover the amount of the note, and for a foreclosure of the mortgage. The action was defended upon the ground that the money for which the promissory note was given and the mortgage executed was the money of and furnished by the directors Hahn and McKewen; that they are the real parties in interest in the transaction, and that they entered into it for the purpose of foreclosing the mortgage and obtaining the property of the corporation; that in so doing they violated their duties as trustees, and that for this reason the note and mortgage was void.

Upon the trial of the cause the court found that the corporation defendant had received the $5,000 for which its promissory note and mortgage had been executed, and that the transaction was thereafter ratified by the vote of more than two-thirds of its stockholders; that the money loaned to it was in fact the money of the directors Hahn and McKewen, and that they are the real parties in interest in the note and mortgage; that the note was made in the name of Helene Mayer; that the note and mortgage were given to and in her name with the purpose and object on the part of said Hahn and McKewen to obtain control of the property of the corporation; that the assignment from her to the plaintiff herein was not a bona fide transaction; that the name of the plaintiff was inserted in said assignment in order to cover up the interest of said Hahn and McKewen, and to give it the appearance of an actual bona fide transaction; that at the meeting of the board of directors of the defendant corporation at which the loan was authorized all of the directors were present, and that Hahn and McKewen participated therein; that at that meeting it was stated to the board by the attorney of Helene Mayer that the loan could be obtained from her, and that the directors other than Hahn and McKewen believed that the money would be furnished by her; that Hahn and McKewen did not at that meeting or at any other time state from whom the loan was to be obtained. The court also found that interest had been paid upon the note up to August 16, 1901, and that since that date no interest had been paid, and held that the plaintiff is entitled to no further interest. Upon these findings the court held that the plaintiff was entitled to judgment against the defendants for the sum of $5,000, without any interest thereon, together with $300 as counsel fees, and $100 for costs of receiver, and for a decree of foreclosure against the defendant corporation, and sale of the mortgaged property to satisfy said amount. From the judgment thus entered the defendants have appealed upon the judgment roll alone without any bill of exceptions.

The appellants do not question the sufficiency of the evidence to sustain the findings of the court, or claim that the evidence before the court would have authorized any further or different findings, but urge in support of their appeal that, as Hahn and McKewen were directors of the corporation defendant, their relation to the corporation and to its stockholders was that of trustees, and that by virtue of that relation the transaction in which the loan was made to the corporation was void. A director of a corporation, like any other trustee, is bound to act in the utmost good faith toward his beneficiary (Civ. Code, § 2228), and is forbidden to take part in any transaction concerning the trust in which he has an interest adverse to that of his beneficiary (Civ. Code, § 2230); but he is not absolutely precluded from dealing directly with the corporation of which he is a director. Any transaction between them is subject to rigid scrutiny, and is voidable at the instance of the beneficiary for any violation of his duty as trustee, but is not ipso facto void. "The mere fact that the creditor was a director of the company does not render the transaction fraudulent. There is nothing which forbids either members or directors of a corporation from making contracts with it like any other individual, and when the contract is made the director stands as to the contract in the relation of a stranger to the corporation." Stratton v. Allen, 16 N. J. Eq. 229. Mr. Thompson says (3 Thompson on Corp. § 2068): "We therefore find the prevailing doctrine to be that the director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor; but always subject to severe scrutiny, and under the obligation of acting in the utmost good faith." See, also, Taylor on Corp. § 634; Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. Rep. 291; Santa Cruz R. R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Sutter St. R. R. Co. v. Baum, 66 Cal. 44, 4 Pac. 916; Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98; Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749.

The question presented upon this appeal does not involve the validity of a transaction in which the director of a corporation has executed a contract on behalf of the corporation in which he is personally interested, without any previous authority of the corporation, or where the resolution authorizing its execution depended upon his vote therefor. The transaction was had under the authority of the corporation, given at a meeting of the board of directors, at which all were present; and, although the court finds that at that meeting Hahn and McKewen "were present and participated therein," it does not find that they voted upon the proposition for the loan. But, even if they had voted for it, the transaction would not have been thereby vitiated, inasmuch as the votes of the other three members of the board were sufficient to make the resolution effective. Porter v. Lassen Co., etc., Co., 127 Cal. 261, 59 Pac. 563. It was not a fraud upon the corporation, or upon the other members of the board, for these directors not to disclose the fact that they were the real parties who were loaning the money, or that the person in whose name the transaction was had was merely a figurehead. It was no violation of their duty as trustee to loan the money in the name of another rather than in their own, unless it could be shown that thereby the corporation sustained some detriment, or they obtained some undue advantage over the corporation.

The allegation in the answer that Hahn and McKewen procured the loan to be made in the name of Helene Mayer "for the sole purpose at that time to bring suit to foreclose said mortgage, and finally acquire the title to the mining property of said corporation, in violation of their trust," is not found by the court to be a fact, and it must be assumed that there was no evidence tending to establish that allegation. The finding that the money was loaned and the note and mortgage given in her name "with the purpose and object on the part of said Hahn and McKewen, and both of them, of obtaining control of the property of said corporation," does not entitle the corporation to avoid its agreement and retain the money. Whatever may have been the underlying motive for entertaining this purpose, the corporation was in no respect injured thereby. They could obtain control of the mortgaged property only through a sale at public auction under a decree of foreclosure. If they should become the purchasers at such sale, the property would still be subject to redemption either by the corporation, or, in its behalf, by any of its stockholders. Wright v. Oroville M. Co., 40 Cal. 20. The transaction was not concealed from the stockholders. The resolution authorizing it was spread upon the records of the corporation. Hahn and McKewen, as well as the other directors, indorsed the note, and the note and mortgage were recorded in the county recorder's office, and thereafter the stockholders ratified the transaction.

The judgment should be affirmed.

The notice of appeal also purports to include an appeal from an order of the court made after the judgment ordering a sale of the property mortgaged, but, as the record contains no bill of exceptions in which this action of the court is presented, the order appealed from should also be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

144 Cal. 521

HOLTUM v. GREIF, County Clerk, et al.
(S. F. 3,868.)

(Supreme Court of California. Aug. 29, 1904.)

NEW TRIAL—CONDITIONAL ORDER—JUDGMENT FOR COSTS OF TRIAL—REVOCATION—POWER OF COURT — WRIT OF EXECUTION — ISSUANCE—DUTY OF JUDGE—CLERK—MANDAMUS—REMEDY BY APPEAL—STATUTE.

1. Where a new trial is granted on condition that the defendant pay to the plaintiff the costs of trial, a subsequent order of the trial court making the previous order absolute, on refusal of plaintiff to accept the amount because of intention to appeal therefrom, is void.

2. An order granting a new trial on condition that the defendant pay the costs of trial, without a specification of the time for payment, requires payment of the amount on demand.

3. An order granting a new trial was made on condition that defendant pay to plaintiff the costs of trial. Plaintiff refused to accept the sum when tendered, and appealed. The order was affirmed, and thereafter the plaintiff demanded payment, which was refused by defendant on the ground that no payment was due. *Held*, that the refusal to pay converted the order into a refusal of a new trial, finally disposing of the motion, and leaving the judgment in full force.

4. Notwithstanding the refusal of defendant to pay the amount of a money judgment for costs of trial on demand, as required by a conditional order granting a new trial, and thus converting the conditional order into the absolute refusal of a new trial, and leaving the judgment in full force, the duty of the clerk to issue execution thereon is not so plain as to warrant the granting of a writ of mandamus against him to compel him to issue the execution.

5. The remedy by appeal from an order overruling plaintiff's motion for execution is not such a plain, speedy, and adequate remedy in the ordinary course of law, within Code Civ. Proc. § 1086, as will prevent the issuance of a writ of mandamus against the judge of the court to compel the issuance of execution, where the result of a reversal of the order would merely confirm the petitioner's already complete right to execution.

Angellotti, J., dissenting.

In Bank. Application by Ferdinand Holtum, administrator of the estate of Karie Holtum, deceased, for writ of mandamus against John J. Greif, county clerk, and Hon. John Hunt, judge of the superior court of the city and county of San Francisco. Writ granted as to judge, and proceeding dismissed as to clerk.

M. T. Moses, for applicant. G. W. Baker (Thos. V. Cator, of counsel), for respondents.

BEATTY, C. J. This is a petition for a writ of mandate requiring the defendants to issue execution upon a judgment. The petitioner, in an action in the superior court, of which the defendants are, respectively, the judge and clerk, recovered a money judgment, with costs. March 12, 1900, on motion of defendant in that action, the court made and filed a written decision directing the entry of an order granting a new trial, "upon condition that the defendant, the Germania Life Insurance Company of New York, pay to the plaintiff, Ferdinand Holtum, the sum of one hundred and fifty-four dollars ($154.00) costs of trial" *within 30 days from that date*. The order, as entered on the court minutes, stated the condition as indicated by the quotation marks, and omitted the words italicized, limiting the time for performance. The defendant, however, on the 9th day of April, and within the 30 days, duly tendered the proper amount to the plaintiff's attorney, who declined to accept it for the reason that he intended to appeal from the order. The next day, and upon proof of said tender and refusal and the reason therefor, the court made and entered the following order ex parte: "Tuesday, April 10, 1900. In this action, upon motion of G. W. Baker, attorney for the defendant, and it being made to appear to my satisfaction, by the affidavit of the said G. W. Baker and the written acknowledgment of the attorney for the plaintiff in said cause, that the sum of one hundred and fifty-four ($154) dollars, the costs of the plaintiff in the trial of said cause, which was ordered paid by the court as a condition for granting a new trial herein, was by the defendant duly tendered to the plaintiff through his counsel, and declined, it is therefore ordered that said condition to the granting of said motion for a new trial be vacated and annulled, and that said motion for a new trial in said cause, for the reason given in the former opinion of this court, be, and the same is, made unconditional and absolute from date hereof." Subsequently, and within 60 days from the date of the original order, the plaintiff appealed therefrom to this court, where it was affirmed. Holtum v. Germania Ins. Co., 139 Cal. 645, 73 Pac. 591. The remittitur in that case was filed in the superior court August 29, 1903, and thereafter the plaintiff made repeated demands upon the insurance company and its attorney for payment, and finally, on January 9, 1904, made a formal written demand, which was refused. Demand was then made upon the clerk for the issuance of an execution, and upon his refusal a formal motion for an order directing the clerk to issue execution was made to the court and denied, whereupon this proceeding was commenced. The facts above stated all appear from the admissions, express or implied, in the answers of the judge and clerk, filed by way of return to our alternative writ.

The first question arising upon the facts stated is this: Was the order of April 10th, above quoted, void? If it was not void, it is of no consequence that it may have been erroneous; for the plaintiff, by failure to appeal, has allowed it to become final and effective as an order granting a new trial absolutely, and, the judgment being thereby vacated, no execution can issue. In other words, this proceeding must fail unless the order of April 10th was void in the extreme sense for want of power in the court to change in a substantial respect the order of March 12th, by which the right to a new trial was made conditional. The power of the court to make an order for a new trial conditional upon payment of costs by the moving party is unquestioned, and a failure to perform the condition converts the order into a denial of the motion. Garoutte v. Haley, 104 Cal. 497, 38 Pac. 194; Brown v. Cline, 109 Cal. 156, 41 Pac. 862. The condition is therefore an essential part of the order, and the right to revoke it ceases when the power of the court over the order ceases. When the power of the court to set aside the order as to the award of a new trial is at an end, its power to eliminate one of the substantial terms of the order must, for the same reasons, be held to have ended. The question, then, is as to the power of the trial court to vacate an order granting or denying a new trial after it has once been regularly made and entered. The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurely or by inadvertence, they may be set aside on a proper showing (O. F. Bank v. Deuprey, 66 Cal. 170, 4 Pac. 1173, and cases cited), and, if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth (Garoutte v. Haley, supra, and cases cited); but, subject to these exceptions, the order is reviewable only on appeal, and, the decision of the trial court having been once made after regular submission of the motion, its power is exhausted. It is functus officio. Bank v. Deuprey, supra; Dorland v. Cunningham, 66 Cal. 484, 6 Pac. 135; Lang v. Superior Court, 71 Cal. 492, 12 Pac. 306; Carpenter v. Superior Court, 75 Cal. 597, 19 Pac. 174; Belser v. Hoffschneider, 104 Cal. 455, 38 Pac. 312.

It is contended that the doctrine of these cases was limited or qualified in its application to conditional orders for new trials in the case of Garoutte v. Haley, supra, but a reference to the opinion in that case will show that there was no qualification of the doctrine, though there may have been a failure to apply it. The amendment or correction of the conditional order which was made in that cause was upheld solely upon the ground that the court had the undoubted right to correct its minutes so as to make them speak the truth; in other words, it was assumed that the court did nothing except to make the minutes show correctly the order as it was in fact made. In this case it clearly appears from the terms and recitals in the order of April 10th that it was not a correction of an erroneous entry in the minutes, but a substantial amendment of the order, making it absolute, instead of conditional. It is contended that this was a proper thing to do, in view of the fact that the tender of the money and its refusal entitled the defendant to a new trial; but, if the order was erroneous, tender of the money did not entitle the defendant to a new trial, for until the right of the plaintiff to appeal had been lost by lapse of the time for appealing, or by waiver or abandonment, it could not be assumed that the conditional order would ever become final by affirmance, and the refusal to accept the money tendered, upon the express ground that the plaintiff intended to appeal, was a good reason for not making the order absolute. The party resisting the motion cannot be forced into a new trial until the right to appeal is at an end or the order has been affirmed.

Counsel are mistaken in assuming that such orders as that of April 10th have never been set aside or reversed, except upon appeal. In Lang v. Superior Court, 71 Cal. 491, 12 Pac. 306, and in Carpenter v. Superior Court, 75 Cal. 597, 19 Pac. 174, such orders were annulled upon certiorari, for the reason that the statutory grounds of review are the measure of the power of the court to review its own orders or judgments. It would make no real difference, however, if the point had never been decided except on appeal, for the remedy by appeal is equally available to correct excesses in jurisdiction and errors in its exercise, and it may appear as clearly from the decision on appeal as from a decision in certiorari that an order is not only erroneous, but void, and whenever it does so appear the order must be disregarded when collaterally called in question, as it is in the present case. It follows, therefore, that the plaintiff in appealing from the order of March 12th was entirely justified in ignoring the order of April 10th, which was wholly inoperative, and the affirmance of the first order left it where the appeal found it, a conditional order; an order, that is to say, which would in effect deny a new trial if the condition was not complied with.

This brings us to the second question in the case: What was the duty of the defendant in the matter of performance? If the order had been entered as it was made, requiring payment in 30 days, or if the minutes had been corrected in this particular, as they might have been, so as to make them speak the truth, there might be a question which does not arise on the case as it is; for the entry on the minutes was never corrected, and the order remains without any provision as to time of payment. Such an order may well be construed as requiring payment on demand, and no more beneficial construction for either party has been suggested by counsel, or has suggested itself. The party resisting the motion may be trusted to demand the money when he wants it. If he concludes to accept the order without an appeal, he will demand the money at once, thus waiving an appeal, and press for a speedy retrial of the issues. If he determines to appeal, he will delay his demand until the order is affirmed. In the meantime the moving party is secure of losing no right by delay or failure in making a tender. Here, after affirmance of the order, demand was frequently and formally made in behalf of the petitioner for payment of his costs, and was refused upon the ground that no payment was due. This, in view of the decisions in Garoutte v. Haley and Brown v. Cline, supra, must be held to have converted the order into a refusal of a new trial, finally disposing of the motion, and leaving the judgment in full force. This did not, however, have the effect of making it the plain statutory duty of the clerk to issue execution. In cases of this kind the clerk cannot be expected to pass judicially upon the question whether a condition annexed to an order granting a new trial has been performed or not, and in any case he must be justified in awaiting the order of the court (where alone the question as to performance can be tried) before issuing execution. For this reason we do not think the petitioner has any right to a writ directed to the clerk.

But as to the court the case is different. Upon the undisputed facts it is the duty of the court to order execution, and the only question is whether that right is enforceable by writ of mandate, which does not issue where there is a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. § 1086. Here it is suggested there is a plain, speedy, and adequate remedy by appeal from the order overruling the motion for execution; but this remedy, although plain, is neither speedy nor adequate. The appeal, in the ordinary course, would not be decided for a long time, and pending the appeal there would be no security for the payment of the judgment; and, besides, nothing would necessarily result from an appeal beyond a reversal of the order, and this would merely confirm the right of the petitioner to execution—a right already complete. So that, unless the judgment of reversal was accompanied by a mandatory direction to order the issuance of execution, the petitioner would find himself at the end of his appeal precisely where he is now—with a right to demand the issuance of the writ, but with no power to compel it. Considerations such as these must have been the ground of decision in Garoutte v. Haley, supra. But, whatever may have been the reasons for sustaining the proceeding by mandamus in that case, it certainly made a precedent which justified the petitioner here in seeking the same remedy. To change the rule of practice now, when it is too late for him to appeal, could not be justified.

It is ordered that the writ be made peremptory as to the superior court, and issue accordingly. The proceeding as to the clerk is dismissed.

We concur: SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.; VAN DYKE, J.

ANGELLOTTI, J. I dissent. In my opinion the order granting defendant's motion for a new trial upon condition that defendant pay $154 costs of trial within 30 days from the date thereof became absolute by reason of defendant's tender of the amount within that time. Compliance by the defendant with this condition, so far as it was not prevented from so complying by the acts of plaintiff, was all that was essential to render the order an absolute and unconditional order for a new trial. Its status was thereby finally determined, and it was thereafter for all purposes an order granting a new trial, and could not be converted into an order denying a new trial by reason of anything that might subsequently occur. The only right that could thereafter possibly remain in plaintiff thereunder was a right to recover the costs, which he has once refused to accept. It is unnecessary here to determine how that right could be enforced, for that question is not involved herein. There is nothing inconsistent with these views in any of the cases cited. I am of the opinion that the application for a writ of mandate should be denied.

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144 Cal. 536

VATCHER v. WILBUR, Judge. (L. A. 1,599.)

(Supreme Court of California. Aug. 31, 1904.)

NEW TRIAL — STATEMENT—PREPARATION—CONTENTS—REPORTER'S TRANSCRIPT—NECESSITY—DISCRETION.

1. Code Civ. Proc. § 648, declares that in preparing a bill of exceptions the objection shall be stated, with so much of the evidence as is necessary to explain it; section 650 requires the judge, in settling the bill, to strike out all redundant matter; and section 659 declares that the settlement of a statement on motion for a new trial shall be the same as the settlement of a bill of exceptions under section 650. *Held*, that a statement on a motion for a new trial of a will contest was only required to contain such evidence as was necessary to a determination of the points raised, and that it was not necessary that it should contain a transcript of the reporter's notes.

2. Where the defeated party in a will contest prepared a statement, on motion for a new trial, in support of his contention that the evidence was insufficient to justify the decision on the question of testamentary capacity, and the opposite party objected to the statement, it was his duty to file proposed amendments thereto.

3. Where, on motion for a new trial of a will contest on the ground that the decision as to testamentary capacity was not sustained by the evidence, petitioner's statement offered for settlement, with slight amendments, would have presented all of the facts necessary to enable the court to pass on the question, and it appeared that the estate did not involve more than $500 or $600, it was not a proper exercise of discretion to order petitioner to obtain at his own expense a transcript of the reporter's notes on the trial, which would have cost from $250 to $275.

In Bank. Mandamus on the petition of A. J. Vatcher against Curtis D. Wilbur, as judge of the superior court of Los Angeles county. Peremptory writ granted.

Hester & Ladd, for petitioner. McNutt & Hannon, for respondent.

VAN DYKE, J. This is an application for mandamus to compel the respondent, a judge of the superior court of Los Angeles county, to settle a statement on motion for a new trial. Petitioner in his petition states that on the 7th day of April, 1903, one Lizzie Clapp filed a petition in said superior court of Los Angeles county for the probate of the alleged last will of Albert Clapp, deceased, dated November 17, 1899, and asking that letters testamentary upon the said estate be granted to her; and that afterwards, on the 19th day of November, 1903, this petitioner filed written objections to said petition of Lizzie Clapp, contesting the probate of said alleged will, denying that the same was the last will of said deceased, and alleging that the same had been revoked by the deceased in his lifetime, to wit, March 16, 1903, by the execution of a later and last will by said deceased, and also by deed conveying to said contestant, Vatcher, all his real property in California; that afterwards, on the 9th day of December, 1903, Lizzie Clapp filed a reply and objections to the contest of the petitioner herein, denying the allegations of said petition, and alleging that at the time said deceased executed the later will and the said deed he was of unsound mind, and the execution of said later will and deed was procured by undue influence; that the said proceeding was tried before the superior court of said Los Angeles county, respondent herein presiding as judge thereof, commencing on the 9th day of December, 1903, and continuing on the 10th, 17th, 22d, and 23d of said month, on which last day the proceeding was submitted to the court for decision; that thereafter, on February 23, 1904, findings in said proceeding were duly filed, to the effect that said Albert Clapp was of unsound mind when he executed the last-mentioned will and said deed, and that the first-mentioned will was the last will of said deceased, and should be admitted to probate as such, and judgment was entered thereon accordingly; that no notice of said decision or findings was at any time served on the petitioner, Vatcher, or his attorney in said proceeding, but that afterwards, on the 19th day of March, 1904, and within 10 days after said Vatcher had learned that said findings had been filed, he served upon the said Lizzie Clapp and her attorneys of record, and filed in the office of said superior court, notice of intention to move for a new trial in said proceeding upon the grounds, amongst others, that the evidence was insufficient to justify the said decision, and that it was contrary to law; that afterwards said Vatcher caused to be prepared a statement of said case on motion for a new trial, specifying the particulars therein in which the evidence was alleged to be insufficient to justify the said decision and alleged error of law, and setting forth substantially all the evidence given upon the said trial relating to said specified particulars, and on the 25th day of March, 1904, caused a copy of said statement to be delivered to, and the same was received without objections by, the said attorneys of the said Lizzie Clapp, said statement covering over 20 pages of typewritten matter; that on the 31st day of March, 1904, on notice to said Vatcher, the said attorneys of said Lizzie Clapp moved the court to strike out the said statement on motion for a new trial, served as aforesaid, on the alleged ground that the same did not contain a fair and correct statement of all the testimony given on the trial, but said Lizzie Clapp or her attorneys did not then, nor have they at any time, served upon said Vatcher or his attorneys any proposed amendments to said statement on motion for a new trial; that said motion to strike out the statement, after argument, was denied by the court, whereupon the attorneys for said Lizzie Clapp moved the court to require said Vatcher to procure a complete longhand transcript of the stenographic report of the testimony given on said trial, and to prepare a statement of the case from such transcript, which motion the court took under advisement, and thereafter, in the absence of said Vatcher and his attorneys, on April 2, 1904, made an order requiring said Vatcher to procure at his own expense a complete transcript of said stenographic report of said testimony, and to prepare therefrom, within 30 days, a statement of the case on motion for a new trial; that the legal charges for said transcript would not be less than from $250 to $275, and that the said reporters refused to furnish said transcript for less than their legal charges, while the total assets of said estate cannot, in any event, exceed $500 or $600; that said Lizzie Clapp having failed to serve upon said Vatcher or his attorneys any proposed amendments to said statement, and more than 10 days having elapsed since the service of the proposed statement upon her and her attorneys, said Vatcher, on April 11, 1904, delivered to the clerk of said court said proposed statement of the case, and notified the said judge that he had so delivered the same, and requested the said judge to proceed to the settlement thereof; that said Vatcher thereafter moved the court to revoke and set aside the order requiring him to procure the transcript of said testimony, and that the court settle said proposed statement of the case, but said court on April 22, 1904, denied said Vatcher's motion to vacate and set aside the former order requiring the transcript of said testimony, and refused to settle the said proposed statement of the case.

Upon this petition being filed, an alternative writ of mandamus was issued by this court, and the respondent has filed quite a voluminous answer to said petition. The facts, however, stated in said petition, are not denied, except that it is denied that the proposed statement of the case on motion for a new trial substantially sets forth all the evidence given upon said trial relating to said particulars wherein the evidence was insufficient to justify the findings, and proceeds at some length to detail wherein the said proposed statement failed to set forth the evidence bearing upon the question of said finding. In fact, respondent's answer herein is much more voluminous than would have been a properly prepared and settled statement on motion for a new trial in the matter of said contest. If it had been necessary, as appears to be contended by the respondent, and by the proponent of the will, who appears for him, to set forth in exact detail all the evidence given by the respective witnesses upon the question of the sanity of the deceased at the time of the later will, the refusal to settle the bill proposed would, perhaps, have been justified as imposing too much labor on the judge. We think, however, that the amount of labor necessary to have been done to present the substance of the evidence tending to show the insanity of the deceased at the time in question is greatly overestimated. It is not necessary, in preparing a statement or bill of exceptions for use in this court, to give the evidence in full, where the question to be presented is solely as to the sufficiency of conflicting evidence to sustain a particular finding. All that is required is that a sufficient amount of the evidence be inserted bearing upon each side of the question to show a substantial conflict, for in such case this court does not interfere with the decision of the court below. It is quite true, as claimed by the respondent and attorney for said Lizzie Clapp, that the duty devolved upon the petitioner herein to prepare a proper statement or bill of exceptions so as to sustain his contention of the insufficiency of evidence to justify the decision of the trial court upon the point in question, but this does not mean that the statement or bill of exceptions should embody all the reporter's notes. It is also equally true that, if the proposed statement had failed in this respect, it was the duty of the attorney of the petitioner, Lizzie Clapp, to propose amendments to said statement, and not, by failing to do so, to throw the labor of proposed amendments upon the judge who tried the cause. In fact, the law is plainly against any such practice. The Code declares that in preparing the bill of exceptions the objection must be stated "with so much of the evidence or other matter as is necessary to explain it, and no more." Code Civ. Proc. § 648. And it is made the duty of the judge, "in settling the bill, to strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as possible." Code Civ. Proc. § 650. On motion for a new trial "the same proceedings for the settlement of the statement shall be taken by the parties and the clerk and judge, as are required for the settlement of bills of exception by section 650," and it is made the duty of the judge, "in settling the statement, to strike out of it all redundant matter." Code Civ. Proc. § 659. The constant neglect or failure to observe these plain provisions of the Code results in our records being many times larger than there is any necessity for, and very greatly increases the cost to litigants as well as the labor of this court, without any corresponding benefit.

The respondent, judge of the court below, in making his order directing the contestant to procure a transcript of the reporter's notes, stated, within the space of a page of typewriting, sufficient facts, in connection with those given in the statement, to support the finding upon the question of the insanity of the deceased. He could have added an amendment to the proposed statement which would have sufficiently preserved the evidence in the case for the benefit of the proponent of the will with as little labor as was required to make the order in question. For instance, the court could have added to the statement the following: "Other evidence was given on behalf of the proponent of the will to the effect that the testator, within two years before his death, frequently complained of an affection in his head, and had at times fits of fainting spells during which he was unconscious; that shortly before his death, and without cause, he had changed his feelings towards the witness John A. Wood from that of friendship to one of hatred; that he was addicted to excessive drunkenness; that his feelings towards his wife were subject to sudden fluctuations from affection to hatred; that he had at times a desire to injure his wife; that he had made threats to commit suicide both before and after March 16, 1903, the date of the latter will and deed in question; and that he did, in fact, commit suicide on April 1, 1903, fifteen days after the execution of said later will and deed."

As proposed, the statement contains the evidence of five witnesses who testified that they were acquainted with the testator, and that, in their opinion, during the last two years of his life he was of unsound mind. It omits, however, to show that these witnesses were intimate acquaintances, and, for that reason, qualified to give an opinion as to his mental condition. But this omission could have been remedied by a few lines giving so much of the evidence as to each of these witnesses, naming them, as would be sufficient to show that they were intimate acquaintances of the testator, or by a general statement that the evidence showed them to be intimate acquaintances, and, as such, qualified to give an opinion as to his sanity. If these amendments had been made to the statement, and it had been settled as thus amended, it would have presented the substance of all the evidence bearing upon the question of sanity; and, in view of the fact that the petitioner did not himself present a more detailed statement of the testimony, although he appears to have been acting in good faith in the premises, he could not justly complain of the action of the court in inserting the amendments in general terms, as suggested, before settling the statement. At any rate, it was entirely unreasonable to require the contestant to incur the expense of $250 for a transcript of the reporter's notes as a condition for settling the statement, particularly in a small estate like this, conceded not to amount to more than $500 or $600. The respondent, as judge of said court, was not required to sign the proposed statement as it was presented. It was his duty merely to settle it, and this implies that he should amend it, or cause it to be amended, so as to make a fair statement, where it can be done with no more labor than was here required.

We think, therefore, under the circumstances of this case, it was not a proper exercise of the discretion vested in the respondent judge to require a transcription of the full reporter's notes as a condition for settling said statement, and for that reason a peremptory writ should issue requiring him to settle the same, and it is so ordered.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; BEATTY, C. J.

144 Cal. 322

MAYBERRY v. WHITTIER et al. (L. A. 1,229.)

(Supreme Court of California. Aug. 3, 1904.)

DIVORCE — DIVISION OF COMMUNITY PROPERTY —LIABILITY FOR JUDGMENT AGAINST HUSBAND—LIS PENDENS—EXECUTION SALE — INDEMNITY BOND—FRAUD—INADEQUATE PRICE.

1. A judgment obtained against a husband for a community debt prior to his wife obtaining a judgment of divorce, which divided the community property between them, but made no reference to alimony or maintenance, is a lien on the part of the property awarded to the wife, notwithstanding an order in the divorce suit setting aside the property as security for satisfaction of any judgment therein for plaintiff; Civ. Code, § 140, authorizing such security only for maintenance and alimony.

2. Filing notice of lis pendens by plaintiff in a divorce suit by a wife does not prevent a judgment obtained pending such suit against

the husband, on a community debt, becoming a lien on the part of the community property awarded to the wife by the judgment in the divorce suit dividing such property.

3. By the judgment awarding plaintiff a divorce, the community property was divided between her and her husband. Prior to such judgment, defendant obtained a judgment against the husband on a community debt. *Held* that, though plaintiff was entitled to have the property awarded to the husband resorted to for satisfaction of defendant's judgment before that awarded to plaintiff could be sold therefor, yet, the husband having claimed as exempt certain property levied on by defendant, plaintiff could have it sold and applied on the judgment only on giving an indemnity bond, as defendant could not be held for the value of such property till it was determined, as against the husband, that it was not exempt.

4. An execution sale of the judgment debtor's property, at which the judgment creditor was the purchaser, will not be held fraudulent, against one whose property is secondarily liable for the judgment, merely because of inadequacy of price.

5. Before judgment is enforced against the property of one only secondarily liable thereon, it will be credited with the value of property of the judgment debtor, released from levy by the judgment creditor, and then sold by the judgment debtor, unless it be shown that it was exempt.

Department 2. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by Emily Gray Mayberry against W. F. Whittier and another. Judgment for defendants. Plaintiff appeals. Affirmed in part.

Geo. D. Blake and E. C. Bower, for appellant. Otis & Gregg, for respondents.

McFARLAND, J. This is an action against W. F. Whittier, who is the main defendant, and also W. A. Hammel as sheriff, to enjoin defendants from selling certain property of plaintiff under executions issued on judgments in favor of Whittier against E. L. Mayberry, plaintiff's former husband, and to quiet plaintiff's title to said property as against Whittier. The judgment was substantially in favor of defendants, and from the judgment, and an order denying a motion for a new trial, plaintiff appeals.

Plaintiff was divorced from her former husband by a judgment rendered November 22, 1899, the ground of divorce being extreme cruelty by her husband. By that judgment the community property was divided, and the property involved in this present action was awarded to plaintiff. There was nothing in the judgment in the divorce case about alimony or maintenance, and, before that judgment was rendered, Whittier had recovered judgments in quite large amounts against the husband, E. L. Mayberry. Under those judgments he had levied executions on property awarded to plaintiff by the divorce judgment, and was about to sell the same when this present action was commenced to enjoin such sale, etc. In the briefs there are elaborate discussions of a good many questions, but there are only a few points or propositions which need be noticed.

It is clearly the general rule that, upon a division of community property under a divorce decree, the former husband and wife each take the part awarded subject to prior liens; and it has been held that the part awarded either wife or husband is subject to community debts not reduced to liens. Panaud v. Jones, 1 Cal. 488; Packard v. Arellanes, 17 Cal. 535; Johnson v. S. F. Savings Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129; Frankel v. Boyd, 106 Cal. 608, 39 Pac. 939. Therefore in the case at bar property awarded to appellant by the divorce decree was subject to the lien of Whittier's judgments, unless this case comes within some exception which takes it out of the rule. And it is contended that, even if the general rule be as above stated, still appellant's right to the property awarded her is superior to respondent's liens by virtue of a certain interlocutory order made in the divorce case, which, it is contended, was warranted by section 140 of the Civil Code. By that section it is provided that during the pendency of a divorce suit "the court will require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case"; and, during the pendency of the divorce suit of Mayberry v. Mayberry, the court in which said suit was pending made an order that, until the final judgment, certain property, including the property here involved, "be, and the same is hereby, set apart as security for the alimony and maintenance of said plaintiff, and is hereby charged with a lien in favor of plaintiff for the payment of alimony in said action and the maintenance of the plaintiff, and as security for the payment and satisfaction of any judgment which may be rendered in said action in favor of said plaintiff." But as is said in the opinion of the learned judge of the court below, "the only provision of that chapter concerning maintenance or payments to be made by the husband are section 137, giving the court power to require the husband to pay as alimony to the wife any money necessary to enable the wife to support herself or children, or to prosecute or defend the action, and section 139, which authorizes the court, where the divorce is granted for the offense of the husband, to compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to his wife for her support as the court may deem just, having regard to the circumstances of the parties"; and we agree with the learned judge that the provisions of section 140 cannot be extended "so as to embrace the matter of the division of common property." Whether or not a decree for alimony and maintenance, which involve duties owing by the husband to the wife, would constitute a lien superior to the liens of general community creditors, is a question not here involved. The said interlocutory order of the court is therefore of no consequence in this case. And the notice of lis pendens filed by appellant during the pendency of the divorce suit had no legal significance. See Sun Ins. Co. v. White, 123 Cal. 196, 55 Pac. 902.

There is a good deal of discussion in the briefs of the subject of marshaling assets. Of course, under that doctrine, it was the right of the appellant to have Whittier resort first to the property awarded to the husband by the divorce decree, but it is found that he had levied upon and sold all of such property, except as hereafter noticed. One of the parcels of property set apart to the husband was the undivided one-third of a tract of land known as the "El Molino Ranch," and this was levied upon by Whittier; but by agreement the husband conveyed the property to Whittier for $20,000, which was credited on the latter's judgment, and the levy was released. The court below found that the appellant was not bound by this agreement, and that the property was of the value of $35,000; and the court correctly ordered that the difference—$15,000—be credited on Whittier's judgments. There was also a bay horse, named "McKinney," which was levied upon; but the husband claimed this horse as exempt from execution, and it was released. The court decreed that as the judgment in the present action cannot bind the husband, he not being a party to it, the horse must be sold, upon appellant giving therefor an indemnifying bond, and the proceeds of the sale credited on Whittier's judgment. We think that this ruling was correct, as Whittier should not be held for the value of the horse before it is determined, as against the husband, that it is not exempt. Under this view, it was not necessary for the court to find the value of the horse. There was also a black horse, which, while it was still community property, had been levied upon by Whittier and released. This was before the decree of divorce by which the property was divided, and this horse was sold by the husband, and was not included in the second levies made after the divorce judgment. Therefore what is said by appellant about this horse is not material.

It is contended by appellant that the sales made under the executions were the results of fraudulent conspiracy between the husband and Whittier, and were for inadequate prices. But the court below found that there was no fraud, although the sums were for less than the full value of the property sold. Upon this subject the learned judge, in an opinion delivered at the time of his decision, says: "But whether the prices are inadequate or not may be said to be immaterial, because the law is well settled that, while inadequacy of price may be given in evidence as a circumstance tending to show fraud on the part of the creditor who has purchased at his own execution sale, yet it is never of itself sufficient as a ground for vacating such sale. In this case none of the elements of fraud are sustained by the evidence, except the single circumstance of inadequacy of price. It is clear from the authorities referred to that the sale cannot be set aside for that cause alone." These views are correct, and, we think, amply warranted by the evidence, as were all the findings above referred to.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

On Petition for Rehearing.

(Aug. 31, 1904.)

PER CURIAM. The petition for rehearing is denied. In the opinion heretofore rendered, it is assumed that the release of the levy on the black stallion occurred before the decree dividing the community property. In the petition for rehearing our attention is called to the dates shown in the transcript, and upon further examination we find that this was an error. It appears that the levy on this horse and the release occurred nearly a year after the decree, and that after the release, and before the second levy, this horse was pledged by Mayberry, and was afterwards sold by him for $1,000. There is no other evidence of its value. It is not a matter of much importance to the disposition of the case, inasmuch as, after crediting all other sums which the court finds plaintiff is entitled to have credited upon the Whittier judgments against E. L. Mayberry, there still remains a balance thereof unpaid amounting to over $40,000. The only benefit to plaintiff to be derived from a finding as to the value of this horse would be an additional credit of such amount on the judgment, and this slight benefit would not justify a retrial of all the other issues in the case. Nevertheless, the plaintiff is entitled to have the value of said horse credited on said judgments before the same are enforced against her allotment of the community property, provided it was not exempt or free from the execution at the time it was released. For the purpose of giving this relief, a new trial of that issue will be necessary.

The judgment and order are affirmed as to all matters and things found and determined thereby, except as to the said black stallion. The cause is remanded to the court below, and that court is directed to take evidence, and make an additional finding upon the question of the levy upon said black stallion by virtue of the execution on the judgment in Mayberry v. Whittier, the subsequent release thereof, the value of said stallion when released, and whether or not it was then subject to said execution; and if it shall determine that it was then subject thereto, and that said execution was levied thereon and afterward released, then to make a supplemental decree, to the effect that the value thereof shall be credited upon one of the said judgments before either of them shall be enforced against the property set apart to Emily Gray Mayberry by the decree of divorce from Edward L. Mayberry. Further proceedings to enforce said judgments are stayed until the entry of such supplemental decree. Each party shall pay his own costs on this appeal.

144 Cal. 625

HAYES v. HAYES. (L. A. 1,408.)

(Supreme Court of California. Sept. 8, 1904.)

DIVORCE — DESERTION—SEXUAL INTERCOURSE—REFUSAL—HEALTH—EVIDENCE.

1. Under Civ. Code, § 96, declaring that "persistent refusal to have reasonable matrimonial intercourse" shall be evidence of desertion justifying a divorce "when health and physical condition does not make such refusal reasonably necessary," evidence of the unexplained refusal of plaintiff's wife to have intercourse with him for three or four weeks after her marriage to plaintiff, in the absence of evidence as to her health and physical condition, was insufficient to entitle plaintiff to a divorce on that ground.

2. In an action for divorce for the wife's fault, her confession as well as plaintiff's testimony must be corroborated.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Charles Holcomb Hayes against Mayne Hayes. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

See 77 Pac. 452.

John L. Fleming, for appellant.

CHIPMAN, C. The action is for divorce on the ground of desertion alleged to have taken place about July, 1899. The default of defendant was duly entered, and service of summons was had by publication. The court found the following facts: That plaintiff and defendant were married in the city of New York, state of New York, on May 19, 1899; that plaintiff is now, and had been for more than four months prior to the commencement of the action, a resident of the county of Los Angeles, this state, but had not been such resident for one year prior to the commencement of the action; that defendant did not desert plaintiff in July, 1899, or at all, nor did she at that time or since refuse to live or cohabit with plaintiff. Judgment followed for defendant, from which plaintiff appeals on a bill of exceptions.

Plaintiff testified that shortly after the marriage he took his wife to England; that she refused to have matrimonial intercourse with him, and, after remaining with her about three or four weeks, he left her, and presumably found his way to Los Angeles, for he testified that in October, 1899, he again went abroad from there, and "was gone several years, and spent most of his time in Paris, Italy, and England"; that he was studying the languages of those countries, and at the same time vainly searching for his wife. He returned to Los Angeles in January, 1903. The complaint was filed in March, 1903. He testified that when he last saw his wife she was acting in the character of page in a dramatic company in London, but whether this was before or after he separated from her does not appear. There is no evidence that she refused to live with him while they were in London. As evidence of her desertion he testified that upon their arrival by steamer at Rotterdam she engaged two bedrooms at the hotel, one for him and one for herself, without his knowledge or consent. There may have been good reason for this; as, indeed, there may have been for her refusal to cohabit with him. Section 96 of the Civil Code makes "persistent refusal to have reasonable matrimonial intercourse" evidence of desertion "when health and physical condition does not make such refusal reasonably necessary," and as to defendant's then health or physical condition there was no evidence. Plaintiff testified that at first his wife refused to be married except by a Catholic priest, as she was a Catholic, but finally consented to be married by a city magistrate. Plaintiff testified, "I think she did not consider that marriage binding, because she gave no evidence of a wife to me." Still there may have been facts concerning her health or physical condition which caused her for the time to refuse cohabitation. Plaintiff does not testify that she deserted him, or refused to live with him. The burden of his complaint is her refusal to have matrimonial intercourse with him, and for this he left her. Furthermore, we doubt whether it can be said as matter of law that the unexplained refusal of a bride of three weeks to have marital intercourse with her husband is such "persistent refusal" as the statute contemplates as evidence of desertion, and as justifying the husband in separating from his wife. On this point there was an attempt made to corroborate plaintiff's testimony, but the most the witness knew was that defendant gave witness to understand that up to that time there had been no matrimonial intercourse between plaintiff and defendant, and this was told the witness in the stateroom of the steamer on their way to England. The witness did not pretend to know whether or not the refusal was "reasonably necessary." But the confession of the wife, as well as the testimony of plaintiff, required corroboration, and there was none. On the point of alleged desertion the finding is supported by the evidence. Whether the finding as to residence is or is not supported, the judgment may rest upon the other finding. Un-

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¶ 1. See Divorce, vol. 17, Cent. Dig. § 128.

less the desertion of defendant was shown, plaintiff could not prevail in the action, though he had been a resident of Los Angeles county the requisite time.

We advise that the judgment be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed: VAN DYKE, J.; SHAW, J.

ANGELLOTTI, J. I concur in the judgment upon the ground that the finding of the court on the question of desertion cannot be disturbed upon the record before us.

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144 Cal. 628

SCHRODER et al. v. ADEN GOLD MIN. CO.

(S. F. 3,140.)

(Supreme Court of California. Sept. 8, 1904.)

APPEAL—FINDINGS OF FACT—CONFLICTING EVIDENCE—ACTION TO DETERMINE TITLE TO MINING GROUND—TITLE TO SUPPORT.

1. Findings of fact cannot be disturbed on appeal where there is conflicting evidence, but only when it can be seen that they are contrary to all the evidence, and that there is no substantial evidence in their support.

2. An action to determine right to mining ground is in the nature of a suit to quiet title, so that plaintiff can recover only on the strength of his own title, and if he fails to show title, it is immaterial that defendant has none.

Commissioners' decision. Department 1. Appeal from Superior Court, Mariposa County; John M. Corcoran, Judge.

Action by Albert Schroder and others against the Aden Gold Mining Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

J. J. Trabuco and C. D. Wright, for appellants. Congdon & Congdon, for respondent.

GRAY, C. This is an action to determine the right to about seven acres of mining ground, situated in Mariposa county. The defendant, on a trial before the court without a jury, obtained a judgment, from which, and from an order denying them a new trial, the plaintiffs appeal.

The plaintiffs claim the land as a part of the San Antonio mining claim. They endeavored to prove to the satisfaction of the court that the disputed ground was included within the lines of said mining claim as they were originally run and marked with monuments in the field. To this end they called a witness, who testified that he had helped to erect the original monuments inclosing the disputed tract, which monuments are numbered 3, 4, and 5 on the plat in evidence. He further testified that the deputy United States surveyor, S. J. Harris, had relocated these monuments, and established new monuments just where the old ones had formerly been. There was also some other evidence tending to corroborate the foregoing. There was also evidence in conflict with it. The original written notice of location of the "San Antonio mine" was at right angles with this direct testimony as to the location of these three monuments. Furthermore, it was shown that there was no evidence upon the ground, and none seems to have been discovered under the ground, that there was any lead or lode extending in a direction to warrant the placing of the monuments 3, 4, and 5 where they must have been to uphold plaintiffs' contention. On the contrary, it was shown by expert testimony that the lead in all probability continued in the direction indicated by its course, as it could be plainly traced for about one-half the length of the claim. This would also make it correspond to the said written notice of location.

The court found, in effect, that the mine extended in the direction indicated by the lead so far as it could be traced upon the surface, and that its location corresponded with the written notice of location, rather than with the evidence as to the location of these three monuments. Appellants attack this finding, and say that the monuments erected in the field should control courses and distances as indicated upon paper. This statement embodies a correct rule many times declared by this court. But in the present case the evidence as to the location of the original monuments was of an unsatisfactory character so far as it related to the three disputed monuments. The surveyor who attempted to relocate these monuments found no satisfactory evidence upon the ground as to their location, and was compelled to rely upon statements of others as to that matter. A considerable length of time had elapsed pending the original location of the monuments and the subsequent relocation of them. A fire had swept over the country, changing the appearance of things, and making the testimony as to their original location very uncertain. The case presents a conflict of evidence as to the original location of the disputed monuments. It was for the trial court to determine where the preponderance lay. The burden rested upon the plaintiffs to satisfy the court that their contention as to the location of the monuments was correct, and we think that, in view of the uncertain character of plaintiffs' evidence, and the surrounding circumstances in apparent conflict with that evidence, the finding of the court should not be disturbed. This court is warranted in interfering with the findings only when it can be seen that they are contrary to all the evidence, and that there is no substantial evidence in support of them.

The defendant claimed the disputed tract as part of two other mining locations designated by name as the "Ernestine" and the "Menlo." It is urged as additional ground for reversal that defendant failed to prove that the original locators of these claims were citizens, or had declared their intention to become citizens, of the United States, and hence it was not shown that they were qualified locators. It is also urged that there was no evidence that the locators of defendant's claims marked the boundaries thereof by monuments. These are matters which do not concern the plaintiffs. When it has been determined that they have no interest in the land in controversy, the case is ended. This is in the nature of a suit to quiet title, and in such a case the plaintiffs must obtain judgment upon the strength of their own title, and if it be shown that they have no title, it becomes immaterial to inquire into defendant's rights. The case is not a contest in the United States land office, and is to be governed and determined by the practice and rules of pleading governing in the state courts in ordinary suits brought to settle disputes as to interests in land. Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047. The want of title in plaintiffs renders it unnecessary to examine the title of defendant. City and County of San Francisco v. Ellis et al., 54 Cal. 72; McGrath v. Wallace, 116 Cal. 548, 48 Pac. 719.

We advise that the judgment and order appealed from be affirmed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

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144 Cal. 609

CONTINENTAL BUILDING & LOAN ASS'N v. HUTTON et al. (Sac. 1,074.)*

(Supreme Court of California. Sept. 6, 1904.)

MECHANIC'S LIEN—NOTICE OF LIEN.

1. A notice of lien correctly stating the whole amount due plaintiff, but inaccurate in stating that such amount was due on the original contract, whereas some of the articles were furnished on subsequent orders, is valid as to the value of the materials actually furnished under the contract stated in the notice, the misstatement not being made with intent to deceive or defraud.

Commissioners' Decision. Department 2. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by the Continental Building & Loan Association against Charlotte A. Hutton, in which Corlett Bros. filed cross-complaint. From a judgment for cross-complainants, defendant appeals. Affirmed.

Coghlan & Harvey, for appellant. Percy S. King and W. H. Grant, for respondents Corlett Bros. Raleigh Barcar, for respondent Continental Building & Loan Association.

GRAY, C. In this action the plaintiff sought to foreclose a mortgage upon certain real estate in the town of Vacaville, county of Solano. The cross-complainants, Corlett Bros., in the same action sought to enforce a mechanic's lien on the same property against the defendant Charlotte A. Hutton, the owner of said property. The said cross-complainants had judgment enforcing their lien for $1,425. The defendant Hutton appeals from said judgment and from an order denying her a new trial.

The questions presented relate alone to the validity of the notice of lien filed by said Corlett Bros. It is claimed that the notice of lien does not truthfully state the terms of the contract under which the materials were sold, that its statement as to the price is untrue, that it does not contain all of the contract, and that it does not truthfully state the agreement as to the place of delivery.

The notice of lien set forth an express oral contract by which the materials were to be delivered to the contractor at Vacaville for the "contract price" of $1,565.30. The evidence upon the trial showed that materials to the value of said $1,565.30 were in fact furnished by the respondents, and actually used in the building; but it also appeared that of the materials so furnished only $1,425 worth were furnished under the original contract between respondents and the contractor. The rest of the materials were furnished thereafter from time to time as ordered by the contractor. The judgment is only for the $1,425 found to have been furnished under the original contract. It is found that, so far as said sum of $1,425 is concerned, the notice of lien contained a true statement of the demand. It is further found that as to the balance of $140.30 the notice of lien did not truthfully state the terms of said contract, "in that said materials aggregating $140.30 were furnished upon an implied promise to pay therefor what the same were reasonably worth, and not upon an express promise for a specified sum, but such misstatement of the terms of said subsequent contract was not made with intent to deceive or defraud the owner or contractor or any person interested in the contract or said building, or the construction thereof, and no one was injured thereby."

The mechanic's lien law is a part of the Code of Civil Procedure, adopted in obedience to the requirements of the Constitution. It is remedial in its character, and should be "liberally construed, with a view to effect its objects and to promote justice." Section 4, Code Civ. Proc.; Corbett v. Chambers, 109 Cal. 184, 41 Pac. 873. Under this construction of it, the trial court was fully warranted in allowing the plaintiff a lien for the value of the materials actually furnished under the terms of the contract as specified in the claim of lien, and it was immaterial that too great an amount was claimed as due under this contract unless it appeared that the excessive claim was for a fraudulent purpose. The whole amount due plaintiff was correctly stated in the claim; the only inaccuracy consisted in saying that that amount was due on the original contract, when in fact only $1,425 of it arose from that contract. The respondent obtained judgment only for the amount due under the contract stated in his claim of lien. The fact that he failed to state any further contract seems to have resulted in the loss to him of all lien on account of the articles furnished under such further contract. The appellant ought to be satisfied with a result which thus operates only to his advantage and can do him no possible harm in any other direction. "It is quite clear that a recorded lien, good in other respects, cannot be rejected because the amount claimed is somewhat larger than can be sustained by the proofs, unless it be so willfully false as to amount to a fraud; and nothing of that kind appears here." Snell v. Payne, 115 Cal. 218, 46 Pac. 1069, at page 222, 115 Cal., page 1070, 46 Pac.

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*Rehearing denied October 5, 1904.

The finding was that the materials were to be delivered at Vacaville, and so was the statement contained in the lien, and both are sustained by the evidence. To be sure, the materials were to be delivered in the first instance on board the cars at Napa, where the respondents' place of business was; but as Waggoner, the contractor, testifies, "the mill work was to be furnished from there to Vacaville," the purchaser paying the freight. "The glass was to be put in place by Mr. Corlett in the building." Mr. Corlett testified that the goods were "to be paid for on delivery at Vacaville." Taking the evidence altogether, it was fair to find from it that the materials were to be delivered at Vacaville, and not paid for until so delivered.

The fifth finding, to the effect that, so far as the sum of $1,425 is concerned, the notice contained a true statement of respondents' demand, was and is in accord with the evidence. The notice of lien was valid, and properly received in evidence.

The judgment and order appealed from should be affirmed.

We concur: COOPER, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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144 Cal. 631

ROHRBACHER v. SUPERIOR COURT et al. (S. F. 3,898.)

(Supreme Court of California. Sept. 8, 1904.)

PLEDGES—FORECLOSURE—APPEAL—SUPERSEDEAS.

1. Code Civ. Proc. § 949, provides that on appeal from a judgment or order the $300 undertaking required thereby shall stay proceedings in the trial court on the judgment or order appealed from, except as provided in sections 942–945. Section 943 declares that, if the judgment appealed from directs the assignment or delivery of documents or personal property, it is not stayed unless the things required to be assigned or delivered are placed in the custody of an officer of the court, unless an undertaking be given that the appellant will obey the order of the appellate court; and if the judgment appealed from direct the sale of personal property on foreclosure of a mortgage thereon the execution of the judgment or order cannot be stayed on appeal unless an undertaking be entered into to deliver the mortgaged property to the officer if the judgment be affirmed. *Held*, that an action for the foreclosure of a pledge of stock was not within the exceptions provided by section 943, and hence, on defendant giving the $300 bond required by section 949 on appeal from an adverse judgment, she was entitled to a supersedeas.

In Bank. Application by Mary S. Rohrbacher for a supersedeas on appeal. Writ granted.

Campbell, Metson & Campbell, for petitioner. Aitken & Skaife, for respondents.

VAN DYKE, J. This is an application for supersedeas upon the giving of the ordinary undertaking of $300 on an appeal from a judgment in an action brought by J. C. Cullen, as assignee of John R. Aitken, against the petitioner, Mary S. Rohrbacher. The action of Cullen v. Rohrbacher is founded upon a promissory note made and executed by the defendant therein, Rohrbacher, bearing date March 20, 1899, and payable to the order of John R. Aitken, for the sum of $3,250, six months after the date thereof, and as collateral security for the payment of said note the maker thereof, Mary S. Rohrbacher, transferred and deposited with said Aitken, by way of pledge, a certificate of the capital stock of the Sunnyside Land Company, and also a certain order of said superior court in the matter of the estate of Philip Rohrbacher, deceased, for family allowance of $300 per month during the progress of the settlement of said estate. It is found by the court below, as a conclusion from the facts in the case, that the plaintiff in said action have judgment against the defendant, petitioner herein, for the sum of $4,199.16, "and a decree of this court foreclosing the pledged property described in the complaint, and to a sale of said property to satisfy the liens thereon," and by the decree R. H. Fitzgerald was appointed commissioner for the purpose of making the said sale.

To the petition filed herein respondents interposed a general demurrer. The question presented, therefore, is whether, upon the facts stated in the petition, the case falls within section 943 of the Code of Civil Procedure, as claimed by the respondents. That section provides, among other things, that if the judgment or order appealed from direct the assignment or delivery of documents or personal property, the judgment is not stayed unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be given in the amount to be fixed by the court, to the effect that the appellant will obey the order of the appellate court upon the appeal; or, if the judgment or order appealed from direct the sale of personal property upon the foreclosure of a mortgage thereon, the execution of the judgment or order cannot be stayed on appeal unless an undertaking be entered into, in such amount as the court or judge thereof may direct, to the effect that the appellant will on demand deliver the mortgaged property to the officer if the judgment be affirmed, etc. This however, was not a mortgage of personal property, but was a pledge; that is, a delivery of the certificate of stock and an assignment of the order, which was all that could be done on the part of the defendant in said action to transfer and assign the said property as security for said indebtedness. As stated in Pennie v. Superior Court, 89 Cal. 33, 26 Pac. 617: "The general rule, as declared in section 949 (Code Civ. Proc.) is that the $300 undertaking mentioned in section 941 stays proceedings in the court below from the judgment or order appealed from. The exceptions are contained in sections 942 to 945, inclusive; and those sections apply to cases where the appellant has money or other property in his possession which has been adjudged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of the respondent, and where it would be unjust to allow the appellant to retain the possession of the property, and perhaps dissipate it, or put it out of his power to perform the act required, without securing respondent by a bond." See, also, In re Schedel, 69 Cal. 241, 10 Pac. 334; Born v. Horstmann, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577; In re Wood, 94 Cal. 567, 29 Pac. 1108; McCallion v. Hibernia, etc., Society, 98 Cal. 442, 33 Pac. 329. The certificate of stock and order in question were personal property, and as such the former may be transferred by the owner. Civ. Code, §§ 953, 954. We may, for the purposes of this case, assume that the latter also may be assigned. A pledge is a deposit of personal property by way of security for the performance of another act, and every contract by which the possession of personal property is transferred as security only is to be deemed a pledge. Civ. Code, §§ 2986, 2987. In the petition herein it is stated that the petitioner is not now in the possession of said personal property, and cannot, on demand or otherwise, deliver the said alleged pledged property to said R. H. Fitzgerald, the officer directed by said judgment and decree to sell the same, if the said judgment appealed from be affirmed; and that said J. C. Cullen is now in possession of said property, and can at any time deliver the same to said R. H. Fitzgerald should said appeal be affirmed. And it appears that the court below, by its finding and decree as well as by the allegation of the petition herein, treated the choses in action in question as having been transferred by way of pledge, and within the control and possession of the plaintiff in said action.

Under the facts in the case the petitioner is entitled to supersedeas, and the writ will accordingly issue.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN. J.

144 Cal. 612

TIFFIN v. CUMMINGS et ux. (L. A. 1,519.)

(Supreme Court of California. Sept. 7, 1904.)

CONTINUANCE — APPLICATION — DENIAL—DISCRETION.

1. An action was begun September 12, 1902. Defendants filed a general demurrer on October 9th, and, not appearing to present the same, it was overruled on November 10th, and defendants allowed 10 days to answer. On December 1st defendants filed an evasive answer, and the case was set for June 25, 1903. Defendants filed an affidavit for continuance, dated June 23, 1903, that they did not know, until informed by plaintiff's attorney on June 10th, that the case had been set for June 25th; that both members of the firm of attorneys representing defendant were then engaged in the trial of another case in a different city, and had been subpœnaed as witnesses therein; that they had had no sufficient time to locate or communicate with their clients or to subpœna their witnesses. The motion was made at 10 a. m. on June 25th, was not supported by evidence, and no notice of the motion was given to plaintiff's attorneys, nor any reasons stated why it was not made sooner. It did not appear that a continuance had been requested of plaintiff's attorneys, nor why defendants' attorneys had not had sufficient time to reach their clients and subpœna witnesses, nor that any attempt had been made in that direction. *Held*, that an order denying the continuance was a proper exercise of discretion.

Commissioners' Decision. Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by William W. Tiffin against George W. Cummings and wife. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Anderson & Kaye, for appellants. John W. Kemp and Smith & Allen, for respondent.

COOPER, C. This action was brought to foreclose a chattel mortgage given to secure a promissory note made by defendants for the sum of $2,000. Plaintiff had judgment, from which defendants prosecute this appeal, and make the sole point that the court abused its discretion in refusing to grant their motion for a continuance.

We have carefully examined the record, and find no abuse of discretion in the order of the court denying the motion. The action was commenced September 12, 1902. Defendants appeared and filed a general demurrer to the complaint on October 9, 1902.

Counsel did not appear to present the demurrer, and on November 10, 1902, the court made an order overruling it and allowing defendants 10 days to answer. On December 1, 1902, the defendants filed their answer. The complaint was verified, and the answer did not deny the execution of the promissory note and mortgage as alleged in the complaint. It attempted to deny the amount due, but its denial was in the following language: "Deny that nine months of interest, and no more, on said principal sum mentioned in said promissory note and said mortgage has been paid, and is indorsed on said promissory note; and deny that two thousand ($2,000) dollars gold coin of the United States, the principal sum mentioned in said promissory note and mortgage, together with interest thereon at the rate of two per cent. per month from July 1, 1902, still remains due and unpaid from said defendants." It denies for want of information or belief that plaintiff was the lawful owner or holder of said promissory note. It alleged affirmatively that the defendants, at the time of executing the said note and mortgage, were directors of a corporation known as "Great Northern Gold Mining Company," and that in the execution of said note and mortgage they acted solely as the agents of the said corporation, and for its use and benefit. The case was set for trial and tried June 25, 1903. In support of the motion for a continuance the defendants' attorneys filed an affidavit dated June 23, 1903, which stated that they did not know until informed by plaintiff's attorneys June 10, 1903, that the case had been set down for the 25th of June; that both members of the firm were then, and would be on the 25th, engaged in the trial of the case of Neal v. Exposed Treasure Mining Company, and that it would be impossible for either member of the said firm to be present in Bakersfield on the 25th day of June, the time so set for the trial of this case; that they had not had sufficient time, since the case was set for trial, to locate or communicate with their clients or to subpœna their witnesses; that both the attorneys, members of the firm, had been subpœnaed as witnesses in the said action so pending in Los Angeles for the 25th day of June, 1903. There was no other evidence offered in support of the motion. The motion was made at 10 o'clock a. m. on June 25th, at the time the action had been set for trial. No notice of the motion had been given to plaintiff's attorneys. No reason is stated as to why the motion was not made sooner. It does not appear that appellant's attorneys even requested the attorneys for plaintiff to consent to a continuance of the case. If between the 10th and the 25th of June the attorneys for appellants had in good faith and upon a proper showing made a motion for a continuance in time to prevent any great inconvenience to plaintiff, the court no doubt would have granted it. If such showing had been made with a proper request to plaintiff's attorneys, they would, in all probability, have consented to setting the case for a time that would suit all parties. While the affidavit states that the attorneys had not had time to locate or communicate with their clients, the reasons are not stated. It does not appear why, between the 10th and 23d days of June, they could not have reached their clients. It does not appear that it was necessary to subpœna any witnesses, nor that any attempt was made to subpœna any. The affidavit does not even state that it is made in good faith, nor that, if the case should be continued, that the attorneys will be present at a future time to be set for the trial. The court does not appear to have acted hastily. With the time that had expired since the suit had been commenced, the kind of answer that had been filed, and the generalities contained in the affidavit, the court was familiar. It had the right to act in view of all these matters.

We advise that the judgment be affirmed.

We concur: CHIPMAN, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

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144 Cal. 615

WARNER v. WARNER. (Sac. 1,072.)

(Supreme Court of California. Sept. 7, 1904.)

ANTENUPTIAL CONTRACT — FILING OF HOMESTEAD DECLARATION BY WIFE — NONSUIT — GROUNDS NOT SPECIFIED IN MOTION—CONSIDERATION ON APPEAL.

1. An antenuptial contract by which the woman relinquishes all right, claim, and interest in and to the property of the man, either as heir or otherwise, does not preclude her, after their marriage, from filing a declaration of homestead on property of his; the marriage imposing on him the obligation to furnish her a home, and the only effect of a declaration of homestead being to exempt the property from execution, and restrain him from alienating it without her consent.

2. The rule that a ground for nonsuit not specified in the motion therefor cannot be urged in support of the court's action in granting it does not apply where the defect in plaintiff's case was inherent, and could not be cured.

Commissioners' Decision. Department 2. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Adam Warner against Katie Warner to have a declaration of homestead canceled. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Hinckson & Elliott, for appellant. Hiram W. Johnson, for respondent.

HARRISON, C. Plaintiff and defendant entered into an antenuptial agreement May 17, 1889, wherein, in consideration of the

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¶ 1. See Husband and Wife, vol. 26, Cent. Dig. § 165.

marriage then contemplated between them, the plaintiff agreed to pay to the defendant certain moneys during her lifetime, and to care for, maintain, and educate a child of the defendant, and wherein the defendant, in addition to agreeing to be a dutiful and faithful wife, "does hereby relinquish and disclaim any and all right, claim, and interest in and to the property of said first party [the plaintiff], either as heir or otherwise." Within a few days thereafter they were married to each other, and are still living together as husband and wife. At the time of their marriage the plaintiff was the owner of certain land, upon which he resided, which was his separate property, and where, since their marriage, they have continued to reside. July 24, 1899, the defendant, without the knowledge or consent of the plaintiff, executed and caused to be recorded in the office of the county recorder a declaration of homestead upon the said land. The plaintiff has brought the present action to have it declared that the said declaration of homestead is a cloud upon his title, and that the same be canceled of record. At the trial the only evidence offered on behalf of the plaintiff was his own testimony, and at the close thereof the court, upon the motion of the defendant, granted a nonsuit. From the judgment entered thereon he has appealed.

The provisions of the Civil Code by which the wife is authorized to select a home for herself and the family out of the separate property of the husband, that shall be exempt from the effect of misfortune or improvidence on his part, as well as from the importunity or rapacity of his creditors, have been enacted in pursuance of a public policy declared in the Constitution, and, being remedial in their nature, are to receive a liberal construction. Keyes v. Cyrus, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296. To the extent that these provisions are enacted in the interest of the wife, the policy in pursuance of which they are enacted, as well as the purposes of their enactment, are to be considered in the construction of any agreement by her in reference thereto. She is not to be held to have surrendered the rights conferred by these provisions, except by clear and explicit language. The relinquishment and disclaimer by the defendant of all right and interest in and to the property of the plaintiff, "either as heir or otherwise," was an agreement on her part not to seek to deprive him of any of his property, or to assert any claim thereto adverse to him, during his lifetime, or any claim of inheritance therein after his death. Her declaration of homestead was not a violation of this obligation thus assumed by her, or an infringement of any right acquired by him by virtue of the agreement. In the same instrument he agreed "to take care of, and to care for, keep, maintain, and support," her; and by the contract of marriage into which they subsequently entered there was imposed upon him an obligation to provide her with a home, and upon their marriage he took her to the property described in the complaint, wherein they have ever since lived, and thereby made it their home. The defendant did not by her aforesaid agreement relinquish her right to a home, or preclude herself from taking the precaution to make the home secure to her during their married life. The only effect of declaring a homestead thereon was to exempt it from execution or forced sale in satisfaction of judgments against him, and to restrain him from alienating the property without her consent. As the property was his separate property, by her declaration of homestead she acquired no estate or proprietary interest therein which she could assert adversely to him, but merely secured the right to a home therein during the common lifetime of herself and her husband. She has no right of survivorship in the property, but on his death it will vest in his heirs, discharged of all claim or interest on her part by virtue of such declaration. Code Civ. Proc. § 1474. The right given to the superior court by this section to set it apart "to the family of the decedent" for a limited period is not controlled, or in any way affected, by the wife's previous selection of a homestead. Weinreich v. Hensley, 121 Cal. 653, 54 Pac. 254. The respondent is not precluded from urging this point in support of the action of the superior court because it was not specified as one of the grounds of her motion for a nonsuit. The reason for the rule that only such grounds can be considered upon an appeal is that, if other grounds were specified, the plaintiff might overcome the objection by additional evidence; but if the defect is inherent in his cause of action, and cannot be cured, the reason for the rule ceases to exist, and the rule itself has no application. Daley v. Russ, 86 Cal. 114, 24 Pac. 867; Fontana v. Pacific Can Co., 129 Cal. 51, 61 Pac. 580.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

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144 Cal. 528

LOS ANGELES & BAKERSFIELD OIL & DEVELOPMENT CO. OF ARIZONA v. OCCIDENTAL OIL CO. (L. A. 1,205.)

(Supreme Court of California. Aug. 30, 1904.)

SPECIFIC PERFORMANCE—MUTUAL OBLIGATIONS —RESULTING TRUST.

1. Under Civ. Code, § 3386, providing that a party to an obligation cannot be compelled specifically to perform it unless the other party has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, specific per-

formance will not be granted of an agreement of locators of oil land to convey it to a corporation on transfer to them of one-fourth the stock to be issued by it, their object and purpose in making the agreement being to secure the development of the land to determine whether it contained oil, and the development not having been made, and the court not being able to compel it to be made, personal labor and services being involved therein.

2. Where a conveyance of land is in consideration of valuable property of the grantee and an agreement of a third person to issue shares of stock having only a speculative value, the court cannot determine what interest in trust in the land such third person has, and therefore cannot enforce it.

3. Where two locations are made on land as mineral land, and no mineral has been discovered in it, the interest of the second locator, conveyed to the person having the interest of the first locator, cannot be measured as to its value, or as to its fractional dimensions, as compared with the whole tract, and therefore a resulting trust in such interest cannot be enforced.

4. A resulting trust can only be created by a writing.

Commissioners' Decision. In Bank. Appeal from Superior Court, Kern County; J. M. Mahon, Judge.

Action by the Los Angeles & Bakersfield Oil & Development Company of Arizona against the Occidental Oil Company. Judgment for defendant. Plaintiff appeals. Affirmed.

T. M. McNamara, Goodrich & McCutchen, and Calvin Edgerton, for appellant. J. W. Ahern and A. F. McCormick, for respondent.

GRAY, C. This is an action to have it declared that defendant holds certain real estate in trust for and to enforce the specific performance of a contract to convey the same to plaintiff. The defendant had judgment on a demurrer to the complaint, and plaintiff appeals. The question for decision here is, does the complaint state a case for the equitable interposition of the court?

The property in dispute consists of three different pieces of public land in Kern county located as oil land under the laws of the United States, and upon which, as appears from the complaint, no oil had been discovered at the date of the alleged contract. The complaint alleges that such title as was acquired by such locations was "vested in, or owned or under the absolute control of, a combination or association of persons," and that this association was represented and wholly controlled by five persons, whose names are given. An agreement is alleged to have been entered into between Charles M. Martin, the promoter and organizer of the plaintiff corporation, and said five persons as follows: Said five persons agreed that they would place in escrow in the Kern Valley Bank a quitclaim deed conveying to Martin all the interest of the locators in said lands. Martin agreed to organize a corporation, and to cause to be transferred and delivered to a trustee to be designated by said five persons one-fourth of the entire capital stock of said corporation in payment for said lands. It was further agreed that said corporation "should have immediate possession of said lands, and proceed with the development thereof, to the end that it might be determined whether oil existed thereunder, and that said deed should be delivered when oil was struck on said lands or any part thereof, or that said deed should be delivered at any time after the issuance of said stock to said trustees." The complaint further alleges that the object and purpose of said persons, as stated and declared by them, in making the said agreement with said Martin, was that by transferring a portion of the lands so located and acquired upon the understanding that they should be developed by the transferee, the said association of persons would secure the development of said territory without expense to themselves; and also with the purpose and object of acquiring the capital stock of said corporation so to be organized by said Martin for its speculative value; and that there was an understanding between such persons and said Martin that in forming such corporation he should associate together men of financial responsibility as incorporators and directors thereof, so that said stock would have a speculative value in the market. That Martin thereafter organized the plaintiff corporation according to his said agreement, using men therein of "known probity, business ability, and financial responsibility" as directors and incorporators; that he communicated the names of those men to said association of persons, and the latter "expressed themselves as more than satisfied with the character and standing of said incorporators and directors"; that the sole object of forming this corporation was to comply with the said agreement, and the only property intended to be held by said corporation was the oil property covered by said agreement; and of all this the said incorporators were fully advised, and entered into the incorporation relying thereon. It is also alleged that said combination or association of persons were acting as the promoters of the defendant corporation in making the agreements aforesaid, and that in furtherance of their previous agreement they promoted and caused to be organized the defendant corporation for the purpose of carrying out the foregoing agreement, and that the incorporators, officers, and directors thereof were composed of said persons and their immediate relatives, "and that the management and control of affairs of said corporation defendant was at all the times herein mentioned" in the hands of the said five persons mentioned in the complaint by name.

The complaint further sets forth that a part of the agreement was that the land should be free and clear of all claims and incumbrances, so that a quitclaim deed from the defendant corporation (which corporation

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¶ 4. See Trusts, vol. 47, Cent. Dig. § 93.

had succeeded to whatever title had been acquired by the said association of persons) "should pass all the interest which was or could be acquired by reason of the location of said lands as aforesaid"; that Martin procured abstracts as to the title of said land, and it was ascertained that a second mining location had been made some two days later than the location hereinbefore referred to by G. W. McCutchen et al., on one of the tracts consisting of 160 acres in a certain section 2, and the attorneys examining said abstract gave it as their opinion that in the case of these conflicting applications the first discoverer of oil would get good title to the land, notwithstanding the prior location. Defects in the title to several other tracts were also discovered.

The complaint further alleges: That Martin was instructed by said defendant and said persons to do whatever was necessary to clear the said titles, and accordingly Martin proceeded from Los Angeles to Bakersfield, and in company with Batz, the latter acting as agent for defendant, they together arranged a compromise of the conflicting claims of the defendant and said McCutchen et al. in said section 2. This arrangement was that McCutchen et al. should convey 80 acres of the disputed quarter of section 2 to said Batz in trust for said Martin and defendant, "and that said defendant should convey to certain persons named by said McCutchen et al. a like 80 acres of said quarter section; and that said Martin should, as an additional consideration, agree to issue or cause to be issued to the said McCutchen et al. 2,000 shares of the capital stock of the plaintiff corporation." That Martin did so agree in writing, and that both Martin and plaintiff corporation are able, ready, and willing to comply with the said agreement. Thereupon said Batz, by consent of Martin, transferred by deed of quitclaim all the interest which he had acquired in said lands in said section 2 to the defendant corporation, but upon the express understanding "that said defendant should convey to plaintiff a one-half interest in said 80 acres of said section 2." That Martin, to secure a quitclaim deed from McCutchen et al., sent agents at his own expense to various points, "and at his own expense secured from each person his signature to said deed." It is also alleged that Martin procured the correction of the defects in the title to the property in other respects not necessary to be here stated.

The foregoing statement contains only a part of a very long complaint, but it is deemed sufficient for the decision of the appeal. It is clear to us that the complaint does not state a case for specific performance, and this for several reasons, only one of which we will state. The main object of the contract was to secure the development of the land to the end that it might be determined whether it contained oil, and this was the principal consideration that induced the defendant to make such contract. And the performance of this part of the contract on the part of plaintiff cannot be enforced in a court of equity, because it involves the performance of personal labor and services. Hence there is a want of mutuality as to the remedy sought to be enforced. Equity will not enforce specific performance of a contract as against the defendant unless the plaintiff has performed, or can be compelled specifically to perform, his side of the contract. Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334. Under this rule the contract cannot be divided up into "independent covenants" and "subsequent conditions" for the purpose of enforcing a part of it and leaving the parties to some subsequent remedy as to the rest of it, but the whole contract, including conditions subsequent as well as precedent, must be kept in view; for our statute says "neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed or is compellable specifically to perform everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance." Civ. Code, § 3386. The forming of the corporation and the issuance of one-quarter of the stock to the defendant was but a small part of the consideration to be performed by plaintiff. The contract was not "nearly" performed on plaintiff's part by the forming of this corporation and transfer of a quarter of the stock. The main object, purpose, and consideration of the contract—the development of the land for oil—was yet to be performed by plaintiff. And, though plaintiff may be entitled at law to a conveyance and to be let into possession before he performs this part of the consideration, yet, as this part of the consideration has not been performed, and its performance cannot in equity be specifically enforced, no enforcement of any part of the contract can be had. This principle is clearly illustrated and the reasons plainly given in Lattin v. Hazard, 91 Cal. 87, 27 Pac. 515. To the same effect is the more recent case of Moore v. Tuohy (Cal.) 75 Pac. 896.

But in his closing brief appellant urges that the facts stated in the latter part of the complaint establish a resulting trust in the land. A resulting trust arises "when a transfer of real property is made to one person and the consideration thereof is paid by or for another." Civ. Code, § 853. The main consideration of the transfer to the defendant of the outstanding claim to one 80-acre tract of section 2 was the transfer of defendant's interest in the other 80 acres of the same section. Martin's efforts as the promoter or agent of the parties and the traveling and other expense he incurred in bringing about this transfer cannot be held to form even a part of the consideration for the alleged transfer. This consideration proceeded not from Martin or the plaintiff, but from defendant, and, the conveyance being to the same party from which the consideration emanated, there can be no resulting trust in favor of another. If it be admitted that the agreement to issue to McCutchen et al. 2,000 shares of the stock of plaintiff constituted a part of the consideration for this transfer, how are we to determine what interest in trust this would carry with it in the property conveyed? No value is assigned to this stock; indeed, the complaint clearly recognizes that it was only of "speculative value." The law recognizes actual values or market values, but, so far as we can learn, has no dealings with speculative values; and equity follows the law. Besides, under the doctrine of resulting trusts it is not the interest in property orally agreed to be conveyed that will be looked to (agreed trusts come under the head of express trusts, and must be created by a writing), but a court of equity will regard only that interest or property as held by virtue of a resulting trust which is conveyed to one by virtue of the consideration emanating from another. What interest was conveyed to defendant in this 80-acre tract by McCutchen et al.? Certainly it cannot be contended that defendant holds under a resulting trust any greater or different interest from that which it obtained from McCutchen et al. These latter parties had only a second location on mineral land upon which no mineral had been discovered. The defendant was already the successor to all the claim that the prior locators had in the same land. Certainly no resulting trust could attach to this prior location. It is impossible to enforce a trust interest that cannot be measured as to its value, or as to its fractional dimensions as compared with the whole tract divided or undivided. The agreement to convey one-half the 80 acres referred to cannot be specifically enforced for the same reasons already given as limiting the power of the court as to the enforcement of the original contract set out in the complaint.

As to the other tracts, it does not appear that any consideration whatever proceeded from Martin or from plaintiff for any interest therein conveyed to defendant; and hence the doctrine of implied or resulting trusts can in no way apply to the transactions had in relation thereto.

Without taking time to critically examine the other points urged against the complaint, we deem it sufficient to say that for the reasons stated the complaint fails to state a cause of action, and we advise that the judgment be affirmed.

We concur: HARRISON, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: McFARLAND, J.; HENSHAW, J.; VAN DYKE, J.

BEATTY, C. J. I concur in the judgment of affirmance upon the ground that the agreement to convey was not supported by an adequate consideration, and that the contract as pleaded was not, as to the locators of the mining ground, reasonable or just. Civ. Code, § 3391. The first thing to be done was the deposit in escrow of a deed conveying all their title to Martin, and this deed was to be delivered, thereby investing Martin with the complete title and power of alienation, upon the delivery by him to the trustee of the locators of one-quarter of the shares of a corporation to be formed. The contract contained no stipulation binding Martin to convey the claims to the corporation, and provided no effective means of binding the corporation to make a thorough development of the ground. On this point it was extremely vague and indefinite. It was not provided that any condition subsequent should be expressed in the deed, and the only condition precedent to its delivery was the issuance to a trustee of the locators of one-quarter of the shares of a corporation with no capital except its stock subscriptions, and with no guaranty that the remaining three-fourths of the shares would be subscribed. It is not alleged in the complaint that any definite number of shares in the corporation have been subscribed, and it is entirely consistent with the case as stated that the one-quarter of the stock issued to the trustee of the locators is practically all that ever will be issued. Besides this, the contract did not provide that the stock issued to the locators should be issued as fully paid, or unassessable in whole or in part, and the complaint does not allege that it was to be held on conditions in any respect more favorable than those affecting the stock of other subscribers. So that, if these locations should now be conveyed to the corporation, as assignee of Martin, the locators would be liable as stockholders for a share of the expense of development exactly proportioned to their interest in the ground—a result utterly at variance with the alleged purpose of the locators in entering into the contract.

Upon this ground, irrespective of others, I concur in the judgment.

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144 Cal. 619

WILLIAMS v. ASHURST OIL, LAND & DEVELOPMENT CO. (Sac. 1,189.)

(Supreme Court of California. Sept. 7, 1904.)

CORPORATIONS—SALE OF STOCK—CONTRACT—PROVISION AS TO ISSUANCE OF CERTIFICATE—CONTEMPORANEOUS CONSTRUCTION—PAROL EVIDENCE.

1. It is evidence, on the theory of a contemporaneous practical construction, that a contract of a corporation for sale of shares of its

capital stock was for shares for which a certificate should not be issued for five years, that the purchaser on making a resale had the secretary of the corporation explain to the person to whom he was making the resale that such was the fact.

2. Provision in a contract of purchase from a corporation of shares of its stock that a certificate therefor shall not be issued for five years is binding.

3. Parol evidence that a written contract for sale of "shares of capital stock" of a corporation was for shares a certificate for which was not to be issued for five years does not contradict or vary the terms of the writing.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Joaquin County; Edward I. Jones, Judge.

Action by Walter E. Williams against the Ashurst Oil, Land & Development Company. Judgment for defendant. Plaintiff appeals. Affirmed.

A. H. Carpenter, for appellant. O. B. Parkinson, for respondent.

COOPER, C. This action was brought to compel the specific performance of a contract made by defendant with plaintiff's assignor for the delivery of 6,500 shares of the capital stock of defendant in payment for a conveyance made by plaintiff's assignor to defendant of the oil in certain lands. Findings were filed and judgment ordered that plaintiff is entitled to receive from defendant "six thousand five hundred shares of the capital stock of said corporation of the class designated as 'pool stock' upon the delivery to said corporation by said plaintiff for cancellation to the extent of said number of shares" of the agreement made by the defendant and plaintiff's assignor as to the shares. It was found that prior to the commencement of the action the defendant tendered to plaintiff the said 6,500 shares of "pool stock," and that defendant has kept its tender good, and hence the court ordered that defendant recover its costs. Plaintiff has appealed from the judgment on the judgment roll and a bill of exceptions.

The principal contention is as to whether the plaintiff is entitled to ordinary certificates of shares of the capital stock of defendant, or to the kind of stock designated in the judgment. The court found that on the 7th day of April, 1900, the defendant made the following agreement with plaintiff's assignor:

"This agreement made this 7th day of April, 1900, between The Ashurst Oil, Land and Development Company, a corporation, and Benjamin F. Thompson, E. E. Thrift and T. D. Kennard, witnesseth: That for and in consideration of the execution and delivery of a certain deed of conveyance of oil rights this day made by the parties of the second part herein to the party of the first part herein, the party of the first part agrees to deliver upon demand to the parties of the second part, 21,154 shares of the capital stock of the corporation named herein as the party of the first part, or upon demand by any one of the parties of the second part, will deliver 7051 shares of said stock to such party making such demand.

"[Signed] The Ashurst Oil, Land and
Development Company.
"By O. B. Parkinson, Secretary.
"Jacob Simon, President."

The court further found as follows: "That the capital stock of said defendant corporation was, at the time said above-mentioned agreement was entered into, divided into two classes: First, what was known as 'treasury stock,' being the regular ordinary stock of the corporation, upon which certificates in regular form were duly issued and sold; second, what was known as 'pool stock,' upon which no certificates of stock in regular form should be issued for at least the space of five years from said 7th day of April, 1900, but for which special receipts, showing ownership of said stock, should be issued to the holders of said stock as evidence of their ownership. That at the time of entering into said agreement between said Kennard and said corporation, said distinction between said stock was explained to said Kennard, and it was agreed then and there between said Kennard and the promoters of said corporation and between said Kennard and said corporation that said stock mentioned in said above-quoted agreement was 'pool stock,' and that no certificate should be issued to said Kennard or his assigns thereon until the expiration of said period of five years; and, further, that said agreement above quoted was at said time simply held by said Kennard as merely a memorandum to be held until the full agreement containing all of the propositions as agreed to orally should be reduced to writing. That the shares of stock mentioned in said agreement were and are the 'pool stock' of said corporation." It seems clear that, if it be conceded that the latter finding is correct, the judgment is the legal conclusion therefrom. It is earnestly urged, however, that the part of the finding that the agreement had reference to "pool stock," and that no certificate in the regular form should issue until the expiration of five years, is not supported by the evidence. The witness Abrams testified that he made the agreement with Kennard (the plaintiff's assignor) as to the kind of stock he was to get on the 7th day of April, 1900, in the presence of Dr. De Vinney. The witness further testified: "We had a talk with Mr. Kennard in this way: I stated to Mr. Kennard that the company was formed with five hundred thousand shares, of which we set aside 275,000. Those 275,000 shares were divided into thirteen blocks of 21,154 shares each. I told him just exactly what we were doing with this stock, that we were dividing this 275,000 shares into thirteen blocks of 21,154 shares each; that we would give him one of these blocks for the oil rights to these lands, and that we would pool this stock, and not to issue any certificates on this stock until the expiration of five years;" and that Kennard agreed to the arrangement as detailed by the witness. The witness Parkinson testified substantially as did Abrams. He said: "I told him [Kennard] that, as it was 'pool stock,' we, of course, could not give him a certificate, but we could give him an equitable assignment of any number of shares that he wished." This conversation referred to a sale of some stock made by Kennard to one Butler. Shortly after the agreement of April 7th, the plaintiff's assignor sold some stock to one Galway and some to one Butler. In cross-examination the witness Kennard said: "I sold some of my stock to Mr. Galway, and gave him a written assignment for it. I sold part of the 7,054 shares of Galway. I did not present the agreement [plaintiff's Exhibit 2] for cancellation at any time. I went to Mr. Parkinson's office with Mr. Galway, and asked him to explain to Mr. Galway that my stock was 'pool stock,' and that he [Galway] could not get any certificate for five years. I asked Mr. Parkinson to explain this to him, which he did, and wrote out an assignment to Mr. Galway, which I signed. I also sold some of my stock in a similar manner to Mr. C. J. Butler, and took him to Mr. Parkinson's office, and requested Mr. Parkinson to explain to Mr. Butler how it was that he [Butler] could not get any certificate of stock, because this was the kind known as 'pool stock.' These transactions were had, I think, in May, 1900." The above testimony supports the finding. The transactions in regard to the sale of stock by Kennard to Galway and Butler show how Kennard understood the contract as to the kind of stock he was to get. "The contemporaneous and practical construction of a contract by the parties is strong evidence as to its meaning, if its terms are equivocal." Keith v. Electrical Engineering Company, 136 Cal. 180, 68 Pac. 598. Kennard would not have asked Parkinson to explain to Galway and to Butler that his stock was "pool stock" unless he so understood his agreement himself. Having made the agreement as to the time at which he would be entitled to regular shares of stock, Kennard was bound by it, and plaintiff, as his assignee, is entitled to no greater rights. He has been given the precise kind of stock that plaintiff agreed to take as consideration. "Restrictions may be created by a contract mutually agreed to by the stockholders." Cook on Stock and Stockholders, § 408. It is claimed that it was error to admit parol evidence for the purpose of contradicting or varying the terms of the written contract of April 7, 1900. But the evidence was not for the purpose of contradicting or varying the terms of the written contract. The agreement did not refer in language to certificates of shares, but "shares of the capital stock of the corporation." The evidence was introduced for the purpose of showing that the terms "shares" referred to and was understood as "pool shares." The writing did not show the kind of shares that Kennard was to receive, but the evidence showed that out of 500,000 shares, 275,000 shares were "pool stock," on which no certificates were to be issued until the expiration of five years, and that the shares Kennard was to get were of the "pool shares." If the writing does not show upon its face that it was intended to express the whole agreement between the parties, parol evidence is admissible to show other conditions or explain latent ambiguities. Kreuzberger v. Wingfield, 96 Cal. 255, 31 Pac. 109; Sivers v. Sivers, 97 Cal. 521, 32 Pac. 571; Balfour v. Fresno Canal & I. Co., 109 Cal. 221, 41 Pac. 876.

Plaintiff cannot assume the role of innocent purchaser even if that doctrine could be invoked in a case like this. He testified that he was told that no certificates could be issued for five years, that it was "pool stock," and that he was to pay $5,000 for the shares when he could realize on them. It is claimed that it was the duty of defendant to issue the stock when fully paid up. Defendant has offered to issue stock to plaintiff, and the judgment is that it issue 6,500 shares of pool stock to plaintiff. A certificate of stock is a mere muniment of title. It is evidence of ownership of the stock. Cook on Stocks and Stockholders, § 14.

It is not argued that the agreement as to "pool stock" was void, and hence it is not necessary to pass on the question. The offer to issue the stock was in conformity with the agreement made by plaintiff and defendant. It is not necessary to discuss other minor questions argued. We do not deem them of sufficient importance to justify a reversal of the case.

The judgment should be affirmed.

We concur: CHIPMAN, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

144 Cal. 511

LACY et al. v. GUNN. (L. A. 1,212.)

(Supreme Court of California. Aug. 29, 1904.)

RULE OF PROPERTY—DECISIONS ASSUMING VALIDITY OF STATUTE—MINING CORPORATIONS—ASSIGNMENT FOR CREDITORS—TRANSFER OF MINING GROUND—RATIFICATION OF STOCKHOLDERS—ASSENTING CREDITORS—ESTOPPEL—WITHDRAWAL OF CLAIM—FRAUDULENT SALE.

1. Decisions which, while not discussing the constitutionality of Act April 23, 1880 (St. 1880, p. 131, c. 118) § 1, stating the requisites of a valid disposition by a mining corporation of its mining ground, recognize the validity of and enforce its provisions, and have been generally considered and acted on as judicial recognitions of the validity of the section, will be considered as a rule of property.

2. One who takes an assignment of claims from creditors of an insolvent knowing that they have filed their claims with the assignee for creditors of the insolvent, and have had them allowed, and who thereafter allows the claims to remain on file, is an assenting creditor within Civ. Code, § 3459, declaring that, unless the provisions of section 3458 requiring an assignment for the benefit of creditors be in writing, subscribed by the assignor, or his agent authorized in writing, the assignment shall be void against creditors not assenting thereto.

3. Under Act April 23, 1880 (St. 1880, p. 131, c. 118) § 1, declaring it unlawful for the directors of a mining corporation to dispose of its mining ground unless such act be ratified by the holders of two-thirds of the capital stock, a mining corporation's assignment for creditors lacking the assent or ratifications of the necessary stockholders is void as against the corporation as to its mining ground; so that as to such ground creditors of the corporation are not estopped to dispute the validity of the assignment, though they have assented to the assignment; so that under Civ. Code, §§ 3458, 3459, they would waive objection to the validity of the assignment because not in writing subscribed by the assignor or by his agent authorized in writing.

4. For a creditor of an assignor for creditors to sue on his claim and reduce it to judgment is not a repudiation of the assignment, or a withdrawal of his claim which he has filed and had allowed and kept on file.

5. A creditor of a mining corporation, though obtaining a judgment against it before ratification by its stockholders of its assignment for creditors, necessary under Act April 23, 1880 (St. 1880, p. 131, c. 118) § 1, to give validity thereto, so far as its mining ground is concerned, yet having continued to maintain the relation of an unsecured creditor, keeping his allowed claims on file, till after ratification by stockholders, making the assignment valid as to the mining ground, and till after sale thereof by the assignee for creditors, is estopped to deny the validity of the title thus transferred to the purchaser, as he would have been had the assignment been originally authorized by the necessary stockholders.

6. A sale by an assignee for creditors will not be held fraudulent merely because of inadequacy of price.

7. Under Act April 23, 1880 (St. 1880, p. 131, c. 118) § 1, declaring it unlawful for the directors of a mining corporation to dispose of mining ground owned by it without the ratification of the holders of two-thirds of the capital stock, a previous consent or direction by the actual owners of such amount of stock, though purporting to have been made by them in their capacity of directors, is, at least as against creditors, equivalent to a subsequent ratification.

In Bank. Appeal from Superior Court, Kern County; M. L. Short, Judge.

Action by Elizabeth C. Lacy and others, as executrices of B. T. Lacy, deceased, against C. E. Gunn. Judgment for plaintiffs. Defendant appeals. Reversed.

D. E. Alexander, for appellant. S. N. Reed, Chas. T. Howland, and J. W. McKinley, for respondents.

SHAW, J. The defendant, C. E. Gunn, within 60 days after its rendition, appealed from the judgment in favor of the plaintiffs, and he brings up the evidence by bill of exceptions. The complaint is in the ordinary form of an action to quiet title. The answer avers title in the defendant, Gunn. The action was begun in the name of B. T. Lacy, who has since died, and the present respondents have been substituted in his stead.

The evidence shows that both the plaintiff and the defendant, Gunn, claim through the Amalie Mining Company, and the question which has the better title depends on the validity of the respective conveyances by which each claims to have acquired the title of that company. The plaintiff claims title by virtue of a judgment, execution sale, and sheriff's deed. On May 9, 1898, B. T. Lacy recovered judgment in the superior court of Kern county against the Amalie Mining Company for the sum of $7,909.56, which was then duly docketed, and became a lien on the real estate of said company within the county. Execution was duly issued thereon on April 27, 1899, and in virtue thereof the sheriff sold the mining claim in controversy to B. T. Lacy, the plaintiff in the action, for $7,500, and, no redemption being made, a deed was executed to the purchaser on October 2, 1900, in pursuance of the sale. The claim of the defendant, Gunn, is upon a deed from J. B. Ferris, as assignee of the Amalie Mining Company under an assignment made by that company for the benefit of its creditors. The assignment, covering the property in question and other property of the company, was executed to the sheriff of the county as provided in section 3449 of the Civil Code. It is dated April 8, 1897, and was duly recorded on April 9, 1897. By the usual proceedings the creditors of the company met, and elected J. B. Ferris assignee, to whom, on April 19, 1897, the sheriff conveyed the property. The assignee took possession of all the property and held the property in question here until November 16, 1898, when, as such assignee, he sold and conveyed it to Gunn for $3,514.82. The assignment antedates the judgment under which plaintiffs claim, and therefore, if the assignment is valid, the plaintiffs' judgment did not become a lien on the property, and the deed of the assignee transferred the title to Gunn, and constitutes a complete defense to the action.

The respondents claim that the assignment for the benefit of creditors is void. The principal ground for this contention is that the property in question constituted the mining ground of the Amalie Mining Company, a mining corporation; that the assignment was neither ratified nor authorized by the holders of two-thirds of the stock of the corporation; and hence that it is void under section 1 of the act of April 23, 1880 (St. 1880, p. 131, c. 118). That section is as follows: "It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or othewise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to

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¶ 6. See Assignments for Benefit of Creditors, vol. 4, Cent. Dig. §§ 792, 802.

purchase or obtain, in any way, any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders' meeting called for that purpose." The appellant claims that the statute is unconstitutional, and cites the case of Krause v. Durbrow, 127 Cal. 682, 60 Pac. 438, in support of his contention. That case holds that section 3 of the act is unconstitutional on the ground that it is an attempt to enact a law for a mining corporation different from that prescribed for other corporations, with respect to a subject which, in its relation to a mining corporation, possesses no natural or intrinsic quality different from that which it possesses in its relation to other corporations. Section 3 prescribes rules for the conducting of elections at stockholders' meetings of mining corporations different from those prescribed for corporations generally. It was held that no reason existed for making a law for such elections with regard to mining corporations different from that for other corporations, and hence that it was special legislation on a subject as to which a general law could be and had been made applicable. It does not follow that, because no reason could be perceived for a classification of such corporations for the purpose of making rules for the conduct of elections, there is likewise no reason for a classification with respect to the method of selling and disposing of the property of such corporations which constitutes its real capital, namely, its mining ground. We do not consider it necessary to enter into a discussion of this point, for the reason that the question would seem to be foreclosed by the previous decisions of this court recognizing the validity of the first section of the act and enforcing its provisions. While its constitutionality has not been discussed, section 1 of the act has been treated as valid, and its provisions enforced by the court in bank in McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Pekin Mining Co. v. Kennedy, 81 Cal. 363, 22 Pac. 679; and Johnson v. California Lustral Co., 127 Cal. 283, 59 Pac. 595. In Granite Gold M. Co. v. Maginness, 118 Cal. 137, 50 Pac. 269, this section, although strictly construed, was recognized as a valid statute. These decisions have been generally considered and acted on as judicial recognitions of the validity of the section, and it must now be considered as a rule of property. Even if the question were an open one, we are not prepared to hold that there is not a natural or intrinsic distinction or difference between the mining property of mining corporations, with respect to the advisability of investing in the directors the absolute power of acquiring or disposing of the same, and the ordinary property of those and other corporations, which would justify a law, applicable to that class of corporations and property, different from the general rule. We must therefore decide the case upon the theory that the section quoted is a valid law.

We think, however, that under the circumstances of this case the plaintiffs cannot question the validity of the assignment so far as it affects the mining property. Section 3458 of the Civil Code declares that "an assignment for the benefit of creditors must be in writing, subscribed by the assignor, or by his agent thereto authorized in writing"; and section 3459 is as follows: "Unless the provisions of the last section are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor not assenting thereto." Aside from the provisions of the Code, there is a general rule that a creditor who files his claim under an assignment in the manner prescribed by law thereby waives all objections to the regularity of the assignment and to the title of the assignee to the assets. Littlejohn v. Turner, 73 Wis. 113, 40 N. W. 621; Olson v. O'Brien, 46 Minn. 87, 48 N. W. 453; Boynton F. Co. v. Sorensen, 80 Wis. 596, 50 N. W. 773; Lawson v. Stacy, 82 Wis. 304, 51 N. W. 961, 52 N. W. 306; Chafee v. Bank, 71 Me. 526, 36 Am. Rep. 345; Jones v. Tilton, 139 Mass. 418, 1 N. E. 741; Appeal of Smith, 86 Mich. 158, 48 N. W. 864. In Olson v. O'Brien, supra, the court says: "Whatever may be the legal status of creditors who have not availed themselves in any manner of the assignment, or the benefits to be derived therefrom, the plaintiff, by making proof of his claim, delivering it to the assignee, and thereafter, although notified of the fact of its allowance, permitting it to stand as a proved-up claim against the estate, has, in law, accepted the instrument, and barred himself from disputing its validity, or from taking any action which will defeat its purpose as a transfer of the property in question to the assignee." And in Appeal of Smith, supra, it is said: "It is well settled that where one comes in under the assignment proceedings in such a way as to entitle himself to share in the dividend arising from the assets in the hands of the assignees, he waives all objections to the title of the assignees to such assets." That B. T. Lacy, the original plaintiff in this action, occupied the position of an assenting creditor, is beyond question. He was the assignee of a number of the creditors of the company, and the judgment under which he bought the property at sheriff's sale was for the recovery of the amounts due him on the claims so assigned. The evidence tends strongly to establish that he was a mere assignee for collection. At all events, he stands in no better position on this question than his assignors, for he unquestionably took with full notice of all the facts with respect to their assent to the assignment. The findings and evidence show that each of these creditors, before the assignment to Lacy, upon receiving notice from the sheriff of the time and place of the meeting to elect an assignee under the assignment, as provided in section 3449, Civ. Code, made due proof of his claim to the sheriff, attended the meeting of the creditors, participated in the election of an assignee, and thereafter filed his verified claim with the assignee, as required by section 3468, Civ. Code, and procured the allowance thereof. So far as the record here shows, these claims still remain on file with the assignee, and are entitled to share in any dividend that may be forthcoming out of the proceeds of the sale to the defendant. These proceedings by the plaintiff's assignors in recognition and acceptance of the assignment were sufficient to make them assenting creditors thereto under the statute and principles aforesaid. The plaintiff received the assignment of the claims with full knowledge of the fact that they had been so filed and allowed, and that they remained on file, and with that knowledge he allowed them to remain on file after he secured his judgment and until the time of the trial. Whatever force would attach to the fact that these claims were on file and were entitled to share in the dividends would be as effective against the plaintiff after he had thus received the assignment of the claims as it would be against the original holders prior to the assignment.

We think, however, that, as to the mining property, the deed of assignment, so long as it lacked the assent or ratification of the necessary stockholders, was void as against the corporation itself, and hence no estoppel to dispute its validity could arise against a creditor during such time as the transfer remained invalid as against the corporation. The effect of the contrary doctrine would be that neither the assenting creditors by their execution sale, nor the assignee by sale under the assignment, could reach this part of the property to apply it to the payment of the debts, and therefore, if all the creditors should file their claims under the assignment in such a case, in order to share in the proceeds of other property included in the assignment, as they would have the right to do, the insolvent corporation could hold this mining property free from the demands of any and all creditors. This would be conclusive of the case if nothing further appeared. But the additional facts and subsequent events justify a different rule. It appears that the assignee had possession of the mining property immediately after his election, and continued to hold possession thereof until the sale to the defendant. The plaintiff's judgment was docketed on May 9, 1898, and thereupon it became a general lien upon all property of the corporation subject to execution. The plaintiff, however, took no steps whatever to enforce the judgment against this or any other property, but allowed the same to remain passive for almost a year. In the meantime, on November 7, 1898, the stockholders ratified the assignment and the deed constituting such ratification was recorded November 25, 1898. Nine days after the ratification the assignee sold the property to the appellant. The sale purports to be a sale of the entire interest therein. There is nothing to indicate that it was a sale subject to plaintiffs' judgment lien, and it is apparent from the entire proceedings in the case that it was not so understood. The deed of the assignee to the defendant, Gunn, was duly recorded on November 25, 1898. No proceedings to enforce the judgment were taken until April 27, 1899, at which time Lacy, the judgment plaintiff, caused the execution to issue on which the sheriff's sale to him was made. During all this time following the sale to the defendant, Gunn, and until the issuance of the execution, the judgment creditor, Lacy, did nothing to withdraw the creditor's claim from full participation in the proceeds of the property sold by the assignee; but, on the contrary, kept the claims on file as unsecured claims, to share fully in the proceeds of the mining property and other assets.

The suit on the claims cannot be considered as a repudiation of the assignment, or a withdrawal of the claims. There is nothing forbidding such suit, either in the statute or in the assignment, and therefore the creditors had the right to sue on the claims after they were filed and allowed, and to collect the judgment recovered out of any property not covered by the assignment. There is no inconsistency in the contemporaneous prosecution of the two remedies, unless there is an attempt to seize the assigned property on the execution. Williams v. Cox, 78 Ala. 325; Lawrence v. McVeagh, 106 Ind. 210, 6 N. E. 327; Trotter v. Williamson, 6 T. B. Mon. 38; Rice v. Catlin, 14 Pick. 221; Nonantum W. Co. v. Holliston Mills, 149 Mass. 359, 21 N. E. 670; Morehead v. Adams, 18 Neb. 569, 26 N. W. 242; First N. Bank v. Newman, 62 N. H. 410; Thompson v. Reeves, 26 Or. 46, 37 Pac. 46; Kingsbury v. Deming, 17 Vt. 367, note; Foster v. Deming, 19 Vt. 313; Limbocker v. Higinbotham, 52 Kan. 696, 35 Pac. 783; Detroit S. W. v. Osmun, 74 Mich. 7, 41 N. W. 845; Smith v. St. P. G. F. Ins. Co., 56 Minn. 202, 57 N. W. 475. There may be very good reasons for such a suit aside from the intention to repudiate or withdraw from the assignment proceedings, as, for instance, to prevent the bar of the statute of limitations.

The purchaser at the assignee's sale had the right to take the conditions existing at the time of his purchase as the measure of his rights and of the claims and rights of other parties to the assignment, and, having made the purchase, presumably, on the faith of these conditions, the other parties to the assignment should not be allowed to change their relations to his prejudice. By continuing to maintain the relation of an unsecured creditor and keeping his claims on file to the full amount thereof, after the ratification by the necessary stockholders had made the assignment valid as to the mining ground, and until the sale to the defendant, and thus keeping himself in a position to share fully in the proceeds of the sale to defendant, the plaintiff became estopped to deny the title thus transferred to defendant as fully as he would have been estopped if the assignment had been originally authorized by the two thirds of the stockholders.

If there was anything in the nature of a claim that the defendant had purchased the property subject to the lien of the plaintiffs' judgment, this estoppel, of course, would not apply to the case; but, as before stated, it is not claimed upon the face of this record that there was any such understanding, and the contrary appears to be the fact. If upon a new trial it shall be shown that there was such an understanding, or possibly if, for any reason, it should appear that the defendant's purchase was unfair or inequitable as against the creditors, we do not wish to be understood as holding that the plaintiff in that case would be estopped from asserting title to the property as against the defendant.

It is suggested that to permit the appellant's purchase from the assignee to stand would be inequitable on account of the low price paid, and the fact that appellant now owns almost all of the stock. It is settled, however, that inadequacy of price alone is not sufficient to justify a court in declaring a sale fraudulent. We are of the opinion that, as against the plaintiffs, the assignment and the sale by the assignee to the defendant must be considered as valid, and that the findings and judgment holding it void are not sustained by the evidence. We cannot, however, direct the court below to enter judgment in favor of the appellant. There is a general finding that he has no interest in the property, and hence a new trial is necessary.

There is evidence tending to show that the directors who instructed the president and secretary to make the assignment were at the time the actual owners, as distinguished from those who appeared to be such on the books, of more than two-thirds of the stock. The resolution authorizing the assignment was passed on April 7, 1897. The evidence shows that the directors who were present at the meeting and assented to this resolution were, on April 9, 1897, the owners of more than two-thirds of the stock. We cannot say from this statement that they were the owners of such two-thirds on April 7th, at the time the resolution was passed, though there may be a strong inference to that effect. Hence we cannot disturb the finding that the assignment was not ratified until after the judgment in favor of Lacy was docketed. But, in view of the probability of a new trial, we think it proper to say that the statute of 1880 was enacted primarily for the benefit of stockholders, rather than creditors, and that a previous consent or direction by two-thirds of the stockholders, although purporting to have been made in their capacity as directors, is, at least as against creditors, equivalent to a subsequent ratification, and that it is the actual owners of the stock, and not those who appear to be so, who are under the protection of the statute, and whose ratification or consent is required.

There are some other points presented in the case, but in view of the conclusions we have reached as above we do not think it necessary to consider them.

The judgment is reversed, and a new trial ordered.

We concur: McFARLAND, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J. VAN DYKE, J.

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144 Cal. 634

In re KENNEDY. (Cr. 1,176.)

(Supreme Court of California. Sept. 10, 1904.)

HABEAS CORPUS—SUFFICIENCY OF EVIDENCE TO WARRANT INDICTMENT.

1. The sufficiency of the evidence before a grand jury to warrant the indictment found by it cannot be inquired into on habeas corpus, though it was taken down by a stenographer, as authorized by Pen. Code, § 925, as amended by St. 1897, p. 204, c. 142.

In Bank. Application for habeas corpus in behalf of William B. Kennedy. Writ discharged.

Wm. H. Schooler and A. S. Newburgh, for petitioners. I. Harris, for respondent.

McFARLAND, J. This is a petition to this court in behalf of William B. Kennedy for his discharge on habeas corpus. The writ issued, and upon the return of the sheriff who holds Kennedy the matter was heard and submitted. The petition sets forth a large number of arrests of Kennedy on various charges, and subsequent discharges from such arrests by superior court judges on habeas corpus; but while these various proceedings may tend to support the contention that these prosecutions were somewhat in the nature of persecutions, they are irrelevant to this present case. Kennedy is now held under a warrant of arrest regularly issued upon an indictment found against him by a grand jury charging him with murder. There is no question of the regularity of the formation of the grand jury, or that the requisite number of jurors acted on the indictment, or as to any other matters touching the general jurisdiction of the grand jury to find the indictment here in question, or that it does not charge a public offense, or as to any deficiency of the indictment in the matter of form or substance. His claim to a discharge is founded on these facts: He was once before tried on a former indictment for the same alleged crime as the one charged in the present indictment. On the former trial he was convicted, but the superior court granted him a new trial on the ground of the insufficiency of the evidence to warrant the verdict, because there was no evidence supporting the charge except the uncorroborated testimony of an accomplice. The people took an appeal from the order granting a new trial, and this court affirmed the order, deciding that the only direct testimony against Kennedy was that of an accomplice, and that there was no sufficient corroborating evidence, and intimating that the testimony of the accomplice himself would not have been sufficient even if the law did not require corroborating evidence. After the remittitur had gone down, the prosecution not being able to state its ability to furnish additional evidence, the court dismissed the indictment under section 1385 of the Penal Code, and ordered Kennedy discharged from custody. Afterwards the grand jury found and returned the said indictment under which he is now held. The testimony introduced before the grand jury upon which the last indictment was found was, on demand of the district attorney, taken down and written out by a stenographer, under section 925 of the Penal Code, as amended in 1897 (St. 1897, p. 204, c. 142), which provides that the testimony should be so taken if the district attorney demands it, and that a copy of it shall be given to the defendant upon his arraignment. This testimony is made part of the petition in this present proceeding, and it is contended by petitioner that it is the same testimony that was given at the former trial, which was held by this court to be insufficient to support a verdict of guilty, and that, therefore, it was insufficient to justify the grand jury in finding a second indictment. And this is the sole ground on which the discharge of Kennedy is asked for on this present proceeding.

We think it clear that upon habeas corpus the sufficiency of the evidence before a grand jury to warrant an indictment is not a proper subject of inquiry. If it could be inquired into in this case, it could be in any case, and the writ of habeas corpus would, for this purpose, be turned into a writ of review for the purpose of inquiring whether the grand jury committed an error reversible on appeal, and an entirely new field of litigation in criminal cases would be opened up, and few indictments would come to trial without this preliminary contest. But there is no such appeal, and no provision for reviewing the action of a grand jury in finding an indictment. Upon habeas corpus we can look only to the matters hereinbefore indicated. We cannot look to the sufficiency of the evidence on which it acted, for as to that matter its action is conclusive. There are no cases decided by this court which are directly in point, this being the first time, within our knowledge, where the validity of an indictment has been attacked upon mere ground of insufficiency of evidence to support it; although in People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77, it was held that for the purpose of determining whether an indicted party should be admitted to bail the evidence taken before the grand jury could not be considered, and in Ex parte Sternes, 82 Cal. 245, 23 Pac. 38, although the point was not necessarily involved, it is correctly stated in the opinion of Mr. Justice Fox that an indictment is a charge "made by a judicial body," and that it is held so conclusive that for centuries, until an information was recently allowed in this state, all courts have been powerless to put a man on trial for a felony except upon indictment, "or to dismiss one without trial who had been in proper form so charged." But in other jurisdictions the question has been directly raised, and we are satisfied that the law always has been and is as stated in Bishop on Criminal Procedure, § 872, that "the court cannot inquire into the sufficiency of proof, or the mode of examining witnesses, to invalidate an indictment." See State v. Boyd, 2 Hill (S. C.) 288, 27 Am. Dec. 376; Smith v. State, 61 Miss. 759; Hight v. U. S., 43 Am. Dec. 111; U. S. v. Reed, 2 Blatchf. 437, Fed. Cas. No. 16,134; Hammond v. State, 74 Miss. 214, 21 South. 149, and cases there cited. In U. S. v. Reed, supra, it is said, "No case has been cited, nor have we been able to find any authority for looking into and revising the judgment of the grand jury upon the evidence for the purpose of determining whether or not the finding was founded upon sufficient proof;" and in Hammond v. State, supra, it is said, "The doctrine appears to be general that the court cannot inquire into the sufficiency of the proof to invalidate an indictment." There are many other authorities to the same point. The statutes of the states where the decisions above referred to were made do not differ materially on the subject of grand juries and indictments from those of this state.

The fact that section 925 of the Penal Code now allows the district attorney, if he so desires, to have the testimony given before a grand jury taken by a stenographer does not affect the rule as above stated. It is true that judges and text-writers, when stating the rule, have sometimes alluded to the secrecy of proceedings before the grand jury, and the difficulty of proving what the evidence before a grand jury was; but the rule itself does not rest upon these considerations. An indictment is a record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for revising it; and there is no method for revising it on the ground that there was not sufficient evidence to support it. The provision that a party who has been "committed" without probable cause may be discharged refers to the preliminary commitment by a magistrate. See Ex parte Sternes, supra. The provision of section 925 is evidently for the benefit of the district attorney—probably for the purpose of preventing witnesses of a certain character from safely giving testimony before the trial jury different from that which they have given before the grand jury; but the district attorney need not have a stenographer before the grand jury, and clearly the provision does not change the rule as above stated. The provision of section 921 of the Penal Code that a grand jury "ought to" find an indictment upon certain evidence is "plainly only matter of advice to the jury." State v. Boyd, supra. The case of Ex parte Jenkins, 2 Wall. Jr. 521, Fed. Cas. No. 7,259, cited by petitioner, is not in point. That case involved a conflict between federal and state courts under the fugitive slave law. A law of Congress provided that judges of federal courts should have the power to issue writs of habeas corpus where prisoners were confined "on, or by any authority of law, for any act done or omitted to be done in pursuance of the law of the United States, or any order, process, or decree of any judge or court thereof." In that case the prisoners were held under an indictment in the state court which merely charged them with riot and assault to kill, and contained no intimation that the parties indicted were officers of the United States, and did the things alleged while acting in pursuance of an act of Congress; and the federal court merely held that the act of Congress could not be evaded by the artifice of an indictment in the state court which did not disclose the facts which brought the case within the operation of the law of Congress. That law included cases where federal officers were held under "any authority of law," whether by the interposition of a grand jury or otherwise.

Said Kennedy is remanded to the custody of the sheriff, and this writ is discharged.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

7 Cal. Unrep. 192

PEOPLE v. MILLER. (Cr. 1,166.)

(Supreme Court of California. Sept. 28, 1904.)

RAPE—INDICTMENT—EVIDENCE.

1. An indictment alleging that defendant on a certain day had intercourse with H., a female under 16 years of age, "and not the wife of defendant," unequivocally alleges that the female was not the wife of defendant at the time of the commission of the offense.

2. Evidence as to the number of boxes witness could pack in a given time is not admissible to show how many defendant could pack.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Clarence T. Miller was convicted of rape, and appeals. Affirmed.

Henry M. Willis, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

SMITH, C. The defendant was convicted of the crime of rape, and sentenced to a term of seven years' imprisonment in the state prison at Folsom. He appeals from the judgment and from an order denying his motion for a new trial. The grounds for reversal alleged are: (1) The insufficiency of the indictment in failing to allege that the prosecutrix was not the wife of the defendant at the time of the commission of the offense; (2) error of the court in allowing a question to the prosecutrix, and the insufficiency of her answer to establish an essential element of the crime; (3) the exclusion of certain testimony; and (4) that the verdict is contrary to the evidence.

The objection to the indictment is obviously untenable. The actual allegation is that the defendant on the day named "did wilfully, etc., * * * commit an act of sexual intercourse with one Eva Hilberg, a female person under the age of sixteen years, and not the wife of said Clarence T. Miller;" and this, whether we have regard to the mere grammatical construction or to the manifest intent of the allegation, unequivocally alleges that the act was committed on a female under the age of 16 years, and not the wife of the defendant at the time of the act. Nor is the allegation susceptible of a different meaning.

As to the second of the grounds urged, the question asked we regard as proper, and the answer of the witness as susceptible of but one inference, which is adverse to the appellant on the point complained of.

The third ground is also without merit. The evidence excluded related to the number of boxes of oranges the witness Hilberg could pack in a given time, which could furnish no grounds for any inference as to how many the defendant could pack which was the purpose for which it was offered. Code Civ. Proc. § 1832.

As to the appellant's fourth point, the evidence against the defendant is, indeed, not so strong as to exclude doubt. But it cannot be said there was no evidence to sustain the verdict, nor can we say there was such abuse of discretion in the lower court in refusing a new trial as to justify the interference of this court. Const. art. 6, § 4.

We advise that the judgment and order appealed from be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

145 Cal. 10

PENNINGTON v. CAUGHEY. (S. F. 3,112.)

(Supreme Court of California. Sept. 28, 1904.)

ASSAULT AND BATTERY—COMPLAINT—ALLEGATION OF DAMAGES.

1. A complaint in an action for assault and battery, alleging that defendant assaulted plaintiff, knocked him down, and kicked him in the face and on the body, and that he "thereby seriously wounded and bruised plaintiff, and rendered him sick, sore, and lame, to his damage in the sum of $5,000," constituted a sufficient allegation that plaintiff had suffered damages to such amount.

Commissioners' Decision. Department 2. Appeal from Superior Court, Mendocino County.

Action by Alf. Pennington against F. L. Caughey. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. A. Sturtevant, for appellant. T. L. Carothers, for respondent.

SMITH, C. The defendant appeals from a judgment against him in favor of the plaintiff, in a suit for assault and battery for $100. There was a demurrer to the complaint, which was overruled, and the only point made by the appellant is the alleged insufficiency of the latter, as to which it is claimed that there is no allegation in the complaint that "the respondent has sustained damages." But it is alleged in the complaint, not only that the defendant assaulted the plaintiff, and knocked him down, and kicked him in the face and on the body, but that he "thereby seriously wounded and bruised the plaintiff, and rendered him sick, sore, and lame, to his damage in the sum of $5,000." This is but to say, in language technically defined by long use, that by reason of the acts complained of the plaintiff suffered damage in, or sustained damage to, the amount of $5,000. Stephen on Pleadings, 33 et seq. 38; Baker v. Hope, 49 Cal. 598. Nor can the language used be otherwise construed. The complaint is entirely sufficient. Childers v. Mercury Co., 105 Cal. 289, 38 Pac. 903, 45 Am. St. Rep. 40; Hearne v. De Young, 132 Cal. 360, 64 Pac. 576.

We advise that the judgment appealed from be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

145 Cal. 54

HENRY v. GARDEN CITY BANK & TRUST CO. OF SAN JOSE. (S. F. 3,387.)

(Supreme Court of California. Oct. 1, 1904.)

TAX ON MORTGAGE—PAYMENT BY PURCHASER OF PROPERTY AFTER MORTGAGE LIEN HAS BEEN EXTINGUISHED — RIGHT TO RECOVER FROM MORTGAGEE.

1. Const. Cal. art. 13, § 4, carried into the Political Code as section 3627, provides that a mortgage securing a debt shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property mortgaged; that the value of the security shall be assessed and taxed to the owner thereof, and the value of the property, less the value of the security, to the owner of the property; that the taxes so levied shall be a lien upon the property, and may be paid by either party to the security; that if paid by the holder of the security the tax upon the property shall become a part of the mortgage debt, and if paid by the owner of the property the tax upon the security shall be applied as a credit on the mortgage debt. *Held*, that the owner of a first mortgage, who bought the property at a foreclosure sale thereunder and obtained title, and who thereafter redeemed from a sale for the tax levied on a second mortgage, and paid other taxes levied on such mortgage to free the property from the lien thereof, had no cause of action to recover such taxes from the owner of the second mortgage, there being no contractual relation between them which would support such an action, and no personal obligation to pay the taxes resting on the defendant.

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by J. H. Henry against the Garden City Bank & Trust Company of San Jose, a corporation. Judgment for defendant on demurrer, from which plaintiff appeals. Affirmed.

Jackson Hatch, for appellant. S. F. Leib, for respondent.

VAN DYKE, J. The court below sustained the demurrer to the second amended complaint, and, the plaintiff declining to further amend, judgment was entered accordingly and in favor of the defendant, from which this appeal is taken. The complaint consists of two counts. In the first it is alleged that one Murphy, being the owner of a certain tract of land situate in the county of San Luis Obispo, executed a mortgage to the plaintiff October 1, 1895, to secure the sum of $30,000, with interest; that subsequently, to wit, February 16, 1897, said Murphy executed a second mortgage to the defendant to secure the sum of $16,670; that on May 9, 1898, plaintiff brought an action to foreclose his said mortgage, making the defendant herein a party defendant in said action; that said defendant made default, and plaintiff, August 11, 1898, had the usual decree of foreclosure; that on September 5, 1898, said property was sold under said decree of foreclosure, and plaintiff became the purchaser for the amount specified in the judgment and decree, and, there being no redemption, a deed was duly executed and delivered to the plaintiff by the sheriff on said sale, April 15, 1899, and ever since said sale the plaintiff has been, and now is, the owner of said land; that on the first Monday of March, 1898, the debt, amounting to $16,670, due defendant, and so secured by said mortgage executed by said Murphy, was assessed by the assessor of said county against the defendant corporation for the purpose of state and county taxes and for special school tax; that said defendant neglected and refused to pay said tax, and that such proceedings were thereafter had by the proper officers of said San Luis Obispo county, because of such failure and refusal to pay said tax, amounting, with interest and penalties, to the sum of $405.77; that the lands covered by the said mortgage were duly and regularly sold to the state of California and purchased by said state; that thereafter, to wit, on March 5, 1900, the plaintiff, in order to remove the lien and incumbrance resulting from such sale, was obliged to pay, and did pay, the sum of $406.30 to effect a redemption of said lands from the sale to the state. The second count is the same as the first, except that it relates to the taxes of 1899, which defendant failed to pay, and which became delinquent, and which the plaintiff paid before any sale thereof to the state.

Among other grounds stated in the demurrer was that the complaint failed to state a cause of action, and we think it was properly sustained on that ground. The appellant bases his claim for a recovery of the amount paid by him to remove the incumbrance and lien on the property he purchased upon the provision of the Constitution, carried into the Political Code (Const. art. 13, § 4; Pol. Code, § 3627). The provision in the Constitution reads: "A mortgage, deed of trust, contract, or other obligation, by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt as secured; 'if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof;' provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

The constitution, it will be seen, says: "The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security." Here, however, the plaintiff was not a party to the security in question. After becoming the owner of the property he redeemed from the state, and paid the taxes assessed upon the land, as stated, for the purpose of relieving his property from this cloud upon his title. The defendant, however, derived no benefit therefrom, and is under no obligation to refund the amount so paid. The question here presented has, however, been directly decided by this court adversely to the contention of the appellant, in Canadian Co. v. Boas, 136 Cal. 419, 69 Pac. 18. The appellant concedes this to be so, but contends that the principles involved in that case do not appear to have been thoroughly considered by the court, and that they are in conflict with the decision in San Gabriel Valley Land & Water Co. v. Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470, and that the importance of the question involved calls for a re-examination before being the basis of subsequent decisions. The opinion in San Gabriel Co. v. Witmer, relied upon by appellant, was by a divided court of four to three, and was followed in Angus v. Plum, 121 Cal. 608, 54 Pac. 97, as stated in the court opinion, "whether that decision was right or wrong," upon the ground that the parties to the controversy in the latter case had acted upon the rule laid down in the former. In McPike v. Heaton, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 335, the defendant was the owner of the undivided half of certain land on the first Monday of March, 1897, and had been such owner for some time, and on the 24th of March conveyed his interest to one Jackson, who on the next day conveyed it to the plaintiff by a grant deed. The land was assessed to defendant Heaton for the fiscal year commencing July 1, 1897, and taxes were levied on the land for that year, and on November 29, 1897, plaintiffs, for the purpose of removing the lien of these taxes, paid the same to the proper officers, and brought the action under consideration to recover from the defendant the amount thus paid. Plaintiff had judgment in the lower court, which was reversed here. In the opinion of this court it is said: "The plaintiffs had no contractual relation with the defendant, and his covenant with Jackson did not pass to them. They could have protected themselves against these taxes either by assuming their payment as part of the consideration for the purchase, or by suitable covenants with Jackson, but they have no right of action therefor against the defendant. San Gabriel, etc., Co. v. Witmer, etc., Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470, cited by the respondents, involved a consideration of the relative obligations between a mortgagee and the owner of the land mortgaged, by reason of the peculiar provisions of the Constitution in reference to the assessment and payment of taxes upon these respective interests in the land, and was determined upon the ground that by virtue of these provisions there is a personal obligation upon the mortgagee in favor of the mortgagor for the payment of the taxes assessed upon the mortgage, and that if these taxes are paid by the owner of the land he may reimburse himself therefor, either by deducting the amount from the mortgage debt or in a separate action therefor. There is, however, no personal obligation upon the owner of land for the taxes levied against it, and the payment of such taxes can be enforced only by a sale of the land in the mode prescribed by the statute. The defendant was under no personal liability for the taxes paid by the plaintiffs, and the case cited is not applicable to the present case." The opinion in that case was signed by one of the justices composing the majority of four in San Gabriel v. Witmer, supra. The opinion in The Canadian Company v. Boas, supra, was written by another of the justices who concurred in San Gabriel v. Witmer. This last case, as already stated, is on all fours with the one at bar. After stating the facts, the court says: "We see no ground upon which the action could be maintained. There was no contractual relation whatever between appellant and respondent with respect to the money sued for. * * * The judgment and lien created by the tax on respondent's second mortgage interest had been satisfied and removed by the sale to the state. Pol. Code, § 3716. The money paid by the appellant to the state was not for the benefit of the respondent, whose entire interest in the property had been first taken by the state for taxes, and afterwards had again been entirely swept away by the judgment of foreclosure. The appellant is in no different position from that of any other purchaser of land who finds his title clouded." This case contains a clear interpretation of the constitutional provision under consideration, and we are not at all inclined to either overrule or modify it, and this disposes of the case now before us.

The judgment appealed from is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; ANGELLOTTI, J.

SHAW, J. I dissent. The facts, briefly stated, are that plaintiff held a senior mortgage on lands on which the defendant held a junior mortgage; that the land was valued for taxation high enough to cover the mortgage interest of both mortgagees for the years 1898 and 1899; that in May, 1898, the plaintiff began suit to foreclose his mortgage, and in due course of proceedings purchased the land at foreclosure sale, and obtained a sheriff's deed on April 15, 1899; that in the meantime the taxes assessed on the mortgage interest of the defendant in the land for 1898 and 1899 had not been paid, and the plaintiff, in order to prevent the sale of his land therefor, and protect his property, was compelled to pay the tax for 1899 after it became delinquent, and to redeem a sale to the state for the defendant's taxes for 1898. The action was to recover of the defendant the sums thus paid for taxes. Under the provisions of the Constitution, and section 3627 of the Political Code, the mortgage interest of the mortgagee in lands is to be considered as an estate therein, the same as any other interest in property.

The principle upon which the action was based is as old as the common law. It is stated and approved as follows in San Gabriel Company v. Witmer Co., 96 Cal. 635, 29 Pac. 502, 18 L. R. A. 465: "Where the plaintiff, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money, not officiously, which the defendant ought to have paid, a count in assumpsit for money paid will be supported." "In such case the law implies a request on the defendant's part, and a promise to repay, and the plaintiff has the same right of action as if he had paid the money at the defendant's express request. The right of contribution or reimbursement for money necessarily paid for another's benefit does not necessarily depend upon contract, but may arise from the equity of the case." In equity the same principle is the foundation of the doctrine of subrogation. "The general rule is that any person having an interest in property on which there is a lien or incumbrance may, if necessary for his own protection, pay off the same and be substituted to the rights and remedies of the holder thereof." 27 Ency. of Law (2d Ed.) 235.

The principle is so well established that it seems useless to cite authorities, but the following examples may elucidate the proposition: Hogg v. Longstreth, 97 Pa. 255, is substantially the same as the case at bar. The plaintiff, a mortgagee, had purchased the land at the foreclosure sale, and afterwards, in order to protect his land from sale for taxes, was compelled to pay certain taxes assessed against the land while it was held by a purchaser from the mortgagor. It was held he could recover in assumpsit from the grantee of the mortgagor the amount of the taxes thus paid. In Graham v. Dunigan, 6 Duer, 629, it was held that a tenant for life of a part, having been compelled to pay the taxes against the whole property, can recover of the other owners their proper proportion of the taxes thus paid. There was, of course, no contractual relation between the tenants with respect to these taxes, and it was further decided that such relation is not necessary to support the action. In Goodnow v. Moulton, 51 Iowa, 557, 558, 2 N. W. 395, the plaintiff, in the belief that he owned the land, had paid the taxes thereon during litigation with the real owner as to the title. The real owner had not paid the tax nor had he caused it to be assessed in his name. There were no contractual relations between the parties. It was held that the plaintiff could recover of the real owner the taxes thus paid. Where, by operation of law, A. is compelled to pay a debt which, in equity and good conscience, B. should have kept from being claimed, A. may recover of B. the amount so paid. Ticonic Bank v. Smiley, 27 Me. 225, 46 Am. Dec. 593. The following authorities are to the same effect: Nutter v. Sydenstricker, 11 W. Va. 535; Bailey v. Bussing, 28 Conn. 455; Nichols v. Bucknam, 117 Mass. 488; Kemp v. Cossart, 47 Ark. 62, 14 S. W. 465; Blythe v. Luning (C. C.) 7 Sawy. 506, 14 Fed. 281; Taylor v. Porter, 7 Mass. 355 (in which there was a mortgage on two parcels sold to different persons, one of whom paid all and recovered half of the other); 2 Greenl. Ev. § 114; 35 Century Dig. cols. 44, 48. This principle was applied in San Gabriel Water Co. v. Witmer Co., supra, and that case was followed in Angus v. Plum, 121 Cal. 608, 54 Pac. 97.

I can see no point lacking in the facts of this case that would be necessary to bring it within the rule of the foregoing authorities: (1) The plaintiff was compelled to pay the taxes in order to protect his own property. (2) The taxes were the personal obligations of the defendant. "Every tax has the effect of a judgment against the person." Pol. Code, § 3716. In People v. Seymour, 16 Cal. 343, 76 Am. Dec. 521, it was expressly decided that a tax is a debt, and that when a tax is duly assessed the owner of the property becomes personally liable, and may be sued therefor in all cases when there is a statute authorizing such suit. To the same effect is Oakland v. Whipple, 39 Cal. 115. There is a statute authorizing such suit. St. 1880, p.

136, c. 123, provides that any county, or city and county, "may sue in its own name for the recovery of delinquent taxes, whether the same be for county, or city and county, and state purposes, or either of them." In Los Angeles County v. Ballerino, 99 Cal. 595, 32 Pac. 581, 34 Pac. 329, this statute was said to be still in force, and it was held that under its provisions a county could sue a taxpayer to recover the taxes delinquent. (3) Being debts or at least personal obligations of the defendant, it follows that he ought to have paid them, and that under the act of 1880 he was liable to a suit by the county to recover them, and hence the payment by the plaintiff, in a legal sense, inured to the benefit of the defendant. It was the duty of the defendant to pay the tax on his property, and this duty was performed by the plaintiff under compulsion. The fact that with respect to the taxes of 1898 there had been a sale to the state before the plaintiff made payment is not material. The right of the plaintiff to be subrogated to the rights of the state include the right to be subrogated to all the remedies which the state originally had against the taxpayer. (4) Moreover, it cannot be said, from the facts of this case, that the second mortgagee suffers any hardship by being compelled to pay the taxes in question. The presumptions of law are in favor of the plaintiff. The mortgage debtor is presumed to be solvent, and there was nothing in the record here to show the contrary. Therefore the valuable element of the property upon which the taxes were assessed, namely, the debt due from the mortgagor to the second mortgagee, is presumed to be, even at the present time, worth the amount thereof, owing to the solvency of the debtor. Under the ruling of the majority, the second mortgagee will secure the payment of his taxes by another, without any liability on his part to repay them.

The opinions in McPike v. Heaton, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 335, and Canadian Co. v. Boas, 136 Cal. 420, 69 Pac. 18, are clearly inconsistent with the above principles, and also with Angus v. Plum and the Witmer Case, and both of these cases proceed on erroneous lines. McPike v. Heaton rests on two propositions: First, that McPike was the second grantee, and that there was no covenant running to him from the person against whom the taxes were assessed, or, in other words, that there was no contractual relations between the plaintiff and defendant; and, second, that, as "there is no personal obligation upon the owner of land for the taxes levied against it, * * * the defendant was under no personal liability for the taxes paid by the parties"; and hence it was said San Gabriel Co. v. Witmer Co. did not apply. In the Boas Case the same propositions were made as the foundation for the decision, and it was put on the ground that the money paid by the plaintiff was not for the benefit of the defendant because of this absence of personal liability. The answer to both of these points is clear from the foregoing authorities. There was a personal liability, and the tax paid by the plaintiff was necessary to remove a burden upon the plaintiff's land arising from the neglect of the defendant to discharge his obligations to the state. The payment discharged his obligation and operated directly to his benefit.

If the defendant should show in his defense that the mortgagor was insolvent, that he had no other security, and, consequently, that his whole estate in the premises and right to the debt had been swept away and destroyed by the foreclosure of the first mortgage, and substantially merged therein, I think the same principles of justice and equity upon which the plaintiff depends would then be operative in aid of the defendant, and would require judgment in his favor. But he should be required to show this, and not have it presumed in his favor.

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145 Cal. 49

SAN DIEGO COUNTY v. SCHWARTZ, County Treasurer. (L. A. 1,429.)*

(Supreme Court of California. Oct. 1, 1904.)

COUNTY TREASURER—COMPENSATION — COLLECTIONS OF INHERITANCE TAX—REPEAL OF STATUTE.

1. The provision of Collateral Inheritance Tax Law Act March 23, 1893 (St. 1893, p. 193, c. 168) § 20, that the county treasurer shall receive, in addition to the compensation provided by the county government act, certain commissions on collections by him for the state under the act, is repealed, so far as it entitles such treasurer personally to such commissions, by County Government Act March 24, 1893 (St. 1893, p. 507, c. 234; St. 1895, p. 10, c. 2) § 216, providing that the salaries and fees provided in this act shall be in full compensation for all services rendered by county officers either as officers or ex officio officers, and section 236 (St. 1893, p. 513), expressly repealing all acts and parts of acts inconsistent with such act; and this though the prior county government act contained both of such provisions; Pol. Code, § 325, providing that where a section or part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted, not being applicable to such repealing provision.

Angellotti, J., dissenting.

Commissioners' Decision. In Bank. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Agreed case between the county of San Diego, as plaintiff, and John F. Schwartz, county treasurer, as defendant. Judgment for defendant. Plaintiff appeals. Reversed.

U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Dep. Atty. Gen., Cassius Carter, Dist. Atty., and W. R. Andrews, Dep. Dist. Atty., for appellant. M. L. Ward and A. Haines, for respondent.

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*Rehearing denied October 29, 1904.

SMITH, C. This is an agreed case submitted under the provisions of section 1138 of the Code of Civil Procedure. The case is properly entitled as above, though in the transcript otherwise entitled. The defendant is the treasurer of the county of San Diego, and was such during the preceding term, commencing in January, 1899. He now has in his hands of the sum collected by him as collateral inheritance taxes under the act of March 23, 1893 (St. 1893, p. 193, c. 168), a balance of $601.96, for which he is sued, and to which he claims he is personally entitled under section 20 of the act, which reads as follows: "The treasurer of each county shall be allowed to retain, on all taxes paid and accounted for by him each year, under this act, in addition to his salary or fees now allowed by law, 5 per centum on the first fifty thousand dollars so paid and accounted for by him, three per centum on the next fifty thousand dollars, so paid and accounted for by him, and one per centum on all additional sums so paid and accounted for by him." The question submitted was whether the plaintiff is entitled to recover the money in question, and this again resolves itself into the question whether the provisions of section 20 of the collateral inheritance act have been so affected or modified by the county government act of March 24, 1893 (St. 1893, p. 507, c. 234; St. 1895, p. 10, c. 2), or by the subsequent county government act of 1897 (St. 1897, p. 573, c. 277), as to entitle the plaintiff to recover. The court adjudged the contrary, and the plaintiff appeals.

The case is in principle similar to that of the County of Kern v. Fay, 131 Cal. 547, 63 Pac. 857, where a judgment for the county was affirmed; and the same judgment, we think, should have been rendered here. In that case the suit was against the district attorney to recover the sum of $630 collected by him as fees in suits for the foreclosure of certificates of purchase of state school lands, and to which defendant claimed he was entitled under section 3553 of the Political Code, which reads: "The district attorney is entitled to receive ten dollars for each suit brought to be taxed as costs." The question considered was as to the effect upon this provision of the provisions of section 216 of the county government act of 1893, which reads: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers, or ex-officio officers, their deputies and assistants, unless in this act otherwise provided." St. 1893, p. 507, c. 234; St. 1895, p. 10, c. 2. It was held in effect: First, "that the salary prescribed by said act was intended to compensate said officer [the district attorney] in full for all services rendered by him in his official capacity," and that he could not "retain for his own use any moneys collected by him in [such] capacity;" second, that the act did not necessarily repeal the section of the Political Code in question; and, third, that whether that section was repealed or otherwise, the county was entitled to recover—the reason given for the last proposition being that "the money was collected by the appellant, Fay, in his official capacity as district attorney, and he cannot now be heard to say that it was paid to him illegally, and that he therefore has a right to retain it." These propositions effectually dispose of all the points urged by the respondent's counsel, unless the difference between the office of the district attorney and that of the treasurer is to be regarded as material; or unless the decision in that case is to be repudiated on the ground that, under the rule stated in section 325, Pol. Code, the sections of the county government act, having been a part of the previous act, are not to be considered as having been re-enacted when the act was amended in 1893, and again in 1897, but as having been the law from the time they were first enacted in 1883, and hence, that they do not repeal by implication the inconsistent provisions of the collateral inheritance tax law of 1893. We do not think the character of the particular office was regarded as material by the court, but, even if it were so, the principle would be the same in its application; for the provisions of the county government act relating especially to the treasurer even more clearly show that these and other fees were not thereafter to be received by him to his own use. St. 1893, p. 368 et seq., c. 234, §§ 70–72, 80–82, 84–89. As to the repeal by implication, it is not important to the decision of this case, for there was also an express repeal. The act of 1893, and that of 1897 as well, contained a section declaring that "all acts and parts of acts inconsistent with this act are hereby repealed." St. 1893, p. 513, c. 234, § 236; St. 1897, p. 577, c. 277, § 232. It is true that this section was also contained in the previous act of 1885, but the rule of section 325, Pol. Code, cannot be applied to such repealing provisions, for, if so, it would render all such provisions after the first absolutely ineffective. The provisions of the county government act on the subject of the fees of the treasurer for the collection of inheritance taxes are directly contrary to those of the tax law in so far as the latter provides that he may apply them to his own use, and the later law is therefore a direct repeal of the former, in virtue of the repealing provision above quoted. The principles of the decision in Kern Co. v. Fay are therefore clearly applicable, even if the ground upon which the repeal was declared in that case be wrong.

As to the application of the points decided to this case, the first proposition is obviously applicable. As to the second, we are of the opinion that section 20 of the collateral inheritance act was not wholly repealed by the county government act, but was modified so that thereafter the fees retained were not for the use of the treasurer as an individual. As to the third, it is immaterial whether the moneys retained are to be held for the use of the state or for the county. If the former, they were legally in the custody, or ought to have been in the custody, of the county, until paid over to the state; and there can be no doubt that the county, even before the passage of the county government act, was entitled to sue for and recover them. Since the passage of that act there can be no doubt of the county's title. St. 1897, p. 573, § 216 et seq.

The principles of the decision in Kern Co. v. Fay, relating to the personal right of the treasurer to the fees under the county government act, have been substantially reaffirmed in the later cases of Dodge v. San Francisco, 135 Cal. 512, 67 Pac. 973, and Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324.

We advise that the judgment be reversed, and the cause remanded, with directions to the court below to enter judgment for the plaintiff for the amount in controversy.

We concur: CHIPMAN, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to enter judgment for the plaintiff for the amount in controversy: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.; SHAW, J.; VAN DYKE, J.

ANGELLOTTI, J. I dissent. It would serve no useful purpose to here indulge in an extended discussion, or to do more than to state that, in my opinion, there has been no repeal or modification of the provision of the collateral inheritance tax law, enacted March 23, 1893, by which the Legislature provided that the county treasurer should receive and retain, in addition to the compensation provided by the county government act, certain commissions upon all amounts collected by him for the state, under the provisions of the inheritance tax law. The three cases cited in the majority opinion do not appear to me to be at all in point. Kern Co. v. Fay, 131 Cal. 547, 63 Pac. 857, presented a question as to the right of the district attorney to retain for himself an attorney fee, collected as costs, in a certain class of actions; the alleged right being based on a section of the Political Code (section 3553) as enacted in 1872. It was very properly held therein that the effect of the subsequently adopted county government act system was to deprive the district attorney of any right to retain money under the provisions of the old section of the Political Code. The intention of the Legislature to this effect was so clearly indicated by the first county government act adopted under the Constitution of 1879 (St. 1883, p. 299, c. 75) that it could not well have been held otherwise. The County of Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324, involved an entirely different question, viz., as to whether a county officer could enter into a valid contract with the county for the performance of services other than those pertaining to his office. Four of the justices held that the effect of the provisions of the county government act was "to render the officer incompetent to enter into a contract for compensation for any services he may render the county, and to render such contract void." Whether that decision was correct or not, it in no degree assists in the determination of the question here presented. Dodge v. San Francisco, 135 Cal. 512, 67 Pac. 973, involved a question as to the effect of certain provisions of the charter of the city and county of San Francisco relative to the compensation of the assessor thereof, and it was held that by reason thereof he could not receive any compensation for any official services except such as were given him by the charter, the matter of the compensation of the officers of such city and county being, under section 8½ of article 11 of the Constitution, a matter concerning which it was competent to provide in the municipal charter.

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144 Cal. 790

TUOHY v. LINDER et al. (Sac. 1,064.)

(Supreme Court of California. Sept. 26, 1904.)

LANDLORD AND TENANT—CROPPERS' CONTRACTS —POSSESSION—RIGHTS OF LANDLORD— REPLEVIN—CHATTEL MORTGAGES.

1. Where plaintiff, the owner of certain land, contracted with T. to raise a crop of wheat thereon, by which T. agreed to harvest the crop and deliver to plaintiff at his warehouse one-fourth thereof, and that T. should receive on the ground, when threshed, the remaining three-fourths of the crop as full pay for his services, less such an amount as shall be necessary to reimburse plaintiff for any amount owing by T. to plaintiff at the time the wheat is delivered, and T., after mortgaging the crop, refused to have anything further to do therewith, whereupon plaintiff had the wheat headed and stacked, when it was removed by the mortgagee, plaintiff was entitled to recover the wheat so removed in replevin, he being entitled to possession of the entire crop, including T.'s interest against such mortgagee, until he had been reimbursed for the amount owing to him from T.

Commissioners' Decision. Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by John Tuohy against R. Linder and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

G. W. Zaitman and C. L. Russell, for appellants. Bradley & Farnsworth, for respondent.

COOPER, C. This action was brought to recover 1,110 sacks of wheat, or the value thereof in case a delivery could not be had. Judgment was entered for the plaintiff upon the findings, and this appeal is from the judgment and order denying defendants' motion for a new trial.

The court found that on the 26th day of July, 1900, the plaintiff was the owner in the possession and entitled to the possession of the wheat unthreshed in stacks on plaintiff's land; that while plaintiff was so the owner and in possession and entitled to the possession, the defendant Linder wrongfully, in the nighttime, went upon the plaintiff's said lands, threshed the said wheat, put it in sacks, and removed it. These findings are supported by the evidence, and entitle plaintiff to judgment. The facts are, in substance, as follows: In September, 1899, the plaintiff, being the owner of section 13 and the south half of the northwest quarter of section 14, township 20 S., R. 27 E., M. D. B. & M., entered into a contract with one Turner, under the terms of which Turner agreed to plow, seed, and harrow the said land, and to seed it with wheat for the cropping season of 1900, and when matured to cut, thresh, and clean the same, putting it in sacks in good merchantable condition. The contract provided that when Turner had so harvested the crop he would deliver to plaintiff at his warehouse one-fourth thereof, and that Turner would take "on the ground, when threshed, the remaining three-fourths of the crop as full pay for all services herein required of him. Thomas Turner also agrees to do all his work in a good farmer-like manner. In consideration of the foregoing services, John Tuohy agrees that when Thomas Turner has fully performed all of the services herein mentioned to be performed by him, and, as full pay and compensation thereof, he will deliver to Thomas Turner the three-fourths of the crop remaining on the ground when threshed." The contract contained the added provision: "Should I be owing John Tuohy any amount at the time the three-fourths of the crop is to be delivered to me, I hereby authorize him to retain sufficient wheat from the said three-fourths to pay himself in full, which I bind myself to deliver to him in the warehouse at Lindsay before the remainder of the three-fourths is moved from the ground where threshed. The value of the wheat so taken to be the best offer John Tuohy has for it at the time of delivery. Thomas Turner." Before the crop had been harvested, on June 20, 1900, Turner had been sued by defendant Linder, and he then notified plaintiff he would have nothing further to do with the crop, and for plaintiff to look out for the crop himself. Plaintiff then took charge of the crop, and at his own expense had the same headed and stacked in the stacks where it was when removed by Linder. It is evident that under the contract the plaintiff was entitled, as owner, to the undivided one-fourth of the crop, and he was also entitled to the possession of the remaining three-fourths until he was paid all the amounts due and owing to him by Turner. The amount properly expended by plaintiff in heading, caring for, and stacking the grain is due him by Turner, and he is entitled to said amount, and to retain possession of the wheat until he is paid. The three-fourths, less the amount so due to plaintiff, is the property of Turner, or those who have succeeded to his rights, but cannot be taken from the possession of plaintiff until he is paid the amounts due him by Turner. In Howell v. Foster, 65 Cal. 169, 3 Pac. 647, it is said: "There is no doubt that where one man farms land of another under an agreement by which he is to give the owner a part of the crop raised for its use, he and the owner, in the absence of a stipulation providing otherwise, become tenants in common of the crops raised. But it is just as clear that the agreement between the parties may be so framed as to secure to the owner of the land the ownership of the product until the performance of a certain stated condition." In Farnham v. Hefner, 79 Cal. 582, 21 Pac. 955, 12 Am. St. Rep. 174, the court said: "It is undoubtedly true, as contended, that the landlord and tenant may by agreement provide that all of the crops raised upon the land may be delivered to and remain the property of the landlord, and be disposed of by him, and such agreement will protect the title of the landlord in the property as against an attaching creditor of the tenant." The contract in this case clearly provides that Tuohy is to have possession of the wheat. Turner agreed that Tuohy should have such possession until Turner should deliver to the warehouse at Lindsay enough wheat to pay Tuohy in full the amount owing to him by Turner. The defendant Linder sets up by way of defense a crop mortgage executed by Turner in October, 1899, upon the crop to be grown upon the lands during the season of 1899–1900. This mortgage authorized Linder to enter upon the premises, and take all necessary measures to protect the said crop, and it provided that upon the harvesting of the crop Linder should be entitled to the immediate possession thereof. The crop mortgage was subject to all the rights of plaintiff under the contract. It could only operate upon the right, title, and interest of Turner after Tuohy had been paid all sums secured to him by the contract. It could not and did not deprive the plaintiff of his right to the possession according to the contract.

Defendant does not seek in this action to foreclose his mortgage. It is not alleged nor found that defendant Linder ever tendered to Tuohy the amount due him by Turner. In case Linder shall tender or pay to plaintiff all sums due him by Turner for seed grain, heading, and expenses incurred under the contract, then in a proper proceeding the rights of Linder under his mortgage can be adjudicated. Here the sole question is as to the right to the possession of the wheat at the time of the commencement of the action.

The finding of the court that the plaintiff is the owner of the wheat is not correct, except as to the undivided one-fourth. Such finding, however, is not necessary to support the judgment, and will not be regarded as finally deciding the title as between plaintiff and Linder. The fact that plaintiff was in possession and entitled to the possession at the time the wheat was taken and at the time of the trial entitled him to judgment. He is entitled to be placed in the position he was before the defendant entered in the nighttime and removed the wheat. The judgment is for the recovery of the wheat, or the value thereof in case a delivery cannot be had. This decision is not to prejudice the rights of Linder in any future proceedings as to the right, title, and interest of Turner after plaintiff has been paid all sums properly due him. Turner will not be allowed to defeat the rights of Linder under his mortgage by the surrender of the crop to Tuohy, nor will Tuohy be allowed to retain any more than one-fourth of the crop due him under the contract and sufficient of the remainder to pay him the amounts due him by Turner and for expenses in harvesting and caring for the property. This is fair to all parties. It does justice to Tuohy, it gives Linder the right to the balance equitably due Turner after satisfying Tuohy. Of course, we do not mean in this action to adjudicate the questions as to the foreclosure of the mortgage held by Linder, but suggest the rights of the parties for their future guidance.

We advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

145 Cal. 1

PEOPLE v. SING YOW. (Cr. 1,111.)

(Supreme Court of California. Sept. 27, 1904.)

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PERMITTING COUNTER AFFIDAVITS — MURDER — EVIDENCE — STATEMENT OF ACCOMPLICE—RECORD ON APPEAL.

1. A motion for a new trial in a criminal case on the ground of newly discovered evidence is addressed to the sound legal discretion of the trial court.

2. In considering a motion for a new trial in a criminal case there is always a question whether, under all the circumstances, the newly discovered evidence is produced in such a way and is of such a nature that its introduction upon another trial would render a different result reasonably probable, and whether, in the absence of such evidence, defendant has had a fair trial on the merits.

3. On a motion for a new trial in a criminal case on the ground of newly discovered evidence shown by affidavits of the proposed witnesses, it is not error for the court to permit the state to file counter affidavits.

4. A statement made by one of six men, who were standing together before a house, and who almost immediately afterward shot and killed another man, who came out of the house, to the effect that, if such person came out, "we will shoot at him," is admissible against one charged with the murder, and who was one of the six in whose hearing the statement was made.

5. Where the instructions in a criminal case are certified as provided by law, they constitute a part of the judgment roll, and should not be reproduced in the bill of exceptions, but affidavits presented on a motion for new trial and the minutes of the proceedings had on such motion constitute no part of the judgment roll, and cannot be made a part thereof by the clerk, and should appear only in the bill of exceptions.

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Prosecution of Sing Yow for murder. From a judgment of conviction and an order denying a new trial, defendant appeals. Affirmed.

Hiram W. Johnson, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

ANGELLOTTI, J. The defendant and four others were jointly informed against in the superior court of Sacramento county for the murder of one Jeong Him, and upon a separate trial he was convicted of murder in the first degree, and adjudged to suffer death. He appeals from the judgment and from an order denying his motion for a new trial.

1. The principal point made upon this appeal is as to the action of the trial court in refusing to grant defendant's motion for a new trial on the ground of newly discovered evidence. The evidence on the part of the prosecution on the trial of the case was to the effect that the defendant and five other Chinese were waiting for the deceased outside of a house in Walnut Grove, Sacramento county; that when he came out to the street three of these men each fired a shot at him, and, the deceased taking to flight, the three others, of whom defendant was one, pursued him for some distance to a stable, and that each of the three fired pistol shots at him. The deceased was found at this place, dead, with some seven gunshot wounds in his body. There was ample testimony on the part of white witnesses to warrant the conclusion that the deceased was pursued by three armed Chinese to the stable, where several shots were fired. Several Chinese testified as to the identity of the six Chinese charged to have been concerned in the perpetration of the crime. On the part of the defendant it was claimed that he was not in Walnut Grove at the time of the shooting, but was several miles therefrom, and that two other Chinese, whose names were not given, did the pursuing and shooting, and testimony to this effect was given. Upon the motion for new trial, to support the claim for a new trial on the ground of newly discovered evidence, there were filed the affidavits of two Chinese, each of whom stated that he witnessed

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¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2134.

the homicide, that defendant had nothing to do with it, and that it was committed by two men named Young Lung and Yee Jim. The other affidavits filed by defendant, except those directed to showing due diligence, were directed entirely to the impeachment of certain witnesses who had testified on the trial. The object of the affidavits of three police officers of Fresno and one Chinese was to show that Lee Bin, who had testified that he witnessed the pursuit and killing of the deceased by the defendant and two others, was at the time thereof in the city of Fresno; and that of the other affidavits, all of which were made by Chinese, was to show that three of the defendants jointly charged with this defendant, and identified as having been present and having participated in the crime by witnesses for the prosecution, were not in fact present thereat, but at the time thereof were elsewhere. Six of these affidavits were filed, two as to each of said defendants.

Assuming the showing as to diligence to have been sufficient, it is very clear to us that, even if no counter affidavits had been filed, the ruling of the trial court in refusing to grant the motion for a new trial on account of newly discovered evidence could not be disturbed. It has been repeatedly said by this court that a motion for a new trial on this ground is addressed to the sound legal discretion of the trial court, and that the action of that court will not be disturbed, except in an instance manifesting a clear abuse of such discretion. A defendant is not entitled to a new trial, as a matter of right, simply because he has discovered new evidence which might have been admitted on the trial if discovered earlier. The question always exists, in this connection, as to whether, under all the circumstances of the case, the newly discovered evidence is produced in such a way, and is of such a nature, that its introduction upon another trial would render a different result reasonably probable, and as to whether, in the absence of such evidence, the defendant has had a fair trial on the merits. The law does not contemplate the granting of a new trial on this ground simply to enable the defendant to go through the form of another trial, where there is no reasonable probability that the newly discovered evidence will change the result, and where it does not appear that by reason of such evidence the result ought to be different. The question as to the effect upon the case of the newly discovered evidence is, from its nature, peculiarly one that is addressed to the discretion of the trial court, and, of course, should be determined by that court with a full realization of the responsibility involved; and the motion should undoubtedly be granted where the showing is such as to make it apparent to the trial court that the defendant has, without fault on his part, not had a fair trial on the merits, and that by reason of the newly discovered evidence the result would probably be or should be different on a retrial. But, unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial in view of the newly discovered evidence, the order of the trial court refusing a new trial will not be disturbed. Oberlander v. Fixen & Co., 129 Cal. 690, 692, 62 Pac. 254. See, also, People v. Demasters, 109 Cal. 607, 42 Pac. 236; People v. Buckley (Cal.) 77 Pac. 169.

The showing made by the affidavits presented on behalf of defendant was not such as to warrant us in holding that the trial court abused the discretion confided to it in this matter. In view of the evidence given on the trial, the trial court was amply warranted in concluding that the showing made by the affidavits of the two Chinese who deposed that they witnessed the homicide, and that defendant was not a party, and the affidavits of the six Chinese who deposed, in couplets, as to the presence at places away from the scene of the homicide of three of this defendant's codefendants, was not such as to indicate that a new trial ought to be granted that their evidence might be obtained, or that the introduction of such evidence would make a different result reasonably probable. The same may be said as to the affidavits relating to the witness Lee Bin. The affidavits of the three white witnesses are not inconsistent with the testimony given on the trial as to the presence of Lee Bin in Walnut Grove at the time of the homicide, and showed, at most, some conflict as to precisely how long before the homicide he had left Fresno.

It is urged, however, that the rule as to the discretion of the trial court cannot be invoked in this case, for the reason that the trial court, over the objection of defendant, erroneously allowed the prosecution to present counter affidavits on the motion for new trial as to certain of the facts proposed to be shown by the newly discovered witnesses. The counter affidavits of certain white and Chinese witnesses to the effect that Lee Bin did leave Fresno early in November, and others contradicting the allegations of defendant's affidavits as to the whereabouts of two of the codefendants, were received over the objection of defendant, and, presumably, considered by the court in deciding the motion. We are of the opinion that the court did not err in receiving these affidavits, or in taking them into consideration in determining the question as to whether a new trial should be granted. To hold otherwise would be to make it necessary for the trial court in many cases to grant a new trial upon the ex parte affidavits of perjured witnesses, where it is easily within the power of the other side to demonstrate that the new witnesses are utterly unworthy of credit, and that the allegations of their affidavits are entirely without foundation, and can be overwhelmingly overcome by the evidence of reputable persons. In such a case it would be manifest that the interests of justice did not demand a new trial, that no substantial right of the defendant had been impaired by his failure to produce the evidence on the trial, and that there was no reasonable probability of a different result by reason of such newly discovered evidence.

As has already been shown, it is well settled in this state that it is for the trial court to determine whether or not the newly discovered evidence is of such a character as to make it reasonably probable that it would produce a different result on another trial, and in the determination of that question we can conceive of no good reason why the trial court should be limited to a consideration of the affidavits offered by defendant and the record of the trial. Such, certainly, has not been the practice in this state. In People v. Fice, 97 Cal. 459, 32 Pac. 531, the record shows that the counter affidavits were entirely devoted to a contradiction of the alleged facts proposed to be proved by the newly discovered witnesses, and this court said: "Upon the ground of newly discovered evidence it is sufficient to say that the affidavits offered in support thereof were fully contradicted by counter affidavits on the part of the prosecution, and for that reason the court below exercised a proper discretion in refusing to grant the motion." See, also, Thompson v. Thompson, 88 Cal. 110, 25 Pac. 962; People v. Mesa, 93 Cal. 580, 29 Pac. 116; Merk v. Gelzhaeuser, 50 Cal. 631; Doyle v. Sturla, 38 Cal. 456. It has been held in many cases in other states that it is entirely competent to show by counter affidavits on motion for new trial that a newly discovered witness is unworthy of credit. Williams v. Baldwin, 18 Johns. 489; Parker v. Hardy, 24 Pick. 246; Pomroy v. Columbia Ins. Co., 2 Caines, 260; Erskine v. Duffy, 76 Ga. 603; Greenleaf v. Grounder, 84 Me. 50, 24 Atl. 461; Moore v. State, 96 Tenn. 209, 33 S. W. 1046; Graham and Waterman on New Trials, vol. 1, p. *485. In other cases counter affidavits as to the alleged facts to be testified to by new witnesses were allowed. Coast Line R. R. Co. v. Boston, 83 Ga. 387, 9 S. E. 1108; Harmon v. Charleston & S. Ry. Co., 88 Ga. 261, 14 S. E. 574; Harris v. Rupel, 14 Ind. 209; Searcy v. Martin-Woods Co., 93 Iowa, 420, 61 N. W. 934; Ames v. Howard, 1 Sumn. (U. S.) 482, Fed. Cas. No. 326; Lorig v. Davenport, 99 Iowa, 479, 68 N. W. 717; Finch v. Green, 16 Minn. 355 (Gil. 315); State v. Burd, 115 Mo. 405, 22 S. W. 377; Burlingame v. Cowee, 16 R. I. 40, 12 Atl. 234; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670; Nicholas v. Com., 91 Va. 741, 21 S. E. 364; Holland v. Huston, 20 Mont. 84, 49 Pac. 390; The Hammond, W., etc., Ry. Co. v. Spyzchalski, 17 Ind. App. 7, 16, 46 N. E. 47. In a note, in 14 Ency. of Pleading and Practice, p. 913, it is said that it is uniformly held that on the hearing of such a motion the court may examine counter affidavits to determine whether a new trial would promote justice or result in a different judgment. It is true that a different rule has been laid down in Illinois, and that rulings excluding counter affidavits have been made in one or two other jurisdictions, but the great weight of authority is to the effect that the court may consider counter affidavits for the purpose of determining whether the interests of justice demand a new trial, and as to whether there is a reasonable probability that a new trial will, by reason of such newly discovered evidence, result differently. The argument of those claiming otherwise is that the unsuccessful party should have the opportunity of presenting the newly discovered evidence to another jury, whose exclusive province it would be to determine as to the credibility of the witnesses and the facts established by the testimony. But this argument loses sight of the object of the law relative to the granting of a new trial on account of newly discovered evidence, which is to allow a new trial where it is made to appear that the newly discovered evidence is of such a character that it cannot be said that the unsuccessful party has, in the absence thereof, had a fair trial on the real merits. This question is addressed to the trial court alone. In Finch v. Green, supra, the Supreme Court of Minnesota said: "The application, which is addressed to the sound discretion of the court, is based upon the ground that there has not been a fair trial upon the real merits, and for this reason it is proposed to compel a party who has once litigated the matter in controversy to litigate it a second time. Why should not such a party be permitted to produce counter affidavits for the purpose of showing that the alleged ground for a new trial has no existence? We think no good reason can be given why he should be concluded by the ex parte affidavits of the moving party. * * * We see no warrant for saying that the court below, upon comparing the affidavits and counter affidavits with reference to the question whether a new trial would be likely to produce any different result from the first, erred in refusing the application." Such counter affidavits are received and considered, as has been said by some courts, simply for the purpose of enabling the trial court to intelligently exercise the discretionary power confided to it of determining whether or not the interests of justice demand that a new trial should be had. There is no decision of this court forbidding the practice of presenting counter affidavits. On the contrary, such practice has been fully recognized by the court as proper, for orders denying new trials have been affirmed on the ground that the showing made by the counter affidavits justified such orders. Defendant relies entirely upon some expressions contained in a concurring opinion in Shafer v. Willis, 124 Cal. 41, 56 Pac. 635. While that opinion is entitled to the greatest respect, it is not a decision of the court, and we are of the opinion that, in so far as it may be in conflict with what has here been said, it is contrary to our recognized practice and to the great weight of authority.

2. An affidavit was presented, made by defendant's attorney, setting forth certain proceedings upon the trial of another defendant, which occurred subsequent to defendant's trial, as to a change in interpreters, the result of which was that the Chinese interpreter who had officiated on the defendant's trial, and for a portion of the other trial, was relieved by the court, and another interpreter substituted, the claim of the defendant being that it was then made to appear that the interpreter who had officiated on his trial was not competent to interpret properly. We have carefully examined this affidavit, and assuming, for the purposes of this case only, that the question as to such competency is reviewable here, find nothing therein to warrant us in holding that the interpreter was not in fact competent.

3. It is urged that the district attorney was guilty of misconduct on the trial. A consideration of the points made in support of this contention discloses no misconduct prejudicially affecting defendant's cause. It must be a very exceptional case in which a reversal will be ordered by reason of the character of the opening statement of the prosecuting officer, and in this case the statement of the district attorney to the effect that he would show that the six Chinese met in front of the house in which the deceased was in accordance with a preconceived purpose to kill him was amply warranted by the evidence subsequently introduced as to the circumstances of the homicide. In the cross-examination of witnesses Brown and Fitzgerald we find nothing of such gravity or importance as to warrant a new trial. There is nothing in the cross-examination of the witness Wise to call for notice, and the jury were very fully and carefully instructed by the court that they must disregard the statement made by the district attorney, in response to a query of the court as to the object of a question asked by him of the witness Lin Tai in cross-examination.

4. It is contended that the court erred in certain rulings as to the admissibility of testimony. The evidence as to the statement made by defendant Ow Sing Dock, immediately prior to the homicide, while the six Chinese were standing in front of the house apparently waiting for the deceased to come out, was admissible. As testified by Ah Hing, that statement was, "If Jeong Him comes out of the house, we will shoot at him." It was made in the presence and hearing of the five other armed Chinese, who, as the testimony for the prosecution indicated, had assembled there with him for the purpose of killing, and who, with him, actually killed the deceased upon his coming out a few moments later, and was practically a part of the transaction itself. There is nothing in any of the other points made that requires notice.

5. Complaint is made that the court erroneously refused certain instructions requested by the defendant, and erroneously modified one such instruction. The modified instruction was one relating to the question of identity, and the court struck out therefrom a statement to the effect that the jury were not bound to believe that the witnesses were able to identify the defendant with certainty because they swore positively to his identity. The jury were instructed that to justify a conviction of the defendant his identity as the guilty person must be proved beyond all reasonable doubt, and that, if there was a reasonable doubt as to whether the witnesses were able to identify the defendant as the guilty person, they should acquit him. They were further instructed that it was their exclusive province to judge of the credibility of the witnesses, and the degree of weight and credit to be given to the testimony of each witness. Defendant could not have been prejudiced by the modification, in the respect stated, of his requested instruction. The requested instructions refused were fully and fairly covered by other instructions given by the court.

We can find nothing in the record that would warrant a reversal.

In view of the fact that the instructions given and refused and the affidavits on motion for a new trial appear twice in the transcript—once in what purports to be the judgment roll and once in the bill of exceptions—thereby enlarging the transcript by nearly 120 pages, it is proper to suggest that no possible good can be accomplished by such a repetition, except in so far as the increase of the cost of printing may be considered an advantage. Where the instructions given and refused are certified in the manner provided by law, they constitute a part of the judgment roll, and should not be reproduced in the bill of exceptions. On the other hand, affidavits presented on a motion for a new trial and the minutes of the proceedings had on such a motion constitute no part of the judgment roll (section 1207, Pen. Code), and the clerk cannot make them a part thereof, and they should appear only in the bill of exceptions.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

144 Cal. 771

McFARLAND v. MARTIN et al. (Sac. 1,114.)

(Supreme Court of California. Sept. 24, 1904.)

VENUE—ACTION CONCERNING REAL PROPERTY.

1. An action by which plaintiff seeks to have it adjudged that he is the owner of an undivided third of mining property, and to have defendants directed to execute to him a conveyance thereof, is within Code Civ. Proc. § 392, providing that actions for recovery of real property or of an interest therein, or for the determination of such interest, must be tried in the county in which the subject of the action is situated.

2. The nature of an action, as concerns its venue, is to be determined from the character of the complaint and of the judgment which may be rendered on a default, which Code Civ. Proc. § 580, provides can grant no relief in excess of what is demanded by the complaint.

Commissioners' Decision. Department 1. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by J. P. McFarland against J. P. Martin and others. From an order, plaintiff appeals. Reversed.

H. H. Welsh and Raleigh E. Rhodes, for appellant. Geo. H. Perry and Francis A. Fee, for respondents.

HARRISON, C. Appeal from an order changing the place of trial. The action was commenced in the superior court of Madera county, and the defendants moved that court to transfer the cause for trial to the city and county of San Francisco, upon the ground that that was their place of residence at the time of the commencement of the action. The plaintiff resisted the motion upon the ground that the action is of a local nature, involving the title to certain real property in the county of Madera and the determination of the plaintiff's interest therein. The superior court granted the motion, and the plaintiff has appealed.

The complaint alleges that on the 26th of April, 1900, the plaintiff, by virtue of an agreement of sale, for a valuable consideration paid by him to John Faubel, acquired the mining property described in the complaint, and shortly after conveyed certain interests therein to the defendants; that he thereupon entered into a mining partnership with the defendants for the purpose of working said mining property, and in pursuance thereof they entered into the occupation of the same, erected valuable improvements thereon, "and have ever since been and are now actually engaged in working said mines and extracting mineral therefrom"; that he has laid out and expended large sums of money for the benefit of said partnership and the developing of said mining claims; and that large quantities of bullion have been taken from said mining claims, and have been taken possession of by the defendants, and portions thereof have been invested in improvements upon a portion of the said mining property; that on or about May 12, 1902, the defendants wrongfully and fraudulently conspired to deprive him of his share and interest in said partnership and said mining claims, and for that purpose, and in violation of their obligations as his partners, and in breach of their duty as such, acquired by purchase from said John Faubel all his interest in said mining claims, and obtained from him as grantor a deed of said mining claims to themselves individually, bearing date May 12, 1902; that the consideration for the purchase by them of said mining ground was largely contributed by the plaintiff as a mining partner of said defendants; that prior thereto the plaintiff had been the manager and superintendent of said mining claims, and had had the control and management thereof, but on said 12th day of May, 1902, the defendants ousted him therefrom, and ignored all his rights and interests thereunto, and instructed the foreman to take no orders or directions from him. The plaintiff further alleges that he claims an undivided interest in and title to said mining claims equal to that of each of the defendants, and prays judgment that they and each of them may be declared to be trustees for his benefit under said deed to them from Faubel for an undivided one-third interest in the title acquired by reason of said conveyance, and that they be required to convey the same to him by good and sufficient deed of conveyance, and also for general relief.

Succinctly stated, the plaintiff seeks by this action to have it adjudged that he is the owner of an undivided third of the mining property described in his complaint, and that the defendants be directed to execute to him a conveyance thereof. His allegations of the partnership between him and the defendants, the working of the mine under said agreement, the acquisition by them of the legal title to the property, the means by which they acquired such title, the relation of trust between them and him at the time they acquired it, and their repudiation of his right therein, are merely averments of probative facts showing his claim of title to the undivided third of the property, and that the defendants hold the same in trust for him, and that he is entitled to a conveyance thereof from them. The allegations in the complaint are not characterized with great precision, and some of them appear to lack connection with the purpose of the suit. The averment that the plaintiff laid out and expended money for the improvement of the mining property would be relevant in an action for establishing a lien therefor, under section 2514, Civ. Code, but is irrelevant in an action to determine the plaintiff's title to the mining property, except in so far as it tends to show the continued existence of the mining partnership.

Const. art. 6, § 5, provides that "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated." Section 392, Code Civ. Proc., provides that actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as provided in said Code: "(1) For the recovery of real property or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property." Section 397, Code Civ. Proc., provides that the court may change the place of trial "(1) when the county designated in the complaint is not the proper county." Under the foregoing provision of the Constitution, the action was properly commenced in the county of Madera, and section 392, Code Civ. Proc., declares that it must be tried in that county, subject to the power of the court, under section 397, to change the place of trial upon one or more of the grounds authorized by statute. The only ground presented in support of the motion was that the defendants resided in the city and county of San Francisco at the time of the commencement of the action. This fact is, however, insufficient to authorize the transfer of a local action from the county in which it was properly commenced. The right of a defendant to have an action against him tried in the county of his residence is, by the terms of section 395, Code Civ. Proc., limited to "all other cases" than those enumerated in the previous sections, and is subordinate to the direction in section 392 that a local action like the present must be tried in the county where the property is situated. The authority given the court by section 397 to change the place of trial, when the county designated in the complaint is not the proper county, is a limitation upon its power, and necessarily implies that if the county designated in the complaint is the proper county, the place of trial cannot be changed, except for some other reason authorized by the Code.

The contention of the respondents that if, at the trial, the plaintiff should fail to establish his right to a conveyance, he might, under his prayer for general relief, show himself entitled to an accounting of the affairs of the partnership, and that they therefore are entitled to a change of the place of trial upon the ground that the complaint will thus authorize a judgment in a personal action, is unavailing upon this appeal. The nature of the action is to be determined from the character of the complaint and from the character of the judgment which might be rendered upon a default thereto. Under section 580, Code Civ. Proc., if there be no answer, the relief granted to plaintiff "cannot exceed that which he shall have demanded in his complaint." He can have no greater or different relief from that which he has demanded in his complaint. Mudge v. Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17. The complaint herein does not ask for an accounting, and there is nothing in its allegations from which it may be inferred that the court could enter into an accounting of the partnership. The allegation that the plaintiff and the defendants "are now actually engaged in working said mines and extracting the mineral therefrom" clearly indicates that the partnership is a going concern, and is inconsistent with the desire for an accounting. The only grievance for which the plaintiff seeks relief is the acquisition by the defendants of the entire title to the mining property, of which he claims that he is the owner of one-third.

The decision in Smith v. Smith, 88 Cal. 572, 26 Pac. 356, cited by the respondents, was made upon the ground that the plaintiff had expressly asked in his complaint for an accounting. In Le Breton v. Superior Court, 66 Cal. 27, 4 Pac. 777, in addition thereto, it was held that the action sought to be prohibited was not based on a lien, nor was it a suit to enforce a lien upon real estate. The present case is substantially the same in its facts as was the case of Booker v. Aitken, 140 Cal. 471, 74 Pac. 11. In that case the defendant held the title to certain real property which the plaintiff alleged had been acquired under such circumstances (setting forth the same in his complaint), that he held it in trust for the estate of the plaintiff's testator, and prayed that it be so adjudged, and that the defendant execute a conveyance of the same. The action was brought in the county in which the property was situated, and it was held that the fact that the defendant was a resident of another county did not give him the right to have the place of trial changed to such county.

We advise that the order be reversed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons stated in the foregoing opinion the order is reversed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

144 Cal. 785

JOHNSON v. MINER et al. (S. F. 3,091.)

(Supreme Court of California. Sept. 26, 1904.)

QUIETING TITLE — NONRESIDENTS — ACTIONS — SUMMONS — PUBLICATION—AFFIDAVIT—COLLATERAL ATTACK—ATTACHMENT—LEVY—TIME —SUFFICIENCY.

1. The jurisdiction of the court in an action against a nonresident to make an order for the publication of the summons after the filing of the complaint rests entirely on the affidavit for publication, showing the facts specified by Code Civ. Proc. § 412, and not on the prior levy of an attachment on defendant's real estate, situated within the state, such attachment being only necessary to support a judgment in favor of plaintiff.

2. Code Civ. Proc. § 542, subd. 1, provides that an attachment may be levied on real property standing in the name of a defendant by filing with the recorder of the county a copy of the writ, with a description of the property attached, and a notice that it is attached, and by leaving a similar copy of the writ, description, and notice with the occupant of the prop-

erty, if there be one; otherwise by posting the same in a conspicuous place thereon. Subdivision 2 provides that real property belonging to a defendant, and standing in the name of another person, must be attached by filing with the recorder a copy of the writ, etc., and by leaving with the occupant, if any, or such other person or his agent, if known, a copy of the writ, and, if there is no occupant, by posting on the property. *Held*, that where vacant property sought to be attached had been conveyed by defendant, who was a nonresident, by a trust deed, which was void on its face, an attachment was properly levied thereon under subdivision 1, and it was not necessary either to leave with, or mail a copy of the writ to, the grantee in the deed.

3. An affidavit for the publication of a summons, reciting that at the time of the commencement of the action, and ever since, defendant was and has been absent from the state, and residing out of the state, and now resides, as affiant is informed and believes, at S., in the state of New York, was not subject to collateral attack on the ground that the statements contained therein were on information and belief only.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; E. A. Belcher, Judge.

Action by Roger Johnson against O. F. Miner and others. From a judgment in favor of plaintiff, defendant McDonald Spencer and others appeal. Affirmed.

Chas. P. Eells, for appellants. Roger Johnson, in pro. per.

GRAY, C. Action to quiet title, with prayer for possession. Both parties deraign title to the disputed land from R. H. McDonald. The plaintiff claims title under an execution sale made to plaintiff's grantor in the suit of McGowan v. R. H. McDonald. The defendants and appellants claim title by virtue of a deed executed by R. H. McDonald to the defendant Miner, in trust to hold and lease the land during the life of one Frank V. McDonald, and at his death to convey to the children of said Frank V. McDonald, and, the children of the latter failing, to the children of Mrs. Mattie Spencer. Frank V. McDonald died childless, and the trustees thereafter conveyed to the four children of Mrs. Spencer, pursuant to the trust. These four children are made defendants, and they bring this appeal from the judgment in plaintiff's favor and from an order denying them a new trial.

It seems to be conceded by appellants that the trust deed through which they deraign title, being a trust to convey, is void under the decision in the "Fair Will Case," 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70. Their attack upon the judgment herein is directed towards the judgment in the case in which execution sale was made to plaintiff's grantor. It is contended that the judgment in that case is void for the reason that the court failed to obtain jurisdiction of the person of the defendant therein. It appears that the judgment in McGowan v. McDonald is based upon a service of summons by publication, the defendant therein residing at the time out of this state. It is claimed that, the defendant residing out of the state, the court had no power or jurisdiction to order publication of summons until an attachment had been first duly levied on some real estate belonging to defendant and situated in this state. The affidavit for publication of summons in McGowan v. McDonald was filed May 28, 1895, and the order of publication was made the same day. The writ of attachment in the case was placed in the hands of the sheriff on May 25, 1895, and on the same day he filed a copy of it in the recorder's office. On May 29, 1895, he posted a copy upon the land, and on the 31st of the same month he mailed a copy to Miner, in whose name he certified the title stood. We do not think the power of the court to order publication of summons depended upon a previous levy of the writ of attachment. By the filing of the complaint the court acquired jurisdiction of the subject-matter of the action, and was thereby placed in a position where it could proceed to acquire jurisdiction of the person of defendant. The defendant being a nonresident of the state, the law required the issuance of a summons, the issuance of a writ of attachment and valid levy of the same upon defendant's real estate situated in this state; also an order for publication of summons based upon the necessary affidavit, and a due service of summons by publication. All these steps must be taken to give the court jurisdiction to enter final judgment against the defendant, to the end that the said property of defendant might be applied in a lawful way to the satisfaction of the plaintiff's cause of action. But so far as the jurisdiction of the court is concerned, the order of these several steps is immaterial. The jurisdiction of the court to make the order of publication rests altogether upon the affidavit for publication showing the facts required by the provision of section 412, Code Civ. Proc. It is not required in this section or elsewhere in the law that it shall be made to appear by affidavit or otherwise that a writ of attachment has been levied as a preliminary step to the order of publication, and it is not for the court to require anything in addition to the requirements of the Code. The proceeding for the publication of summons is distinct and separate from the proceeding in attachment. The judgment against a nonresident is dependent upon both these proceedings, but neither of the proceedings is dependent upon the other. The defendant in the action will be presumed to know that he has property in the state, and service of summons by publication as directed by the Code will serve as notice to him that, if he does not appear and defend against the action, the plaintiff will not only take judgment against him, but he is liable to also take all such steps preliminary thereto as will make that judgment effective as against said property. He is bound to take knowledge of the Code, and know that the plaintiff can fully avail himself, of the attachment law of the state without giving him any actual notice thereof. The case discloses a substituted service of summons as required by law, and a levy of attachment as required by law prior to such service, and that is all that was necessary. In Anderson v. Goff, 72 Cal., at page 69, 13 Pac. 75, 1 Am. St. Rep. 34, it is said: "Nor was it necessary to show by the affidavit that a writ of attachment had issued, or that the defendants had property in this state. Our statute gives the right to service of summons upon defendants in all cases where they are nonresidents of the state, without reference to the fact of their having or not having property here. The effect of a judgment thus obtained is quite another thing." It may be well also to observe in this connection that our Code does not limit either the issuance or levy of a writ of attachment to any particular time during the pendency of the action, but permits it to be issued "at the time of issuing the summons or at any time afterwards." Code Civ. Proc. § 537. This section is general, and applies to cases where substituted service is had as well as to others.

Appellants next contend that there was no valid levy of the attachment in McGowan v. McDonald, for the reason that the sheriff mailed a copy of the writ to Miner, in whose name the property is claimed to have stood of record, instead of leaving it with him, as provided in subdivision 2 of section 542, Code Civ. Proc. It is conceded by all parties, and correctly so, that a valid levy of the attachment was necessary to give validity to the judgment against the nonresident defendant. We think the levy of the attachment was valid. The deed from McDonald to Miner is conceded to have been void on its face for the reason that it was intended to establish a trust to convey. It could be seen, therefore, from the record, that the deed was void, and that the property was not in the grantee named in the deed, but that in fact the property stood of record in the name of McDonald. This being so, the proper method of levying the attachment is to be found not in subdivision 2, but in subdivision 1 of section 542, Code Civ. Proc., and it was entirely unnecessary to either leave with or mail to Miner a copy of the writ. It was sufficient to post the copy on the unoccupied premises after filing with the recorder as is shown by the sheriff's return. In the absence of a showing to that effect, we will not presume that the title stood in the name of any person other than McDonald. Nor will we be bound by the certificate of the sheriff that the title stood of record in Miner's name, when this certificate is contradicted by an inspection of the instrument placed in evidence by the appellants themselves, and upon which rests all the claim they have to the land in dispute. It would be highly improbable to suppose that any valid or other deed than the one placed in evidence passed from McDonald to Miner. If any such other deed could have been found of record, appellants would have brought it forward as a link in the chain of title they were trying to establish.

Appellants further contend that the affidavit for publication of summons in McGowan v. McDonald is insufficient in that the statements contained in the affidavit are upon information and belief. They quote from the affidavit as follows: "That at the time of the commencement of the action, and ever since, said defendant was and has been absent from the state of California, and residing out of said state; and now resides, as affiant is informed and believes, at Schenectady, in the state of New York." It will be noticed that the statement in the above is positive as to the fact of the defendant "residing out of said state." The "information and belief" relates only to the then present place of his residence. As against the attack, which is here collateral, we deem the affidavit entirely sufficient to sustain the jurisdiction of the court to make the order of publication. The statute authorizing publication of summons requires only that it appear that the defendant reside out of the state. It is not a part of the ground for publication of summons that it shall appear where, outside of the state, the defendant resides. Nor was the statement of the nonresidence of defendant contained in the affidavit given in the form of an opinion, but, on the contrary, it is a positive statement of the fact of residence out of the state.

We advise that the judgment and order be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

145 Cal. 35

In re BURLEIGH. (Cr. 1,160.)

(Supreme Court of California. Sept. 30, 1904.)

PUBLIC OFFICERS—ACCUSATION—INDICTMENT—OFFENSE—PLURALITY OF OFFENSES.

1. Pen. Code, § 888, provides that all public offenses triable in the superior court shall be prosecuted by indictment or information, except as provided in the next section, which declares that, when proceedings are had for the removal of county, municipal, or township officers, they may be commenced by an accusation or information in writing, as provided in sections 758, 772. Const. art. 4, § 18, provides, after making a provision for the impeachment of the Governor and other named state officers before the Senate, that "all other civil officers shall be tried for misdemeanors in office in such manner as the Legislature may provide." Pen. Code, § 917, declares that an indictment is an accusation, in writing, presented by a grand jury "to a competent court," charging a person with a public offense; and section 758 declares that an accusation must be delivered by the foreman of the grand jury to the district attorney. *Held*,

that an accusation of a public officer for offenses in office, brought merely for the purpose of removing him from office, was not an indictment, and hence was not objectionable on the ground that it contained more than one offense.

In Bank. Appeal from Superior Court, Fresno County.

H. G. Burleigh was accused of certain misconduct in his office of supervisor, and, from an order sustaining a demurrer to the accusation, the state appeals. Dismissed.

U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., and Geo. W. Jones, Dist. Atty., for appellant. Frank H. Short, for respondent.

McFARLAND, J. A written accusation under sections 758 et seq. of the Penal Code was made by a grand jury, charging the respondent, Burleigh, with misconduct in his office of supervisor. He filed what, we suppose, may be called a demurrer; that is, a written document containing objections "to the legal sufficiency of the accusation" as provided in sections 762 and 763. The demurrer was based on several grounds, and, among others, that the accusation did not substantially conform to the provisions of the Penal Code, or section 950, 951, or 952 thereof, and that more than one offense was charged. The court below sustained the demurrer, stating in its order that it was sustained for the reason that more than one offense was charged therein. The people appeal from the judgment.

The appellants concede that, if the accusation is to be treated as an indictment, then the demurrer was properly sustained. They contend, however, that an accusation under section 758 is not an indictment. They also concede that, if that be so, then the people have no appeal, and this appeal would have to be dismissed. Notwithstanding this peculiar position occupied by appellants, still, in order to reach the proper judgment to be rendered on this appeal—that is, whether we should consider the judgment of the court below, and either affirm or reverse it, or whether we should dismiss the appeal—it seems necessary to determine whether or not the accusation under section 758 is, in law, an indictment, and the trial under it subject to the rules which apply to the trial of an indictment; and, in our opinion, such accusation is not an indictment, and is not to be treated as such.

The main argument of respondent is that an accusation comes strictly within the definition of an indictment, which is defined in section 917 as follows: "An indictment is an accusation in writing presented by the grand jury to a competent court, charging a person with a public offense." But an accusation under section 758 is not an accusation "presented by a grand jury to a competent court"; it "must be delivered by the foreman of the grand jury to the district attorney." When an indictment is found by a grand jury it "must be presented by their foreman in their presence to the court" (section 944), and must have certain indorsements; and the defendant may, on motion, have the indictment set aside "where it is not found, endorsed, and presented as prescribed in this Code." Section 995. The proceedings on an indictment, and the consequences following a judgment thereon, are entirely different from those accompanying the trial on an accusation under section 758. A warrant of arrest follows an indictment, under which the defendant is immediately imprisoned unless he gives bail. Nothing of the kind occurs on an accusation; the party accused is merely served by the district attorney with a copy of the accusation, and notified to appear within a certain time and answer it, and may appear or not as he chooses, as in a civil action. In an indictment, only one public offense can be charged; its main purpose is to punish the defendant for the commission of a crime, and an acquittal or conviction is a bar to a future prosecution for the offense charged. The main purpose of the accusation under section 758 is to remove a person from public office for misconduct in such office; the misconduct charged need not necessarily include an act which would itself constitute a crime, and, if it does include such crime, the judgment on the accusation would not be a bar to a subsequent prosecution for such crime. The judgment can go only to the extent of a removal from office. The provisions of the Penal Code clearly make a distinction between an indictment or information, and the procedure by accusation here under review. Section 682 provides that "every public offense must be prosecuted by indictment or information except—1. Where proceedings are had for the removal of civil officers of the state." Again, it is provided in section 888 that "all public offenses triable in the superior court must be prosecuted by indictment or information, except as provided in the next section;" and the next section (889) provides that "when the proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation or information in writing, as provided in sections 758 and 772." In section 18 of article 4 of the Constitution, after a provision for the impeachment, before the Senate, of the Governor and other named state officers, it is provided that "all other civil officers shall be tried for misdemeanors in office in such manner as the Legislature may provide." The Legislature, perhaps, might have provided that the proceeding for the removal of an officer should be by indictment, and, if that had been the intent, a few words would have expressed it. That, however, was clearly not the intent, for the Legislature, by 758 and succeeding sections, has elaborately provided an entirely different procedure. These sections immediately succeed the sections relating to impeachment before the Senate, and they are evidently intended to be similar in character to articles of impeachment. This intent is emphasized in section 762, which provides that the accused may object to the sufficiency of the accusation "or of any article therein." There are no decisions of this court in point. In the case of People v. Ward, 85 Cal. 585, 24 Pac. 785, cited by respondent, the point was not raised, and the one or two allusions in the opinion to the proceeding as an indictment were evidently merely for convenience of statement, and are not to be taken as a decision of a question not before the court. It was held there that the charge against the appellant was insufficient because there was "no averment of any illegal act by appellant," and that ground of reversal would have been good whether the proceeding was considered as an indictment, or as an accusation within the meaning above stated. But as the appellants concede that, if the accusation is not an indictment, the people have no appeal, therefore the appeal herein must be dismissed, and it is so ordered.

We concur: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

145 Cal. 38

RICHARDS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Cr. 1,202.)

(Supreme Court of California. Sept. 30, 1904.)

COURT REPORTERS—DUTY TO FURNISH TRANSCRIPTS—DUTY OF JUDGE TO FIX TIME FOR FILING.

1. Code Civ. Proc. § 269, provides that the official reporter must, if directed by the court or requested by either party, within such reasonable time after the trial of a case as the court may designate, transcribe, in longhand or by typewriter, the testimony taken on the trial, or such portions thereof as may be requested, and when directed by the court file the same with the clerk, duly certified. Section 274 provides that when such transcript is ordered by the court the fees of the reporter shall be a charge against the county. *Held*, that section 269 does not require a reporter, in either a civil or criminal case, to make a transcript at the request of a party, unless his proper fees therefor are paid or tendered.

2. Such section imposes no duty on the court to designate a reasonable time within which a transcript shall be filed, unless such action is taken as to make it the duty of the reporter to furnish the transcript, either by payment of his fees or by obtaining an order of the court therefor.

In Bank. Application by Edward Richards for a writ of mandate against the superior court of the city and county of San Francisco, William P. Lawlor, judge of said court, and Platt B. Elderkin, official reporter. Writ denied.

Milton Shepardson, for petitioner.

HENSHAW, J. This is an original petition for a writ of mandate against the respondents, the Hon. W. P. Lawlor, judge of the superior court, and Platt B. Elderkin, his official phonographic reporter. The application for a writ is based upon the provisions of section 269, Code Civ. Proc., as follows: "Such reporter, or any one of them, where there are two or more, must, at the request of either party, or of the court in a civil action or proceeding, and on the order of the court, the district attorney, or the attorney for defendant in a criminal action or proceeding, take down in shorthand all the testimony; * * * and if directed by the court, or requested by either party, must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court." As to the phonographic reporter, a demand or request for a transcription is alleged, with the reporter's refusal to comply therewith. As to the judge, it is averred that after request he has refused to designate a reasonable time within which the transcription by the phonographic reporter shall be made.

We are of the opinion that as to neither of the respondents should the writ issue. We are further of the opinion that for the correction of possible abuses, and for the elucidation of the proper procedure in such cases, a brief exposition of the matter will be both pertinent and valuable.

First, as to the judge: Section 269 contemplates that, in the exercise of his sound discretion, the judge may order a transcript of the proceedings, or of any part of them, to be made by the phonographic reporter. When so ordered by the judge, or "by the court," the fees of the phonographic reporter become a proper charge against the county treasury. Code Civ. Proc. § 274. Section 269 further contemplates that in a proper case the trial court, when called upon, will designate the "reasonable time" within which the phonographic reporter shall file the transcription of his notes. A proper case is one where it has become the duty of the phonographic reporter to make the transcription, and where, for the orderly and expeditious procedure of the case, the court is appealed to to designate the time within which the phonographic reporter shall perform his duty. But, manifestly, if the case be one where the shorthand reporter is not called upon to make a transcript, it is not one which calls for a declaration of time upon the part of the court.

The application for a writ against the respondent judge for having refused to designate such a time is denied, because, for reasons next hereinafter to be considered, the case was not one calling for a declaration from the court.

We thus come to, second, the rights of the parties and the duties of the phonographic reporter. Section 269 in this regard provides that the reporter must, if requested by either party, transcribe such specific portions of his notes as may be designated. We have already seen that when this request is made by the court the law expressly provides that the phonographic reporter's fees shall be a charge against the county treasury. But where the request is made by either party, it becomes the duty of the reporter to make the transcription only upon tender or payment to him of his legal fees and charges. A defendant in a criminal case, like a defendant in a civil case, is chargeable with fees as to all matters, saving those from the payment of which he is especially exempted by law. He is so especially exempted as to certain matters. He is exempted from bearing all or any part of the costs of his trial. Upon his appeal the state, in its liberality, requires the county clerk to prepare and print, as a county charge, his transcript. By express enactment of law, no fee is exacted for the filing of his papers upon appeal in this court. But each and all of these exemptions are matters of express statutory enactment. Where the Codes are silent, the costs are still thrown upon a defendant in a criminal case, as well as upon a defendant in a civil case. Thus the defendant must himself pay for the printing of the brief which he presents to this court. The same holds true when a demand is made directly upon the phonographic reporter for a transcript of all or any part of the proceedings upon his trial. If he orders it himself he must pay for it himself, and until he pays the phonographic reporter is not compelled to do the work. If he is unable to pay, an appeal may always be made to the judge, who will thus have an opportunity to review the request, and to designate the transcription of such portions of the record as may be fit and necessary for the purpose intended, and in such cases the rights of the county are preserved, in that the expenses of an excessive transcript are not cast upon it, and, upon the other hand, the defendant's rights are fully protected, since, without cost to him, he has obtained all that he is entitled to present upon his appeal.

The construction contended for by petitioner would lead to unbearable abuses and untold extravagance. It would result that in every criminal case in which a conviction was had, by the mere request of the defendant, he could cause every word of the proceedings to be transcribed, and the cost of the transcription made a burden upon the county. Under such a system it would, at least, be a question whether or not the state could not better permit the depredations of felons to go unpunished, as causing the community less loss than would their successful prosecution to convictions.

Therefore, to sum up, we hold that it is the duty of the phonographic reporter to comply with the request made by either of the parties litigant, only upon payment to him of his fees; that it is his duty, when ordered by the court, to furnish transcripts, his fees being then a charge upon the county treasury.

For the foregoing reasons the petition for mandate is denied.

We concur: BEATTY, C. J.; VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.

145 Cal. 30

CONTINENTAL BUILDING & LOAN ASS'N v. BOGGESS et al. (Sac. 1,282.)

(Supreme Court of California. Sept. 29, 1904.)

BUILDING AND LOAN ASSOCIATIONS—FORECLOSURE OF MORTGAGE—DEFENSES—SHAM PLEADING—MOTION TO STRIKE OUT.

1. Where the mortgage given by a borrowing stockholder of a building association provided that on foreclosure the surrender value of the borrower's stock might be applied on the mortgage debt, and the stock should then become the property of the association, an answer in foreclosure which does not deny that the credit given thereon on account of the stock was its actual surrender value, computed in accordance with the by-laws, does not state any ground of defense by an allegation that, because of mismanagement of the association, such credit is less than it should have been.

2. It is error to strike out as sham a verified answer, or a portion thereof which alleges matter constituting a defense, although it contains other irrelevant or evidential matter. In such case the motion should go only to the objectionable matter.

Commissioners' Decision. Department 1. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by the Continental Building & Loan Association against Emma A. Boggess and others. Judgment for plaintiff. Defendants appeal. Reversed.

Frank M. Stone, for appellants. Gavin McNab, for respondent.

CHIPMAN, C. Foreclosure of mortgage executed to plaintiff by defendants Emma A. and Riley A. Boggess on certain property situated in the city of Marysville, Yuba county, to secure the payment of a promissory note for $3,000. Plaintiff had judgment, from which defendants appeal on bill of exceptions.

It was recited in the mortgage that the mortgagors, having subscribed for 30 shares of the capital stock of plaintiff corporation at the par value of $100 each, evidenced by certificate No. 15,935, the mortgagors promised to pay to mortgagee said amount in monthly installments of 30 cents per month for each said share, on the 15th of each month, until fully paid by said payments and by the dividends and accumulations on said shares, and further to pay the monthly premium of $18 on said loan on the 15th day of each month until said shares are fully paid; and as further security for the payment of said promissory note and interest and the par value of said shares mortgagors pledged the said shares, and in case of foreclosure of said mortgage, or the nonpayment of said promissory note or interest, or the said installments as above set forth, or the premium, mortgagee "may apply, at its option, without notice to said mortgagors, the cash surrender value of said shares, as provided in the by-laws of said corporation, * * * to the payment of said promissory note, and the said shares shall thereupon become the property of and vest in said mortgagee." Other provisions to cover advances, payment of taxes, and similar provisions usual to mortgages, are set forth in the mortgage. It is alleged in the complaint, also, that plaintiff did by resolution declare the whole of said note and mortgage due and payable, and elected to foreclose the mortgage; that the advances, installments, and premiums on said loan from March 15, 1901, amount to $851.40; that the cash surrender value of said certificate No. 15,935 of plaintiff's said stock, pledged to plaintiff, was, on March 23, 1903, the day of passing said resolution declaring said note to be due, the sum of $18.41. Demand of payment and refusal is alleged, with usual prayer for sale of premises, etc.

Defendants, answering, admitted the execution of the note and mortgage set forth in the complaint; on information and belief denied that plaintiff passed the resolution above referred to; and on information and belief denied that plaintiff made any further advances, and denied that interest, installments, and premium on said loan amount to $851.40, or any other sum. Further answering the complaint, and particularly that portion which alleges the cash surrender value of said certificate No. 15,935, the answer, after alleging the existence of plaintiff corporation (which is but an admission of the allegation in the complaint), proceeds, in folios 65 to 75, to set forth sundry matters which are apparently intended to show that the cash surrender value of said certificate should have been "largely in excess of the value of $18.41," if the affairs of the corporation had been properly and honestly managed. A motion was made by plaintiff and granted by the court to strike out this portion of the answer, designated "a" in the motion, on the ground that it is "sham and irrelevant and surplusage," and not "proper matter of averment," and does not "show any defense to an action to foreclose a mortgage." This motion was granted. The answer then sets forth what is called "an equitable and for a further and distinct defense." This portion of the answer (omitting the unnecessary allegation of the existence of plaintiff corporation) is contained in folios 77 to 99. Designating this matter as "b," plaintiff made a motion to strike it out on the same grounds as already stated, which motion was granted.

The portion ("a") of the answer, above referred to, briefly stated, is to the effect that one Corbin was, at the time the mortgage was executed and up to the time of the passage of said resolution fixing the value of said certificate, the secretary and manager of plaintiff corporation; that its affairs "have been corruptly, dishonestly, and improperly managed by said William Corbin"; that he misapplied and misused large sums of plaintiff's money "as manager of said corporation and in his individual capacity"; that plaintiff attempted to recoup its losses through the acts of said Corbin, and that the property received from him by plaintiff with that view is being carried on plaintiff's books at a valuation "far in excess of the real value of said property so taken"; that plaintiff's affairs have been so conducted by its officers and managers as to greatly decrease the surrender value of said certificate No. 15,935, and that, if the said affairs had been "properly and honestly managed, the cash surrender value of said certificate of stock would be greatly in excess of the sum of $18.41"; that equity requires that the cash surrender value of said certificate should be credited "in the same manner and to the same amount as if the business affairs of said corporation plaintiff had been honestly conducted"; that a large amount of money has been paid by plaintiff "in an improper manner as dividends upon what is termed nonborrowing stock," thus diminishing the surrender value of said certificate; that said Corbin improperly withdrew large sums belonging to plaintiff, and charged the same improperly to traveling expenses, thus depreciating the value of said stock. The facts, set forth with much greater particularity than we have given them, are stated by the pleader, we presume, to show that the certificate should have had a greater surrender value than $18.41. The issuable fact in this case, in this respect, was the surrender value of the certificate. It was entirely immaterial what such surrender value might have been if the affairs of the plaintiff corporation had been differently managed. The agreement of the parties, as shown by the mortgage, was that the actual surrender value should be allowed. The complaint alleged that such actual surrender value was $18.41. This allegation was not denied by the matter stricken out, designated heretofore as "a," and, so far as we can see, such portion in no way constituted any answer or defense to plaintiff's cause of action, and was properly eliminated by the order.

The portion of the answer designated in the motion as "b" is composed to considerable extent of evidentiary matter purely defensive, and contains some allegations of fact entirely irrelevant and immaterial. Still there are facts properly alleged which show an agreement on the part of plaintiff by which plaintiff agreed that, when plaintiff had realized sufficient money out of the mining property mortgaged to it, plaintiff would pay defendant Emma Boggess an amount equaling her indebtedness to plaintiff. It was alleged that plaintiff did realize the money, and it thus became equitably bound to apply it in payment of her debt to it. Civ. Code, § 1479. The answer was verified, and it is urged that to strike it out as sham was error; citing Greenbaum v. Turrill, 57 Cal. 285. We do not think it can be said that the answer was sham, which means an answer good in form but false in fact, and not pleaded in good faith (Id); and to warrant applying the severe rule of striking the answer from the record the matter must be shown to be unquestionably false and not pleaded in good faith. And. Dict. tit. "Sham," and cases cited. This cannot be said of the answer in the present case. All the matter set up as equitable defense, and designated in the motion as "b," was stricken out. The grounds of the motion, other than that it was "sham," were that it does not tend to show any defense to the action, and is irrelevant and surplusage. This is true to some extent, as already intimated, but it is not true as to the entire answer. A motion to strike out the irrelevant averments would, therefore, have been proper. The object of such a motion is to rid the pleading of its objectionable averments only. The cases cited by respondent as to the rule where redundant or irrelevant matter is alleged are cases, so far as we have found, where the objectionable averments only were attacked. To illustrate: Suppose, in an action involving title to real estate, the pleader should allege ownership by sufficient averments, and should then proceed to set forth his chain of title. On motion these latter averments would be stricken out as surplusage and evidentiary matter, but not the entire pleading. See the subject discussed in Pomeroy's Code Remedies (4th Ed.) §§ 422, 423, 445. We think it was error to strike out the whole of this portion of the answer.

It is advised that the judgment be reversed.

We concur: GRAY, C.; SMITH, C.

For the reasons given in the foregoing opinion the judgment appealed from is reversed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

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145 Cal. 12

DWINNELL v. DYER et al. (Sac. 1,024.)

(Supreme Court of California. Sept. 28, 1904.)

MINING LOCATIONS—FAILURE TO COMPLY WITH STATE STATUTE—REPEAL OF STATUTE—ACTION TO QUIET TITLE—FINDING—SUFFICIENCY.

1. Locators of a mining claim took all the steps necessary to constitute a valid location under the laws of the United States, but failed to comply with Act March 27, 1897 (St. 1897, p. 214, c. 159), prescribing the manner of making mining locations, etc. This latter statute was repealed by Act March 20, 1899 (St. 1899, p. 148, c. 113), and Act February 8, 1900 (St. 1900, p. 9, c. 6). The locators went into possession after the original location, and were in possession when the repealing acts were passed, and remained in possession thereafter. *Held*, that the repealing acts left the location unaffected by the statute repealed, so that it was a valid location under the statutes of the United States.

2. In an action to quiet title to a mining claim, in which plaintiff claimed under a location made in 1900, where it appeared that defendant had long prior to that time made a location which was confessedly invalid at the time it was made, a finding to this effect is not sufficient to dispose of the material issue as to whether defendant had made a valid location before plaintiff's location was made.

McFarland, J., dissenting.

In Bank. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by G. W. Dwinnell against W. F. Dyer and others. From a judgment for plaintiff, defendants appeal. Reversed.

The following is the opinion in department, referred to in the dissenting opinion:

CHIPMAN, C. Plaintiff alleges ownership of a quartz mine called Cuban Beauty No. 2, situated in Siskiyou county; that defendants unlawfully entered upon plaintiff's said land with force and arms, and drove off plaintiff's men there employed, and are excavating gold-bearing rock contained therein. It is prayed that defendants be enjoined from interfering with said mining property, and that plaintiff be adjudged to be the owner thereof. Defendants Oscar Dyer and Charles Truesdale disclaimed all interest in the land in controversy. Defendant W. F. Dyer answered, claiming ownership in certain three mining claims, known as Squaw Creek Gold Mine No. 1 and No. 2 and No. 3. It is alleged that a portion of plaintiff's said claim overlaps a portion of Squaw Creek Gold Mines Nos. 2 and 3; ownership is claimed at the commencement of the action and some time prior thereto, and that defendant and his predecessor in interest have been in possession continuously since September 12, 1898, and since said date have been entitled to possession; denies plaintiff's ownership of any part of said overlapping ground; denies interference with plaintiff or claim of his said alleged claim except as to said triangular piece. The court found the facts for the plaintiff, and, as conclusions of law, found that plaintiff is the owner, and entitled to have defendants restrained from interfering therewith. Judgment was accordingly entered, from which, and from the order denying their motion for a new trial, defendants appeal.

Certain errors of law occurring at the trial are specified by defendant, but, as they are not noticed in his brief, they will be deemed waived. Appellants' contention is that the evidence does not sustain the findings in certain particulars, namely: (1) That at the time plaintiff made his location, November 26, 1900, the ground was unoccupied and subject to location; the contention of defendant being that he had long prior to that date made a valid location of ground including that in dispute. (2) Under like contention, the finding is claimed as unsupported that plaintiff complied with law. (3) Also as unsupported that one Grant Davis had attempted to locate the same land as that covered by plaintiff's location, and thereafter sold and conveyed the same to plaintiff; and this because the Davis location was in conflict with a prior location by defendant; that the Davis location did not include any ledge in place; that Davis had made no discovery of mineral in place within the lines of his location. (4) Also as unsupported, so far as concerns defendant, that the attempted early locations of Davis and of defendant Dyer and Phillips were not made in compliance with the law then in force, to wit, the act of March 27, 1897, of this state; defendant's contention being that his location was valid.

There is evidence that Davis made his location October 30, 1898, on which day he posted notice at the center of the north line of the claim bordering on the so-called Cuban Beauty. The lines were run out, and corners marked. The notice was not recorded until September 8, 1899. The Cuban Beauty and the Dewey, both of which corner with the Cuban Beauty No. 2 at the northeast corner of the latter, were located at the same time by the Davis party, and formed one group of mines. Davis subsequently also located the Black Bear No. 2, which lies south of and adjoining the Cuban Beauty, and west of the Cuban Beauty No. 2, and joins it, but extends south less than half the length of the latter. He conveyed to plaintiff on November 27, 1899, by deed placed in escrow, which was delivered on compliance with the contract of sale in September, 1900. There is evidence, though not without conflict, that when these locations were made there was no other location, or signs of any other location, of the ground involved. On November 26, 1900, plaintiff relocated the Cuban Beauty No. 2 through one Cousins, who did the work. This location was intended to be and was substantially identical with the original Davis location. Cousins testified that Davis had previously shown him the lines and corners, and in January, 1900, defendant Oscar Dyer, in company with Davis, showed him some of the lines and corners. Speaking of the relocation in November, 1900, he testified: "At the time I located this claim, I went all over it. As for mining work, there was a small hole dug on it. In some small places it was picked a little. There wasn't a square yard of dirt or rock moved in any one place. I don't think it would amount to a cubic yard." When Oscar Dyer was with Cousins in January, 1900, he told Cousins that his brother (defendant) claimed the ground west of the southeast corner of the Davis claim, and that more than the assessment work had been done. Cousins testified: "I then said that I had seen they had. But it wasn't on what we claimed. They hadn't hit a lick of work on what we claimed. North of our south line he had done a lot of work upon the hill and on the ground we didn't claim."

It appears from plaintiff's testimony that he relocated the Cuban Beauty No. 2 because of some doubt of the legality of the Davis location under the state mining law of 1897, and his attempt to do the assessment work was in order to hold the claim if the Davis location was legal. As to the relocation in 1900, the assessment work becomes immaterial, as it might be done at any time during the year 1901, and the action was tried in August of that year. It also appeared from plaintiff's testimony that he acquired all the Davis group of claims, and the contract of sale calls for the payment of $125,000 for all the mines. There were some others besides the three mentioned by plaintiff in his testimony following: "There were three claims—the Cuban Beauty, the Cuban Beauty No. 2, and the Admiral Dewey—and that work [the assessment work for 1899] on the Admiral Dewey was supposed to develop the three claims, and was done for that purpose, and then I did the assessment work for those three claims on the Admiral Dewey. I spent about three thousand dollars on the Admiral Dewey for the time in doing it. I ran about 500 feet of tunnels, and then I built some buildings, and then I fixed the trail and general development of the mining claims." Allen Davis testified that he was working on the Dewey mine about May 1, 1899, and met defendant William Dyer there at that time; and, in a conversation, Dyer, in reply to a question as to the line between sections 6 and 7, and as to whether his location extended into section 6, pointed out about where the section line was, and stated: "I haven't got anything in 6. All of mine is in section 7." The south line of the Cuban Beauty No. 2 is admittedly a considerable distance north of this section line—"three or four hundred feet," as testified by witness Cousins. Dyer's claims did in fact extend onto section 6, and he probably meant no more in his statement to Cousins and those present than that he claimed nothing within the lines of the Davis location of the Cuban Beauty No. 2. Dyer knew where the section line was, and so testified. The court found that the Squaw Creek No. 2 included some of the ground embraced in the Cuban Beauty No. 2.

It is not necessary to discuss the validity of the original location by Davis, for the court found that it was not made in conformity with the state law (St. 1897, p. 214, c. 159), and the finding cannot be questioned by plaintiff. Cowing v. Rogers, 34 Cal. 648. Nor do we think it necessary to examine the evidence particularly as to the validity of the Dyer locations made about the same time, for they also failed to comply with the statute, and the court so found. Dyer subsequently posted a new notice, January 14, 1899, recorded March 13, 1899. The statute above referred to was in force until February 28, 1899, when it was repealed. St. 1899, p. 148, c. 113. Dyer claims under this location, as well as his location in 1898. But we think the evidence fails to establish the validity of either location, while there is evidence showing the validity of plaintiff's location of November 26, 1900. As we understand the purpose of the evidence as to these early locations, it was not so much to show valid locations in fact as it was to show the intention of the locators as to the particular ground in question. Appellant's contention is that he took all the ground south and west of a line drawn from the southeast corner of the Brown Bear claim to what is now claimed by plaintiff to be the southeast corner of the Cuban Beauty No. 2, and, as the Brown Bear claim lay west of the Cuban Beauty No. 2, and extended only about 600 feet along the latter, the said line would cut off more than a third of the southwest portion of the Cuban Beauty No. 2, including the ledges and rock in place found on the latter by Davis, its original locator. This contention of appellant is based largely on evidence that Davis himself conceded this to be the dividing line in February, 1890, when he and appellant and some other persons were on the ground for the purpose of ascertaining its location. It appeared, however, that, when Davis took the party to what in fact was the southeast corner of his claim, he by mistake told them it was the southwest corner, and that his southeast corner lay over east, near the Chadwick claim. The evidence here is in sharp conflict, and there is evidence that the Cuban Beauty No. 2 was laid out originally as claimed by plaintiff, and that, when Davis pointed east for his southeast corner, he by mistake called it the southwest corner, which would thus cut off the triangular piece in the southwest part of the claim. This was all cleared up to the satisfaction of the trial court, and, as there was evidence to support its conclusion, it cannot now be disturbed. Besides, the trial court held that, as these declarations of Davis were made after he had sold the property to plaintiff, they were inadmissible, as affecting plaintiff's title; and this ruling, though objected to at the time, is not now questioned. The bearing of this evidence was confined to its effect upon statements of plaintiff's witnesses as to where the lines of plaintiff's claim were in fact located. Appellant used at the trial a plat by way of illustration. Much of the evidence brought out in connection with this map is so reported as to be unintelligible here, though doubtless was understood by the trial judge. The diagram was not proven to be correct. It furnishes us but little aid, because not drawn to show the exact situation of the several claims referred to in the evidence, and is but an approximation of their relation to each other. It is confusing by reason of this fact, and also because the top of the map is south instead of north, which latter is the usual and better method of preparing illustrative maps. From the best consideration we can give of the evidence with this map in hand, we think the findings are supported.

The principal point urged by appellant is that he was in possession of the contested ground when plaintiff made his last location, and therefore it was not unoccupied mineral land and subject to location by plaintiff. Defendant claims from the evidence that the man sent to relocate the claim for plaintiff was driven off by defendant before he did any work; that defendant had a dwelling house on the claim, was living in it and working on the claim, and had done about $2,000 worth of work on it, and had the claim marked off so that the boundaries could be readily traced. And it is claimed that plaintiff had to commit a trespass upon the ground in order to locate. The decisions are not entirely harmonious as to whether an occupation such as is described above, under an invalid location, would be sufficient to prevent a valid location being made by another qualified person, provided he could do so without the use of force. The question is not necessarily involved in this case. There is evidence, which the trial court accepted, showing that the facts are not as above claimed. Defendant had done much work on a claim at considerable distance from plaintiff's claim, and he had a dwelling house on one of his claims, but it was a mile from plaintiff's claim. There was evidence that these improvements were not on any claim that encroached upon plaintiff's claim. Defendant's map shows a cabin which was erected by defendant more recently, but it is not on plaintiff's claim. The only work done by defendant on any part of plaintiff's claim is described as of but small extent. The evidence is not that Cousins, who made plaintiff's location, was driven off by defendant at the time the location was made. This circumstance happened some time before, when he went there to do assessment work under the Davis location. So far as the evidence shows, Cousins made the relocation peaceably, and without interruption or objection by any person. He was familiar with the lines by previous examination of them, and he testified that when he relocated the claim he went all over it, and found only such evidences of work on it as have been already stated. He found no person on any part of the claim, and no one in actual possession of any part of it. The utmost that can be said of the evidence in support of defendant's contention is that he had an invalid location on which he had done much work outside the boundaries of the claim in dispute, that he claimed that his location overlapped and included some of plaintiff's ground, and that in 1899 he had done some prospecting work on the disputed ground, but was not working this ground when plaintiff's relocation was made.

In view of this state of facts, the case of Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735, would seem to settle the question against defendants' contention. In that case Belk attempted to make a location in December, 1876, and did everything necessary to a valid location, if the ground was then subject to location. There was, however, a prior locator, whose rights precluded a valid location by Belk. This prior locator's rights expired on January 1, 1877, and were in fact then lost. Belk claimed that, upon the failure of the prior locator to keep his location alive, his (Belk's) location, made in December, at once attached. The court held that it did not so operate. Between December 19th and February 21st following, Belk did a small amount of work on the claim, which did not occupy more than two days of his time, and he had no other possession of the property than such as arose from his location of the claim and his occasional labor upon it. On February 21, 1877, defendants Meagher and others entered on the property peaceably and made another relocation, doing all that was required to perfect their rights, if the premises were then open to them. After showing that the rights of Belk were not affected by the Montana statute, and that his right of location depended entirely on the act of Congress, the court said: "All he got or could get by his entry was possession, and that, to be of any avail, must be actual. Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate unless he secured what is here made the equivalent of a valid location, by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough and kept others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and, if he was not actually in, he was, in law, out. A peaceable adverse entry, coupled with the right to hold possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got if he had kept it for the requisite length of time. He made no such location as prevented the lands from being, in law, vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force." The court then said: "There is nothing in Atherton v. Fowler, 96 U. S. 513 [24 L. Ed. 732], to the contrary of this." Applying the principles of Belk v. Meagher, we must hold that defendant acquired no right to the disputed land which constituted it other than unoccupied public land, or precluded plaintiff from making a valid location thereon. See the question discussed and cases cited pro and con in Lindley on Mines (2d Ed.) vol. 1, §§ 216–219. Belk v. Meagher also disposes of appellant's further contention that the repeal of the act of 1897 did not impair his rights vested by virtue of his invalid location. He could only claim such land as he actually possessed and was working in good faith.

The judgment and order should be affirmed.

We concur: GRAY, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

Gillis & Tapscott, for appellants. Warren & Taylor, for respondent.

BEATTY, C. J. Action to quiet title to a mining claim. In his complaint, filed November 30, 1900, the plaintiff alleged, among other things, that he was, and for a long time had been, the owner, entitled to the possession, and in the exclusive possession of a quartz lode mining claim, known as the "Cuban Beauty No. 2"; that on the 15th of November, 1900, the defendants had entered upon the claim with force and arms, and had driven off the men employed by him to do the necessary assessment work for that year; that they had taken possession of the ground, claimed to own it, and were excavating and removing the gold-bearing quartz, etc. Wherefore he prayed for a temporary injunction, and for a final decree adjudging him to be the owner, etc. By their answer the defendants alleged that W. F. Dyer was the owner of a mining claim located in 1898 as the "Squaw Creek No. 2," a small portion of which was included within the alleged boundaries of the Cuban Beauty No. 2, and they denied that they had excluded plaintiff from any portion of his claim, except that which overlapped the superior claim of W. F. Dyer. As to that portion they admitted, in effect, that they were holding it, and mining and removing the ores contained therein. From this brief statement it will sufficiently appear that the only material issues presented by the pleadings were those relating to the validity and priority of the overlapping claims. Upon these issues the findings and decision of the superior court were in favor of the plaintiff, and the defendants appeal from the judgment and from an order denying them a new trial.

From the evidence contained in the record it appears that both parties relied, to some extent, at least, upon locations made or attempted in 1898, all of which were held invalid for failure of the locators to comply with some of the requirements of an act of the Legislature of California, passed March 27, 1897, prescribing the manner of making mining locations, etc. St. 1897, p. 214, c. 159. These locations being held void, the decision of the superior court in favor of the plaintiff was based wholly upon a relocation of the Cuban Beauty No. 2, made November 26, 1900, by the plaintiff, just four days before he commenced this action. In view of the grounds of the motion for a new trial—i. e., failure of the evidence to sustain the findings, and that the decision is against law—it will facilitate the discussion to quote some of the more specific findings in full. They are as follows:

"(1) That upon the 26th day of November, 1900, plaintiff, a citizen of the United States over the age of 21 years, located as a mining claim a certain parcel of land situated in Gazelle mining district, county of Siskiyou, state of California, and described as commencing at a point where location notice was posted; thence westerly, along the line of the Cuban Beauty quartz mine, a distance of 300 feet, to stake in mound of rock; then southerly, a distance of 1,500 feet, to stake in mound of rock; thence easterly, 600 feet, to a stake in mound of rock; thence in a northerly direction, 1,500 feet, to the southeast corner of the Cuban Beauty quartz mine, to stake in mound of rock; thence along the line of said Cuban Beauty quartz mine to place of beginning—and commonly known as the 'Cuban Beauty No. 2.' That at the time plaintiff made mining location, said land was unoccupied public mineral land of the United States, and subject to location as such.

"(2) That, in making said location, plaintiff complied with the laws of the United States by placing markings at the exterior boundaries of said location, so that the same could be readily traced, and also complied with all local customs and usages in recording notice of said location.

"(3) That, prior to said location by plaintiff, one Grant Davis had attempted to locate the same land covered by the said location of plaintiff herein, and thereafter sold and conveyed said land to this plaintiff by deed.

"(4) That, prior to said location by plaintiff, defendant W. F. Dyer and Frank Phillips had attempted to make locations of certain quartz mining ground in Gazelle mining district, and known as 'Squaw Creek Gold Mine No. 1,' 'Squaw Creek Gold Mine No. 2,' and 'Squaw Creek Gold Mine No. 3.' That said Squaw Creek gold mine No. 2 covers a portion of the same ground covered by the location of the plaintiff herein.

"(5) That the said attempted locations made by said Grant Davis, and by said defendant W. F. Dyer and said Frank Phillips, were not made in compliance with the law then in force when the same was made.

"(6) That upon or about the 15th day of November, 1900, plaintiff sent workmen upon said claim for the purpose of doing assessment work thereon, and upon said day defendants wrongfully and with force and arms entered upon said land of plaintiff and drove off said workmen, and threatened to drive them off if they ever returned, and at the time of the commencement of this action still hold possession thereof, and threaten to continue to hold possession."

These findings, when read in connection with the evidence in the case, fully disclose the erroneous view of the law which guided the decision of the superior court. The attempted location of the Squaw Creek claims by Dyer and Phillips was in September, 1898, and the evidence shows without substantial conflict that they then did everything necessary to constitute a valid location of the ground under the laws of the United States; that is to say, they discovered a lode of gold-bearing quartz, they posted on the ground a notice claiming 1,500 feet along the supposed course of the vein and 300 feet on either side, they plainly marked the exterior lines of their claim, including the point of discovery, and shortly afterwards commenced the work of development, which they prosecuted with more than sufficient diligence. In addition to this, Dyer, who had acquired the interest of his colocator, Phillips, built a house on the claim and was residing there within his marked boundaries at the time when plaintiff's employés came on the ground, November 15, 1900, for the purpose of doing assessment work for the Grant Davis location of Cuban Beauty No. 2, and also when plaintiff made the location on November 26, 1900, which the court finds to have been a valid location of unoccupied mining ground, and upon which alone his right of recovery is made to depend. The attempted location of the Cuban Beauty No. 2 by Grant Davis was made in October, 1898, a month later than the discovery and attempted location of the lode by Dyer, and the act done by Davis—giving the utmost credit to his testimony—fell far short of the efforts of Dyer to comply with the law. His evidence leaves it very doubtful if he ever discovered any gold-bearing rock in place, or did anything except to mark the boundaries of his claim.

The court finds that his claim as marked was the same as the location made by plaintiff November 26, 1900, and there is evidence that this claim at its extreme southern end includes some croppings of a lode, which appears to be the same as that upon which Dyer has done a large amount of work. But this finding that plaintiff's location embraces the identical ground covered by the Grant Davis claim is sustained by no testimony aside from that of Davis, and his testimony on the stand is in direct conflict with statements he admits having made when on the ground with Dyer and others for the purpose of adjusting their lines so as to avoid a conflict of locations. At that time he stated that his southwest corner was where he now claims his southeast corner was placed, and the change he thus makes involves a swinging of the southern end of his claim

600 feet to the west, making it by that means alone cover a triangular portion of Dyer's claim, including the only rock in place which could have been the basis of a valid location. He, however, says that his statement on the ground was a mistake, and the trial judge accepted his explanation, as he had a right to do, and as we should, perhaps, be bound to do, if the fact were material, which, as will appear, we do not deem it to be, so far as the present appeal is concerned. In view, however, of the necessity for a new trial, and the possible materiality of this fact in some different aspect of the case, it may properly be suggested that an accurate instrumental survey of this original claim in connection with the lines of the older claims—the Cuban Beauty and Dewey, with reference to which the Cuban Beauty No. 2 was located, and the subsequently located claims of Chadwick and the Black Bear No. 2, located with reference to the Cuban Beauty, the Dewey, and Cuban Beauty No. 2—would probably show whether the testimony of Grant Davis, in addition to being inconsistent with his former statements, does not also involve a geometric absurdity; that is to say, whether it does not require us to believe that by going south on the west side of a claim bounded by parallel lines we will reach the southeast, instead of the southwest, corner. But, assuming for the present purpose that the plaintiff's location of November 26, 1900, covered the identical ground included by the boundaries marked by Grant Davis in October, 1898, there is no evidence that either Davis or the plaintiff ever did or attempted to do any development work within those boundaries prior to the 15th of November, 1900, when plaintiff's men found Dyer in possession and were driven off the ground by him and his employés; Dyer having in the meantime, as above stated, built a cabin on the ground, taken up his residence there, and continued work upon the vein.

But the whole question as to what, if any, effect the Grant Davis location may have had upon the rights of the parties is eliminated from the case as presented on this appeal by the finding of the court—amply sustained by the evidence, even if the respondent could question it—that his attempted location was invalid for want of conformity to the requirements of the law then in force. The law to which this finding (No. 5) refers was the above-cited act of March 27, 1897, prescribing certain particulars that location notices must contain, and requiring the record of such notices within certain limited periods. This state law was no doubt valid as one of the local regulations authorized and sanctioned by the act of Congress, and so long as it remained unrepealed was obligatory upon those who desired to secure mining claims in this state by the constructive possession resulting from a technical compliance with the law. The superior court, therefore, was right in concluding that neither the Davis location nor the Dyer location was valid at the time it was made. But the act of 1897 was repealed long before the plaintiff made his location in November, 1900. In the first place, an act properly entitled was passed March 20, 1899 (St. 1899, p. 148, c. 113), for the purpose of repealing it; but, owing to a faulty wording of the body of the act, there seems to have been a question whether it effected the desired repeal. In consequence of this uncertainty the same act, properly worded, was introduced at the extra session of the Legislature in 1900, and finally passed February 8th of that year, taking immediate effect. St. 1900, p. 9, c. 6. The result of this repeal was to make the validity of mining locations in this state solely dependent from that time forward upon a compliance with the laws of the United States and such valid local regulations as the miners themselves may have adopted in their respective districts. There is no evidence of an organized district including these claims, and no suggestion of a failure to comply with any miners' rules or customs. So that the point to be considered is the effect upon the Davis and Dyer locations of the entire elimination from our state or local laws of all regulations additional or supplemental to the laws of the United States governing the location of mining claims.

The repeal of the state law took effect at least as early as February 8, 1900, if not on the 20th of March, 1899, and the condition in which it found the Davis and Dyer claims was this: Davis had never attempted anything except a technical location, and in that he had failed. Dyer had also failed in his earlier attempt at a technical location, but he was on the ground working the vein within his marked boundaries, and had done everything necessary to constitute a valid location under the only law then and thereafter in force. This being so, his claim was thenceforward good so long as he continued to do the necessary assessment work. This work, and far more than necessary to satisfy the requirements of the act of Congress, was clearly proved without any substantial conflict in the evidence, and therefore the concluding portion of the first finding, to the effect that on November 26, 1900, plaintiff's mining location was made upon unoccupied mineral land of the United States, is unsustained by the evidence. This finding is apparently based upon the view that the Dyer location, having been originally defective by reason solely of noncompliance with the state law, although fully complying with the laws of the United States, acquired no validity by the repeal of the state law. But this is not a correct view. The repeal of the state law, of course, had no affirmative effect in giving validity to the location; but it did away forever with the necessity of conforming to its provisions, and left unimpaired and unaffected every right which is conferred by a compliance with the provisions of the Revised Statutes of the United States. Dyer, having complied with those provisions, was certainly in no worse a situation with respect to this ground than the plaintiff. He had discovered the ledge once. He could not discover it again. He had marked the boundaries of his claim. There was nothing to be gained by marking again boundaries that were already marked. The laws of the United States require no posting or recording of notices, but merely provide that a notice, when required by local regulations, must contain certain things in order to be of any effect. There was no longer any law providing for notice or record, or giving any effect to a recorded notice, and all that Dyer could do was to perform the amount of development work required by the law of Congress, and that he was doing when this action was commenced and injunction issued, more than a month prior to the expiration of the year allowed to him for that purpose.

Upon these facts we cannot understand how it could be held that at the time of plaintiff's attempted location the ground was unoccupied. Dyer had in fact a pedis possessio to the extent of his visible boundaries, and the fact that those boundaries had been marked in connection with an attempted location, invalid only because of failure to comply in other particulars with the state statute of 1897, then no longer in force, made them none the less efficacious for his protection. Conway v. Hart, 129 Cal. 483, 484, 62 Pac. 44. The working of a quartz lode inside of defined boundaries is not only a pedis possessio of all the ground within such boundaries, but is in itself the substance of everything required by law to constitute a valid location, and ever since the decision of this court in English v. Johnson, 17 Cal. 107, 76 Am. Dec. 574, it has been held to give a good title to a mining claim (not excessive in extent), regardless of local rules providing for the posting and recording of notices. It is actual possession, while a formal location is only constructive possession. In addition to the cases of English v. Johnson and Conway v. Hart, above cited from the decisions of this court, we refer for a fuller statement and elucidation of the views here expressed as to the location or mining claims since the act of Congress of May 10, 1872, to the following cases: Golden Fleece Co. v. Cable Consolidated Co., 12 Nev. 312; Gleeson v. Martin White Co., 13 Nev. 442; North Noonday Co. v. Orient Co. (C. C.) 1 Fed. 522; Jupiter Co. v. Bodie Mining Co. (C. C.) 11 Fed. 666. The Nevada cases were among the first that arose under the act of Congress of May, 1872, and the views therein expressed were substantially embodied in the charge to the jury given by Judge Sawyer in the two cases cited from the Federal Reporter. The decisions of Judge Sawyer have been cited and followed in numerous subsequent cases in the federal and state courts, and we are not aware that they have ever been seriously questioned.

It is proper here to notice the case of Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735, which in the department opinion affirming the judgment and order of the superior court was cited as a controlling authority. It will not be difficult, we think, to point out a distinction between that case and this which makes it totally inapplicable to the point to be decided here. In that case Belk, in December, 1876, posted a notice of location upon mining ground then covered by a valid claim of third parties, who by their acts done in compliance with the law of the United States had become invested, according to its express terms, with the "exclusive right of possession" of the ground so located until the 1st of January, 1877. If by that date they did not resume work on the claim their right of possession would lapse, but in the meantime it was unquestionable, and when Belk attempted his location he not only posted his notice upon ground not open to location, but he was guilty of an unlawful act—a trespass upon the lawful possession of others. A careful reading of Chief Justice Waite's opinion will show that for this reason alone his acts done in December were held utterly void. In this case the acts of Dyer, done while the act of 1897 was in force, were every one of them lawful, and every one of them constituted a step taken in compliance with the law of Congress. His discovery was upon unoccupied land of the United States. His entry, his marking of boundaries, his work on the lode—everything he did—was free from any imputation of illegality, and when he had fully complied with the act of Congress there was nothing left for him to do except to post and record the notices as prescribed by the state law, in order to make his location perfect; and this he could have done at any time before the ground became subject to an intervening right.

Under the law of Congress, under the law of this state, and under every code of district laws adopted by miners that has come to my notice, the prescribed order of the acts necessary to a valid location is, first, the discovery of mineral-bearing rock in place; second, the posting of notice at or near the point where the ledge is exposed; next, the recording of notice; next, the marking of boundaries; and, finally, the work of development. But, although this is the proper and natural order of procedure, it is not obligatory, in the absence of intervening rights. It is, indeed, universally held that, when every act necessary to complete a location has been done before an adverse claim has accrued, the order in which such acts have been performed is immaterial. If, for instance, a locator, before the discovery of any lode, begins by first marking out a surface claim, his location is perfected if he develops a lode within his boundaries before a good location is made by an adverse claimant. So here Dyer, having done everything required by the act of Congress, could have perfected his claim under the state law, if it had remained in force, by a subsequent posting and recording of the prescribed notices. To state the matter in another form: Several distinct acts are essential to constitute a valid location. The order in which they are performed is immaterial. Dyer performed all the acts required by the federal statute in a perfectly legal manner, and they were all valid. The acts to be performed under the state law had been omitted, but were still performable at his option without any infringement of intervening claims when the state released him, in common with all others, from compliance with its local law. His claim was then perfect. Belk, on the contrary, commenced his attempted location by an unlawful trespass upon the rights of others, which for that reason was totally invalid as the foundation of any right, and, excluding this unlawful act from consideration, it was held that his subsequent acts, prior to Meagher's location, were insufficient to secure the ground. Dyer's acts, on the contrary—none of which could be excluded from consideration on the ground of illegality—did long prior to the 26th of November, 1900, constitute a perfect location as the law stood from and after the 6th of February of that year.

We have not overlooked the contention of respondent that it is found as a fact by the superior court (concluding portion of the first finding) that, when plaintiff made his location on November 26, 1900, the ground was vacant and unoccupied, and his further contention that there is sufficient conflict and uncertainty in the evidence regarding the Dyer locations to sustain this finding in its broadest sense. We think, however, that such a finding would not only have been in conflict with all the substantial evidence in the case, but it would have been inconsistent with other and more specific findings, and with the allegations of the complaint. The allegation of the complaint is that the ouster by defendants occurred on the 15th of November, 1900, and the evidence conforms strictly to this allegation. It shows that on that day two men employed by plaintiff to do assessment work on his supposed claim were driven from the ground by Dyer and his men. At that date, then, when, according to the specific findings of the court, plaintiff had acquired no rights to any of the ground in controversy, the defendants were on the ground, and remained in possession, claiming it under the location which the court finds they had long before attempted to make. It was eleven days later that the plaintiff's supposed right was initiated by his formal location of November 26th, and when four days later, on November 30th, he filed his complaint in this action, he alleged the ouster on the 15th, the taking possession and claim of ownership by defendants, and that they were excavating and threatening to continue excavating the gold-bearing rock. In short, the allegations of the complaint itself on any fair construction of their terms are inconsistent with the assumption that Dyer was not in possession of his claim at the date of plaintiff's location.

Finally, we think that a new trial should have been granted upon the ground that the decision is against law for want of a finding upon the most material issue presented by the pleadings. It is found that plaintiff made a location of the ground in November, 1900, and it is found that Dyer's previous location was invalid for lack of conformity to a law in force at the time it was made. This finding, however, is entirely consistent, as we have endeavored to show, with the supposition that after the repeal of the act of 1897 his location may have been or become perfect, and the material question—the issue upon which the whole case depends—is not whether Dyer had a good claim in 1898 or 1899, but whether he had a good claim prior to November 26, 1900. Upon this point there is no direct finding, and, if it be contended that it is indirectly or inferentially found against the defendant, we can only repeat that such finding is not only in conflict with the evidence, but inconsistent with the allegations of the complaint.

The judgment and order appealed from are reversed.

We concur: SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

McFARLAND, J. (dissenting). I dissent, and adhere to the opinion heretofore rendered in department. I think that the judgment and ordered appealed from should be affirmed.

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144 Cal. 776

CONTINENTAL BUILDING & LOAN ASS'N v. WILSON et ux. (Sac. 1,176.)*

(Supreme Court of California. Sept. 24, 1904.)

EJECTMENT—HUSBAND AND WIFE—ESTOPPEL—MORTGAGES—FINDINGS—SUFFICIENCY—STATUTES.

1. A finding that all the allegations of the complaint are true except as to damages, that all the allegations of the answer are untrue, that all the allegations of the cross-complaint are untrue, and that all the allegations of the answer to the cross-complaint are true, is not against the pleadings and evidence, merely because plaintiff admitted some of the allegations of the defendant's answer on uncontroverted matters.

2. Where a married woman signs deeds of trust, authorizing payment by the grantee of incumbrances on her land, and thereafter receives the benefits of such payment, she is estopped to say that she did not, in writing, authorize the payment of the incumbrances.

3. Civ. Code, § 2922, providing that a mortgage can be created, renewed, or extended only

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*Rehearing denied October 24, 1904.

by writing executed with the formalities required in the case of the grant of real property, and section 2429, providing that every transfer of an interest in property other than in trust as security for another act is a mortgage, do not prevent the application of an estoppel against a married woman to deny that she did in writing authorize the payment of incumbrances on her real estate by the grantee in a deed signed by her conveying the property in trust, expressly authorizing the payment by the grantee of such incumbrances.

4. The grantee in deeds of trust by which a married woman and her husband authorized the grantee to pay all incumbrances on the land is not, under Code Civ. Proc. § 1971, requiring agents for the transfer of property to be authorized by writing, deprived of the benefit of the provisions of the deeds, in ejectment by the grantee against the husband and wife, merely because plaintiff claimed, in its answer to defendants' cross-complaint, under a verbal contract with the husband, acting for himself and wife, in relation to her land, that certain advances were to be distributed in a given amount pro rata under each deed; it appearing that the deeds of trust each authorized even a larger amount to be distributed thereto.

5. In ejectment by the grantee in certain deeds of trust against a husband and wife, one of the principal issues was that plaintiff agreed to make a building loan of $31,500, and that on the completion of the four buildings in question there remained in plaintiff's hands $23,685; that plaintiff agreed to proceed with four other buildings on the completion of these four, and so on to the completion of all; that plaintiff refused to furnish any further money, by reason of which defendants were prevented from performance on their part. There were no other material issues. The averments of the answer and cross-complaint were traversed by plaintiff in its pleadings. The court found all the allegations of the defendants' answer and cross-complaint were untrue, and that all the allegations of plaintiff's pleadings were true. *Held*, that a contention that the court failed to find on material issues presented by the pleadings is untenable.

Commissioners' Decision. Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by the Continental Building & Loan Association against Charles L. Wilson and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Webb & Creed, Parcells & Brown, and F. P. Tuttle, for appellants. L. L. Chamberlain and Charles Tuttle, for respondent.

CHIPMAN, C. Ejectment. The verified complaint alleges ownership and right of possession of certain lots (describing them) in the city of Lincoln, Placer county; that defendants have excluded and do now exclude plaintiff from possession, to plaintiff's damage in the sum of $1,000. Defendants answered, denying plaintiff's ownership and right of possession; also answered by way of "a second and further defense"; and also "by way of cross-complaint." Plaintiff answered the cross-complaint, and at the trial the court found that all the allegations of the complaint are true except as to damages, that all the allegations of the answer are untrue, that all the allegations of the cross-complaint are untrue, and that all the allegations of the answer to the cross-complaint are true. As conclusion of law the court found the plaintiff entitled to the relief asked for in the complaint, "and for damages, which are fixed at $780." Judgment was accordingly entered, from which, and from their motion for a new trial, defendants appeal.

There are certain admitted facts found by the court which may be first stated: On July 16, 1900, defendants executed 16 different deeds of trust to secure the payment of certain 16 promissory notes, also executed and delivered by them to plaintiff, each for $1,950. Each deed of trust conveyed certain four lots in the city of Lincoln. The money borrowed on each note was to be used in constructing a dwelling on the group of lots conveyed by the deed of trust given to secure said notes. The notes were in the form usual with building and loan associations, and showed that defendants pledged certain shares of the capital stock of plaintiff company, for which they had subscribed, as further security, and agreed to pay for said shares the principal and certain interest and premiums on the shares and interest on the loan monthly, in default of which plaintiff had the right to treat the notes as immediately due and payable. The deed of trust by its terms was to secure "all amounts of principal hereafter borrowed by said grantors, * * * not exceeding at any one time $450." Grantors agreed to pay any incumbrances (and some other charges named) there might be then upon the premises or that might be thereafter imposed thereon as taxes, etc., in default of which plaintiff was authorized to pay the same, and the deed of trust was to be security therefor. Four dwellings were erected with money furnished by plaintiff, and defendants having defaulted, as was claimed by plaintiff, in making certain payments stipulated for in these four promissory notes and deeds of trust, the property was sold by the trustees, and deeds therefor made to plaintiff, and these deeds are the source of title relied on by plaintiff. The controversy arises out of some disputed points in what constituted the agreement made by the parties contemporaneously with the execution of the notes and deeds of trust, and subsequently thereto touching the construction of the building and the furnishing of money therefor by plaintiff. The pleadings on this phase of the case are very lengthy, embracing about 70 pages of the transcript. The agreement as set forth in defendants' answer and cross-complaint differs materially from that contained in that portion of plaintiff's answer "by way of affirmative defense to the matters and things alleged in the cross-complaint of defendants" and as found by the court. The evidence is sharply conflicting on controverted points, but there is evidence sufficient to support the finding that the allegations of plaintiff's answer to defendants' cross-complaint are true.

Stated as concisely as may be, there was evidence that the transaction was as follows: Defendants are husband and wife, and, being desirous of erecting dwelling houses on certain lots in Lincoln, defendant Charles Wilson (who seems to have conducted all the negotiations for himself and wife, either personally or through their broker, one Krigbaum) applied to plaintiff for a loan of $31,200; that being the estimated cost of 16 dwellings at $1,950 each. After much negotiation plaintiff agreed to make the loan, with the understanding that sufficient money would be furnished to pay for four houses when completed, but that no more money would be furnished until these houses had been either sold and this money repaid or the property sold to parties upon part payment, balance secured by mortgages satisfactory to plaintiff; defendants meanwhile to pay the monthly interest and other charges in accordance with the form of note prescribed by plaintiff, and defendants also representing title clear, and, if not clear, they were to make it so. Sixteen separate notes and deeds of trust were executed and at once recorded, although no money was to be then paid over; the purpose of recording all the deeds being to make subordinate any subsequent liens upon the lots. An abstract of title was subsequently furnished by defendants which disclosed several liens on the property, which defendant Charles Wilson represented could and would be removed for $4,000. Further proceedings were thereupon suspended, and plaintiff refused to go forward with the business, unless defendants would cause these prior liens to be discharged. Later along defendant Charles Wilson represented that defendants had made all possible effort to raise the money without success, and appealed to plaintiff to advance it, which plaintiff finally consented to do, and thereupon paid off these lien holders, furnishing $4,000 therefor to defendants under an agreement with Wilson, acting for himself and wife, that this sum should be secured by the deeds of trust by apportioning $250 to each group of four lots covered by a deed of trust, and this advance was to be treated as part of the fund to be furnished in building the houses, and any shortage of money required for that purpose was to be furnished by defendants. This arrangement was conditional to furnishing any money for the construction of any of the buildings, and the $4,000 was paid to the Union Trust Company of San Francisco on August 15, 1900, about one month after the deeds of trust had been executed and recorded; the various documents effecting releases having been placed there in escrow by the arrangement of Wilson and wife. These documents show that they represented judgments, mortgages, or pending actions incumbering the property, and in which Mrs. Wilson and her husband were debtor parties. Witness Corbin testified that no interest was to be charged, or was charged, except on money actually advanced; that Wilson represented that each building and its lots would sell for $3,000, which would pay the loan and leave defendants $500 or $600 or more profit; that Wilson represented himself to be worth $25,000 to $50,000; that the whole amount due plaintiff July 15, 1901, on these four houses, excluding the $4,000 advanced to remove incumbrances, was $8,525.36. This sum is made up of various items, some or all of which are enumerated by witness Corbin, and he testified that he "furnished Wilson a segregated statement of each building, showing the amount due on each building." He further testified: "We did not go on and build four more buildings, because Wilson did not comply with his portion of the agreement to put money into the buildings himself. He did not pay any attorney's fees, and paid nothing on the insurance policies, paid nothing for recording fees, paid no installment of interest and premium, and did not sell the houses. He did not pay us a five cent piece from the time we entered into the original contract with him up to the closing of that contract." Corbin's testimony as to the agreement is corroborated by that of witness Krigbaum, defendants' agent, witness Harding, a director of plaintiff's corporation, witness J. L. Wilson, a contractor, and witness Armitage.

1. It is urged that, because the pleadings of plaintiff admitted some of the allegations of defendants' answer, the omnibus finding that all the allegations of defendants' answer are untrue is against the pleadings and evidence, and brings the finding within the rule of Krug v. Brewing Co., 129 Cal. 322, 61 Pac. 1125; in other words, that the finding in effect is "that all the allegations of the answer so far as they are inconsistent with the allegations of the complaint, and all the allegations of the cross-complaint so far as they are inconsistent with the answer thereto, are not true"—a form of finding condemned in the case cited. We do not think that the admissions in plaintiff's pleadings pointed out in defendants' brief lead to the result suggested. The first is where the agreement to loan defendants $31,200 is admitted. But the answer "denies that the same was to be paid either in the manner or at the times in the said cross-complaint mentioned," and the answer proceeds to set forth what the agreement was. There is no controversy as to the amount which plaintiff agreed to loan, but rather upon the terms upon which it was to be furnished from time to time. The other admission admits the matters contained in paragraph 5 of the cross-complaint, which sets forth the execution of the notes and deeds of trust, about which there is no controversy. The admission is followed by the averment that "they were delivered to plaintiff by defendant, and plaintiff accepted the same, on the terms and conditions hereinafter mentioned; but plain-

tiff denies that it accepted the said promissory notes or deeds of trust except upon the terms hereinafter stated." The findings present no such difficulty as they did in Krug v. Brewing Co., supra.

2. It is contended that the sale under the deeds of trust was premature and void, for the reason that defendants were not in default at the time of said sale. It is claimed that the four loans aggregated $7,800 ($1,950 each), and that but $7,515 was paid for the four houses; that plaintiff, therefore, had sufficient money on hand under the loan to pay all dues, premiums, and interest, and it was plaintiff's duty to apply it to these charges—citing section 1479, Civ. Code; Monroe v. Fohl, 72 Cal. 568, 14 Pac. 514; Bank v. Thein (Sup.) 28 N. Y. Supp. 232. Conceding that defendants were entitled to have any money applied standing to their credit on the loans, the difference between $7,800 and $7,515 would be but $285, while the evidence shows that the dues, premium, and interest due August 28, 1900, on advances made to that time, amounted to $327.60, and on December 5, 1900, like charges amounted to $218.14, not to speak of advances in addition to the contract price on the buildings.

3. It is contended that the lien attempted to be created by the advancement of the $4,000, distributed among the 16 loans, was invalid because contrary to the statute of frauds. With this may be considered the further point, namely, that in no event could this advancement operate as a lien upon Mrs. Wilson's property without her consent thereto expressed in writing, and her husband had no authority in writing to charge her as agent and as required by section 1971, Code Civ. Proc. The agreement was that the money loaned was to be used in the construction of certain houses. Each of the deeds of trust provided for advances, beyond the principal amount to be loaned, for which the property was made security. After the deeds were executed it was found, as above shown, that certain incumbrances rested on the property, placed there by defendants, which they agreed should be removed before any money was paid on the loan. Defendants found themselves unable to do this, and plaintiff advanced the money necessary for the purpose. Mrs. Wilson must be charged with notice of the negotiations, for she signed papers that were placed in escrow, to effect the release of the property, and the discharge of these liens inured to her benefit as well as that of her husband. Besides the deeds of trust expressly provided that defendants should pay "all incumbrances now subsisting or which may hereafter subsist," etc., on the granted premises, in default of which the trustees "may at such time as they deem best, * * * pay and discharge all * * * liens and incumbrances, * * * and these trusts shall continue as security * * * for all money laid out and expended by virtue hereof." In addition to these general provisions in each deed of trust, there was also one covering "all amounts hereafter borrowed by said grantors from said association during the continuance of these trusts, not exceeding at any one time four hundred and fifty dollars."

Mrs. Wilson, having signed the deeds of trust, and having taken part personally in placing the matter of the incumbrances in the hands of the trust company to be paid, and having received the benefit of that payment, cannot be heard now to say that she did not authorize it in writing. The clearing off of these incumbrances was made a condition precedent to furnishing any money for the buildings. Mrs. Wilson will not now be permitted to say that these advances were not secured by the deeds of trust. This view is in no sense inconsistent with the doctrine of the cases cited by defendants (Porter v. Muller, 53 Cal. 677; s. c., 112 Cal. 355, 44 Pac. 729), or the provisions of the Code as to creating or renewing a mortgage (Civ. Code, §§ 2922, 2924). Nor is plaintiff deprived of the benefit of the provisions of the deeds of trust because plaintiff claimed in its answer under a verbal contract with Wilson, acting for himself and wife, that the $4,000 advances were to be distributed among all the deeds of trust, $250 to each. There was no waiver by plaintiff of its lien under the deeds of trust, and the agreement was in harmony with their provisions. Each of the four deeds of trust authorized an advance of $450 at one time, and the agreement to apportion $250 to each deed of trust was more favorable to defendants than the deeds themselves.

4. Finally it is claimed that the court failed to find upon material issues presented by the pleadings. There are no material issues, except such as arise out of the agreement already referred to. One of the principal issues presented by defendants' answer and cross-complaint was that plaintiff agreed to loan the entire sum of $31,500, and that upon the completion of the four buildings there remained in plaintiff's hands, which belonged to defendants, the difference between that amount and $7,515, advanced for these four buildings, or $23,685; that plaintiff by its agreement was to proceed with four other buildings on the completion of these four, and so to the completion of all; that plaintiff refused to furnish any further money, by reason of which defendants were prevented from performance o. their part. These and other averments of defendants' answer and cross-complaint were traversed by plaintiff in its answer. The court found that all the allegations of the defendants' answer and cross-complaint were untrue, and all the allegations of plaintiff's answer thereto were true. It seems to us that every material issue arising under the pleadings was thus disposed of. Defendants' allegations having no foundation in fact to rest upon as affecting

the deeds of trust other than the four under which plaintiff was claiming, the court was not called upon to make any disposition of these other notes and deeds of trust. Plaintiff claimed nothing under them, and answered as to them, to meet the claim of defendants, that plaintiff failed to advance the money it had agreed to advance, and to show that the sale under the trust deeds was not premature. The issue presented by plaintiff was its title and right of possession to the 16 lots in question and no others. Defendants having failed to maintain the defense arising out of their alleged agreement as to the entire transaction, there remained no right of the respective parties as to these outstanding notes and deeds of trust to be determined, further than was done by the court in its judgment "that defendants are not entitled to recover anything from plaintiff by their cross-complaint on file herein, and that defendants take nothing by the same."

We advise that the judgment and order be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

144 Cal. 763

CAYFORD v. METROPOLITAN LIFE INS. CO. (S. F. 3,699.)

(Supreme Court of California. Sept. 21, 1904.)

LIFE INSURANCE—FAILURE TO PAY PREMIUM.

1. Under the provisions of a life policy that, if any installment of premium be not paid when due, the policy shall be void; that all premiums are payable yearly in advance, but when paid in semiannual installments any part remaining unpaid at maturity of the policy shall be deducted, but that this provision shall not affect the provision respecting forfeiture for nonpayment of installment of premium; and that a grace of one month will be allowed in the payment of the "second annual or any subsequent premium"—the policy is void where only the first semiannual premium is paid, and insured dies 15 days after the second semiannual installment has become due.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Hannah Cayford against the Metropolitan Life Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

Page, McCutchen & Knight, for appellant. Van Ness & Redman, for respondent.

SMITH, C. Judgment was entered for the plaintiff on demurrer to the complaint. The suit was brought on a policy of insurance executed by the defendant to plaintiff's husband, of date March 20, 1902. The policy was made payable to the plaintiff, if living at the time of his death; otherwise, to the legal representative of the insured. The payment of the first "semiannual premium" is acknowledged in the policy. The second semiannual installment, which by the terms of the contract became due September 20th of the same year, was not paid; and the insured died 15 days thereafter.

The terms of the policy, so far as material, are as follows:

The "Metropolitan Life Insurance Company, * * * in consideration of the semiannual premium of thirty dollars and ten cents, on or before the delivery of this policy, and of a like amount on or before the twentieth day of March and September in each and every year during the continuance of this policy, not to exceed twenty years, doth hereby agree, in the event of the death of the said insured within twenty years from the date hereof, subject to the conditions set forth on the reverse side hereof, each and all of which are hereby made a part of this contract, and are contracted by the insured and assured to be part thereof as fully as if herein recited, to pay at its home office, in the city of New York, the sum of one thousand dollars to Hannah Cayford, wife of the insured," etc.

"Conditions referred to on the face of this policy as part of this contract: * * *

"Third. If * * * any premium or installment of premium be not paid when due, this policy shall be void and all premiums paid shall be forfeited to the company, except as provided below. * * *

"Fifth. * * * All premiums are considered payable yearly in advance, but when paid in semiannual or quarterly installments, that part, if any, which remains unpaid at the maturity of the policy shall be deducted; but this provision does not affect the provisions of the third paragraph respecting forfeiture for nonpayment of installment of premium.

"Concessions: * * * Fourth. A grace of one month will be allowed in the payment of the second annual or any subsequent premium due on this policy, subject to an interest charge at the rate of five per cent. per annum for the number of days during which the premium remains due and unpaid. The policy will remain in force during the month of grace, and the unpaid premium, with interest as above, will be deducted from the amount payable hereunder in the event of the death of the insured during the grace period."

In view of the express provisions of the contract, the judgment, we think, was unwarranted. By the express terms of the third condition, the policy became void, and the premium paid was forfeited, upon the failure of the insured to pay the second semiannual premium when it became due. Joyce on Insurance, § 1108; Methvin v. Fidelity Mut. Life Ins. Co., 129 Cal. 251, 61 Pac. 1112. Nor is the case in any way affected by the provision of the policy conceding "a grace of one month * * * in the payment of the second annual or any subsequent premium due on the policy." This provision is explained by the provision in the fifth condition of the policy that "all premiums are considered payable yearly in advance," which clearly defines the terms, "the second annual" and "any subsequent premium." Obviously, the provision applies only to the second annual payment (one at the beginning of the second year), and to premiums subsequent thereto.

We advise that the judgment appealed from be reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the complaint.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the complaint: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

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144 Cal. 767

HOWE v. SOUTHREY et al. (Sac. 1,133.)

(Supreme Court of California. Sept. 21, 1904.)

SCHOOL DISTRICTS — JUDGMENTS—COLLATERAL ATTACK—PERFORMANCE—MANDAMUS —INTEREST.

1. A nonappealable judgment awarding costs against a school district is not subject to collateral attack, on the ground that the district was not liable for costs, in mandamus to compel the trustees of the district to perform the judgment.

2. Where a judgment against a school district did not provide for interest, interest could not be awarded on a written mandate issued to compel the trustees of the district to perform the judgment.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Joaquin County; Geo. F. Buck, Judge.

Mandamus on petition of C. E. Howe against J. N. Southrey and others. From a judgment in favor of defendants, petitioner appeals. Reversed.

A. H. Carpenter, for appellant. C. W. Norton, for respondents.

GRAY, C. In a suit originally commenced in the justices' court for $299, and afterwards appealed to the superior court, the appellant obtained judgment in the latter court against the Fair Oaks school district, in San Joaquin county, for $55 and costs, taxed at $134.50. The trustees of said school district offered to pay the $55, but refused to pay the costs. This action is brought to obtain a writ of mandate compelling the trustees of said district to issue to appellant the proper order or requisition upon the county superintendent of schools of said county for the entire amount of said judgment and legal interest thereon. After a hearing the court denied appellant's petition, and the latter appeals from the judgment.

We think the petition should have been granted. Respondents seem to concede that the judgment for the $55 was valid. They contend, however, that the court had no jurisdiction or power to award costs against a school district. We do not think, however, that the case presents a question of jurisdiction. Whether or not the superior court should have taxed the costs against the school district was a question of law necessarily involved in the original case, and there can be no doubt that it was within the jurisdiction of the superior court to decide that question. The case having been appealed from the justices' court, the decision of the superior court was final. It cannot be reviewed on appeal, for there is no further appeal allowed. Nor will a review be permitted upon this application for a writ of mandate. The writ of mandate is "issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station." Code Civ. Proc. § 1085. There is nothing in this provision to indicate that the defendants can avail themselves of the position which they now occupy to review the decision of the court in the original action upon the questions of law which do not involve the jurisdiction or power of the court to act in the matter. If the court had determined in the original action that the costs could not be assessed against the district, the respondents would not now be contending that the court had no jurisdiction to so decide. If it did have jurisdiction to decide the matter either way, it had equal jurisdiction to decide it the other way. Jurisdiction, in cases of this character, implies the power of the court to decide a question wrong as well as right. It is, therefore, not necessary for us here to determine whether the costs should have been assessed against the district or not. This is a collateral attack upon the judgment in the original case, and we can go no farther here than to determine whether the judgment is void or not. The court having acquired jurisdiction of the subject-matter and of the parties, its judgment is not void for a mere erroneous decision of a question of law, however important that question may be. The judgment having been rendered by a court of competent and final jurisdiction, it fixes the liability of the district, and from this arises the duty in the board of trustees to issue to appellant the necessary requisition to satisfy the original judgment.

As to the matter of interest, it does not appear from the petition herein that any interest was provided for in the judgment entered in the original suit. Mandamus does not lie to enforce the obligation of contracts, but only to enforce the performance of an act which the law specially enjoins. In this case it can go no farther than to compel the board to issue its requisition for the exact amount of the judgment. It cannot determine whether the obligation rests upon the district to pay interest upon the judgment, for such is not the office of the writ of mandate. Barber v. Mulford, 117 Cal. 356, 49 Pac. 206.

We advise that the judgment be reversed, with directions to the court below to issue the writ in accordance with the foregoing opinion.

We concur: HARRISON, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to issue the writ in accordance with the foregoing opinion: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

144 Cal. 677

McCARTY v. SOUTHERN PAC. CO. et al. (CITY OF SACRAMENTO, Intervener; Sac. 1,200-1,202.)*

(Supreme Court of California. Sept. 19, 1904.)

NEW TRIAL—REVIEW—FINDING.

1. Where, in an action against certain railway companies and a city to quiet title to a levee and to enjoin its use, the city claimed title thereto by estoppel, adverse possession, etc., and the railway companies claimed under the city and by grant of the state legislature, etc., and, notwithstanding the evidence showing a long continued use of the levee by the defendants was conflicting as to whether the use was under assertion of right and therefore adverse, and that defendant railway companies had expended large sums of money on the levee with the knowledge and acquiescence of plaintiff and his predecessors, etc., the court made a single finding that defendants had no right, title, or interest in or to any part of the land, or any easement over the same, an order granting a new trial was not erroneous.

In Bank. Appeal from Superior Court, Sacramento County; F. B. Ogden, Judge.

Bill by Daniel McCarty against the Southern Pacific Company and others and the city of Sacramento, intervener. From a judgment in favor of plaintiff, defendants and intervener appeal, and from an order granting a new trial, plaintiff appeals. Affirmed.

J. H. McKune, for appellants. S. Luke Howe and A. A. De Ligne, for intervener. Devlin & Devlin, for respondents S. P. R. R. Co. and C. P. R. R. Co. Burns & Ford and A. L. Shinn, for defendants.

HENSHAW, J. The action was commenced by plaintiff to quiet his title to a tract of land situated in the county of Sacramento commonly known as the "Norristown Tract." So far as the defendants and the intervener, the city of Sacramento, are concerned, the dispute is over a strip of this land, 165 feet wide, running through the tract in a northerly and southerly direction. This strip of land constitutes a part of the levee of the city of Sacramento, and on the levee are, and for many years have been, steam railroad tracks, now controlled and operated by the Southern Pacific Company. By his action plaintiff sought a judgment that the defendants the Southern Pacific Company and Central Pacific Railroad Company have no right of way, easement, or franchise on the levee of the city of Sacramento located on the land, and an injunction enjoining them from operating trains thereon. Many years prior to this, the city of Sacramento had granted franchises to the predecessors of defendants to lay tracks and operate trains on the levee, and accordingly the city intervened, contending that it was the owner in fee of the levee and of the strip of land upon which it was built. No controversy arises between the intervener and the defendants. They make common cause against the claims of plaintiff. The trial court gave judgment for the plaintiff, holding that the defendants had no right of way on the levee, and enjoined them from going on it. It further adjudged that the city did not own the fee of the levee and the land on which it was constructed, but had an easement over the land for levee purposes only, which had been acquired by prescription. From this judgment the defendants and intervener appealed. The defendants also moved for a new trial, and their motion was granted. From this order the plaintiff appeals. The situation thus presented is an appeal by defendants from an adverse judgment, which has been vacated by the trial court's order for a new trial, and an appeal by the plaintiff, in whose favor the judgment ran, in resistance of the court's order for a new trial. If the order granting a new trial is to be sustained, it is wholly inutile to consider the appeal from the judgment, as upon new trial entirely different findings and conclusions may be reached.

A brief exposition of the claims of the defendants and intervener will serve to throw light upon the material matters in dispute. At a very early day, and to protect the city of Sacramento from flood waters, a levee was built upon this land. It was then owned by the predecessors in title of plaintiff. The city of Sacramento contends that it acquired absolute title in fee to the land over which this levee was constructed by condemnation proceedings, by adverse title and prescription, by exercise of its police power, and by estoppel raised against plaintiff to dispute its title. Further, that if it be not the owner in fee, it still is the owner of a perpetual easement for levee purposes, and for all uses and purposes incidental and beneficial thereto, which easement has the same sources and origin as those just recited touching the title in fee. The defendant railroad companies based their right to the use of the track upon the levee upon a franchise from the board of supervisors of the city and county of Sacramento, upon a contract and agreement with the board of city levee commissioners, upon a grant from the Legislature of the state of California, upon a prescriptive right, and by the acquiescence and laches of plaintiff. It further, and among other claims and contentions not here necessary to specify, insists that if the city of Sacramento be the owner in fee of the strip, or of a perpetual easement for levee purposes over it, that defendants' right to operate a track upon the levee cannot be questioned in an action such as this, where the plaintiff seeks possession; that defendants are using the easement only, and that, as plaintiff is not entitled to the possession of the levee against the city, he is not entitled to it as against one claiming under the city; that all objections to the validity of the franchise or franchises granted to the predecessors in interest of the defendants must be made in direct proceedings instituted by the Attorney General in the name of the state; that the track in question is a part of the railroad system of defendants, and has been such since its construction in 1869; that it joins the main line of the Central Pacific Company running to Ogden and the main line of the Western Pacific Railroad Company running from Brighton to San José and San Francisco; that the track has been used for such general railroad purposes as were necessary or requisite; that large sums of money have been expended in broadening and preserving the levee, and in improving the track, and that plaintiff and his predecessors having permitted this construction and these improvements and the maintenance thereof for 30 years, plaintiff is precluded from interfering with the possession of the defendants, and, if injured at all, must seek relief in an action for damages. This sufficiently outlines the main points of controversy between the parties. Upon some of them the probative facts are not in dispute, since they rest wholly upon uncontradicted records, but the ultimate facts—that is to say, the proper conclusion to be drawn from these undisputed probative facts—are the subject of keen controversy. The court upon all of these matters of defense, and upon all of these separate claims of title and interest, made the single brief but comprehensive finding that the defendant companies "have not, nor has either of them, at any time had any right, title, estate, or interest of, in, or to any part of the land described in said amended complaint, nor have they, or either of them, at any time had any easement of a right of way for a railroad over any part of said land, and the several adverse claims of the said corporation defendants, set out in their several answers filed in this case, are, and each of them is, invalid." It seems highly probable that upon argument of the motion for a new trial the court's views, as expressed in this finding, were materially modified. Certain it is that the evidence showed a long continued use by the defendants, and that it was at least conflicting as to whether that use was under assertion of right, and therefore adverse and prescriptive in its nature, or was in subordination to the asserted right of plaintiff and his predecessors. The evidence also showed the expenditure of large sums of money by the company with the knowledge and acquiescence of plaintiff and his predecessors, and yet the court failed to find upon the plea of estoppel. There is further conflict in the evidence as to the construction of the railroad track; plaintiff claiming that it was constructed for the beet sugar factory of the prior owners of the land, defendants insisting that it was a part of its main line from the Missouri River to the Pacific Ocean. There thus appears to have been sufficient to have justified the order of the court granting a new trial, and this without a consideration of the propositions advanced upon the appeal from the judgment, since they will only properly come before this court when the trial court has finally expressed its views, as they may be modified by the result of the new trial which it has ordered.

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*Rehearing denied October 19, 1904.

The order granting a new trial is therefore affirmed. It becomes unnecessary to consider the appeals from the judgment.

We concur: McFARLAND, J.; LORIGAN, J.; SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

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144 Cal. 717

FAUBEL v. McFARLAND et al. (Sac. 1,153.)

(Supreme Court of California. Sept. 20, 1904.)

TITLE TO REAL ESTATE — ESTOPPEL — ADVERSE POSSESSION—TENANTS IN COMMON—MINING CLAIM—ASSESSMENT WORK.

1. S., the owner of an undivided half interest in a mine, as shown by the records, though witnessing an agreement of V., the owner of the other half, to sell the property, and though present at the mine when it was visited by plaintiff after receiving a deed of the entire property from V., and then wishing plaintiff success, is not estopped to assert his title; he not having known that the deed purported to convey the entire property, and not having made any representations to plaintiff respecting the character of his title.

2. A cotenant cannot by exclusive possession of property acquire title by adverse possession, without notice indicating that the possession is hostile or adverse.

3. One of the tenants in common of a mining claim does not lose to his co-tenant his interest in the mine by not contributing to the assessment work of the latter.

Commissioners' Decision. Department 2. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

¶ 2. See Tenancy in Common, vol. 45, Cent. Dig. § 49.

Action by **J. Faubel** against S. J. McFarland and others. From an adverse judgment, plaintiff appeals. Affirmed.

G. H. Perry, for appellant. J. Quadt, J. P. Martin, A. O. Colton, and A. H. Ricketts, for certain respondents.

HARRISON, C. Action to quiet title. Judgment was rendered in favor of the defendants, and the plaintiff has appealed. The correctness of the judgment is challenged only in so far as it was in favor of Samuel J. McFarland. In this respect the court found that the plaintiff and McFarland were each the owner of an undivided half of the premises in controversy between them—the Alpha mine, situate in Madera county—and rendered judgment that the plaintiff take nothing against him by reason of this action.

The title of each to the premises is derived through a decree of foreclosure and a sale thereunder, wherein the property was sold November 26, 1894, by a commissioner appointed therefor, to Victoria B. McFarland and the said Samuel J. McFarland; and there having been no redemption therefrom, the commissioner executed a conveyance to them June 6, 1895, which was recorded in the office of the county recorder June 10, 1895. The title thus conveyed to Victoria became vested in the plaintiff by virtue of certain mesne conveyances, while that conveyed to Samuel has never been conveyed by him. As they were, therefore, tenants in common, the plaintiff was not entitled to the relief sought by him. He contends, however, that it appears from other evidence in the record that he has acquired the title to the whole of the property by adverse possession, and that the respondent Samuel is estopped from disputing his title thereto. After the sale by the commissioner, but before the time for redemption had expired, Samuel had some correspondence with an attorney named Clement, looking to an assignment of the certificate of sale held by himself and Victoria (his mother). No assignment of the certificate was made, however, but thereafter Victoria executed an agreement to sell the property to one Cabaniss, in which reference was made to the letter of Samuel. In this agreement it is recited that Cabaniss was acting therein through his attorney, Clement, and the execution of the agreement is witnessed by both Clement and Samuel. Thereafter Victoria conveyed the property to Cabaniss July 22, 1895. At the trial herein the plaintiff testified that Clement was his attorney in conducting the negotiation for this purchase of the property, and that he (the plaintiff) paid the money and received the deed executed to Cabaniss. He does not claim, however, to have taken possession of the property until after the deed from Cabaniss in February, 1896. On the other hand, the husband of Victoria testified that Clement acted as attorney for Mr. Cabaniss, and there was no evidence that Samuel saw the deed to Cabaniss or knew of its contents. Cabaniss conveyed the property to the plaintiff and one Benton February 29, 1896, but the deed was not recorded until April, 1900. Benton conveyed his interest to the plaintiff in October, 1897.

The plaintiff testified that after the deed from Cabaniss to himself and Benton he went to the property and let a contract to run tunnels therein to J. P. McFarland, the father of Samuel; that at the time he took charge of the mine he saw Samuel there and had a conversation with him, in which Samuel wished him success; that he again saw him on the property in 1900; that he visited the property once or twice every year; that J. P. McFarland was in charge up to 1897; and that after that nobody was in charge, no work being done other than assessment work. It cannot be held that the evidence thus presented created an estoppel against Samuel from asserting his title to the undivided half of the property. He made no representation to the plaintiff respecting the character of his title, nor does the plaintiff claim to have relied upon any statement by him, or to have been in any respect influenced thereby in his conduct. At the time that he took the conveyance from Cabaniss he had notice from the public records that Samuel was the owner of an undivided half of the property and that he had never conveyed the same. The presence of Samuel at the mine when the plaintiff went there after receiving the deed from Cabaniss was consistent with this record, as was also his wishing the plaintiff success. It does not appear that Samuel knew that the deed from his mother to Cabaniss, or from Cabaniss to the plaintiff, purported to convey the entire property, and the deed from Cabaniss to the plaintiff was not placed upon record until more than four years after its date.

Neither does the evidence show that the plaintiff had acquired any title by adverse possession of the property. Being tenant in common with the respondent, the plaintiff could not by mere exclusive possession, even if such had existed, acquire the title of his co-tenant. His possession was that of the respondent, and would inure to the benefit of the respondent, until he should by some notice, actual or constructive, indicate to him that such possession was hostile or adverse. The rule on this subject has been so often stated that it is sufficient merely to refer to the cases. Miller v. Myers, 46 Cal. 539; Unger v. Mooney, 63 Cal. 592, 49 Am. Rep. 100; De Frieze v. Quint, 94 Cal. 662, 30 Pac. 1, 28 Am. St. Rep. 151; Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658. The evidence herein falls far short of meeting the requirements of the rule thus indicated.

The fact that Samuel did not contribute to the assessment work done did not deprive him of his interest in the mine, or transfer his interest to the plaintiff. Rev. St. U. S. § 2434 [U. S. Comp. St. 1901, p. 1498], provide the mode in which the plaintiff could have protected himself; but he did not avail himself of that mode.

There is a suggestion in the appellant's brief, although it is not directly stated, that in the negotiation for the purchase by Cabaniss in 1895 it was the intention of the parties thereto that Samuel should join in the execution of the deed. There is no evidence tending to show this fact, however, and in consideration that his title was clearly shown by the records, and that Mr. Clement acted as attorney for Cabaniss, and must have carefully examined the deed, it is not to be presumed. But, even if such were the intention, it is not available to the plaintiff in this action under the pleadings herein.

The judgment and order should be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons stated in the foregoing opinion, the judgment and order are affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

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144 Cal. 709

BANK OF WILLOWS v. SMALL et al. (Sac. 1,053.)

(Supreme Court of California. Sept. 20, 1904.)

APPEAL—REVIEW OF FINDINGS—PAROL GIFT OF LAND—EVIDENCE TO SUSTAIN CREDITORS' SUIT—EVIDENCE.

1. Every presumption is in favor of the ultimate findings of a trial judge, and it is only in cases where there is an absence of substantial evidence that such findings will be set aside by an appellate court.

2. To sustain a parol gift of land by a mother to her son, the facts must be such that it would be a fraud on the donee if the contract were not enforced, and a mere expression of intention on the part of the mother to give the land to the son, and permitting him for some years to take the rents and profits, where, although she conveyed land by way of gift to other children, she retained the title to that in dispute until after she had incurred a large indebtedness as surety, for which she had been sued, when she conveyed the land to the son without his knowledge, does not make a case which warrants a court of equity in sustaining the conveyance as against her creditor.

3. In a creditors' suit to set aside a conveyance of land by a surety for the plaintiff's debt, evidence is admissible to prove the insolvency of the principal, and also of the surety aside from the land conveyed.

Commissioners' Decision. Department 2. Appeal from Superior Court, Glenn County; Frank Moody, Judge.

Action by the Bank of Willows against William Henry Small and Nancy Small. From a judgment for plaintiff, William Henry Small appeals. Affirmed.

Frank Freeman and Charles L. Donohoe, for appellant. F. C. Lusk, for respondent.

COOPER, C. Appellant presents this appeal from an order denying his motion for a new trial. The facts, concerning which there is no controversy, are substantially as follows: Henry Small died in Colusa county about the year 1874, leaving a widow, defendant Nancy Small, to whom he devised all his property, consisting of several ranches, among which was a ranch containing 1,800 acres, known as the "Musick Place," and being the property in controversy here. The land stood on the records in the name of defendant Nancy Small at all times after the decree of distribution in the estate of Henry Small until June, 1896. In March, 1896, one Julian, a son-in-law of defendant Nancy Small, and a brother-in-law of appellant, William Henry Small, borrowed from plaintiff $5,000, giving his promissory note therefor, signed by defendant Nancy Small, the note being a joint and several note. In May, 1896, Julian died, being insolvent, and his estate has ever since been insolvent. After the death of Julian in June, 1896, defendant Nancy Small, without consideration, made and recorded a deed of gift to her son and codefendant, William Henry Small, who knew nothing about it, and was then in the state of Oregon, where he had resided since the death of his father. This land was the only property possessed by defendant Nancy Small, and by her conveyance to her son she became, and has since been, insolvent. After the death of Julian plaintiff commenced an action in the superior court of Colusa county against defendant Nancy Small upon the said promissory note, and recovered a judgment for the amount thereof, with interest, the total being $5,417.58. Upon this judgment a writ of execution was issued, and, after the application of $1,207.99, being the proceeds of sales of certain personal property, was returned unsatisfied for the balance, $4,332, which is still due and unpaid. This action was commenced in October, 1896, for the purpose of setting aside as fraudulent and void, as to the plaintiff, the deed made by defendant Nancy Small to her son and codefendant, and resulted in judgment upon the findings in favor of plaintiff. It was not disputed that at the time of the conveyance by defendant Nancy Small to her codefendant she was insolvent, and that she has remained so; that plaintiff was a creditor of Nancy Small at the time of the said conveyance, and is still such creditor; that the deed so executed by her was without consideration, and was a deed of gift. Defendant Nancy Small made default, and is therefore out of the case. There being no appeal from the judgment, it will be regarded as the correct conclusion from the facts found.

The appellant contends that he had title to the land by reason of a parol executed gift of the same, and by reason of adverse possession for more than five years immediately prior to the commencement of the suit. The court found against him on both propositions, and the sufficiency of the evidence to justify the findings in this regard is the important question here. Every presumption is in favor of the ultimate findings of the trial judge. It is only in cases where there is an absence of substantial evidence that this court will interfere. It is said in appellant's brief: "There can be no question, under the evidence in this action, that if the defendant relied entirely and solely for his title upon the deed made to him by Nancy Small in June, 1896, that his case must fail, and plaintiff would be entitled to judgment, because, if that were his only claim to the land, there is no doubt but, under the provisions of section 3442 of the Civil Code, that the deed would be void. But the defendant William Henry Small does not claim a title to this land by virtue of that deed." Appellant then proceeds to argue that he obtained title by a parol gift from his mother in the year 1878. Experience has proven that parol evidence is too uncertain, and perjury is too often committed, to allow a title to real estate to rest in parol. It has therefore been the rule in England, and in this country, and in all civilized countries, for many years, that a conveyance of real estate is void unless in writing. Courts of equity, in order to prevent great wrongs, have recognized and established certain well-defined exceptions to the rule. Where the conduct and acts of the owner have been such as in equity and good conscience to estop him from claiming the land—as where he has received the consideration, and allowed the party purchasing to go into possession and erect valuable improvements; or where he has made a parol gift, and the donee has gone into possession, made valuable improvements and changed his condition; and in other cases where the equities are similar—courts will grant relief. But in all such cases the facts must be such that it would be a fraud upon the innocent party in possession not to enforce the parol contract. These exceptions have grown up under the doctrines of courts of equity, and while, in many cases, preventing great injustice, have been a source of much litigation, and have perplexed the courts in drawing distinctions as to whether or not any given case is an exception. The tendency of courts of late years has been to strictly construe the rule as to exceptions, and not to extend the doctrine. When a party claims the assistance of a court of equity to enforce an exception to the rule, the case must fall within the doctrine of courts of equity as to such exceptions, and the evidence must be clear and convincing. Particularly is this so as to family arrangements where a parol gift of land is claimed by one child to the exclusion of others, or by a wife to the exclusion of the children. It is often sought in such cases to construe acts of kindness attributable to love and affection into gifts such as to pass valuable estates. A man who has been kind to a son or brother dies, and when he can no longer speak the party who has been the object of his bounty, and who should show his gratitude, sets up a claim of title which he never asserted while the owner was living. The rule, as stated in Waterman on Specific Performance of Contracts, § 187, is as follows: "A gift of real estate will be enforced with great caution, and not, in general, unless the donee has taken possession and made improvements on the faith of the gift. When he does this, it constitutes a valuable consideration to ground a claim for specific performance. Where complainants alleged a gift of real estate from defendant's testator in consideration of natural love and affection, and that the donee, pursuant to said gift, went into possession of the premises, made large improvements thereon, and finally died in possession thereof, it was held that, to entitle the complainants to a decree, there must be a conclusive proof of the gift, and satisfactory evidence explaining why the gift was not consummated by a conveyance." It was said by this court in Blum v. Robertson, 24 Cal. 142: "It is a rule well settled that a party who claims a right to a conveyance of land under a parol or verbal contract on the ground of part performance must make out by clear and satisfactory proof the existence of the contract as alleged by him; and it is not enough that the acts of part performance proved are evidence of some agreement, but they must be unequivocal and satisfactory evidence of the particular agreement charged in the complaint or answer, as the case may be; besides which the agreement must appear to be certain in its terms, and just and fair in all its parts." A valuable and leading case upon the subject of a parol gift between relatives is Poorman v. Kilgore, 26 Pa. 372, 67 Am. Dec. 524. It is there said: "The very nature of the relation, therefore, requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have especial reference to it, and nothing else. [Christine v. Manderson] 2 Pa. 365 [not in point]; [Hack v. Stewart] 8 Pa. 213; [Bash v. Bash] 9 Pa. 262; [Lantz v. Frey] 14 Pa. 201; [Sanders v. Wagonseller] 19 Pa. 251–366; [McCue v. Johnston] 25 Pa. 308; [Huguss v. Walker] 12 Pa. 175. The importance of this rule is very apparent, for it requires but a glance over the cases of this class to discover how sad has been the experience of the court in family disputes growing out of the exceptions which have been allowed to this statute; and how many and how distressing must have been the ruptures of the closest ties of kindred that have been produced and perpetuated by the encouragement thus given to try the experiment of extracting legal obligations out of acts of parental kindness." It was said in Poullain v. Poullain, 76 Ga. 420, 4 S. E. 92: "Where a son claims land under a parol gift from his father, the evidence should be so clear, strong, and unambiguous as to leave no reasonable doubt." In Hardesty v. Richardson, Ex'r, 44 Md. 617, 22 Am. Rep. 57, the rule is thus stated: "The proof must be clear, definite, and conclusive as to the fact of the gift, and those facts done on the faith of it, which render inequitable any attempt on the part of the doner to avoid the gift." In Jones v. Tyler, 6 Mich. 364, the rule is thus stated: "There is no evidence in this case clearly establishing the fact that Job Tyler ever gave, or agreed to convey, the property in question to his son De Witt. That he sold it, there is no pretense. As against the widow and heirs of Job Tyler, a decree for a conveyance would be made only on the most conclusive proof of the gift and of some satisfactory reason why it was not consummated by a conveyance, even if upon the case made by the bill relief would, in any case, be granted. * * * The evidence of Bonham is the most direct and satisfactory of any, but even this shows no contract of agreement; nothing but an unexecuted intention."

It is not necessary to cite further authorities. Now, the court found: "The said defendant Nancy Small was the owner in fee and entitled to the possession of all of said real estate in the month of October, 1878, and had been and was such owner in fee and entitled to the possession at all times from that time unto the date of said deed of gift, to wit, June 10, 1896; that on the ——— day of October, 1878, or at any other time, the said defendant Nancy Small did not make a gift of all or any of the land described in the complaint to the defendant William Henry Small; and upon the ——— day of October, 1878, or at any other time, the defendant Nancy Small did not deliver to the defendant William Henry Small the possession of all or any of the lands above described in pursuance to any gift." This finding is supported by the evidence. Nancy Small was defendant's witness. When we remember that she is a hostile witness to plaintiff and friendly to her codefendant, her evidence is doubly significant. She testified that after the death of her husband in 1875 she gave and deeded to her daughter Mrs. Welch the "Welch Place," to her daughter Mrs. Julian the "Julian Place," to her son George the "Fruto Ranch," that defendant William Henry Small lived in Oregon on some land given him by his father in his lifetime; that she intended him to have the Musick Place, the land in contest; that it was the understanding that appellant should have the land in contest; that about four years after her husband's death appellant came down from Oregon on a visit; that he said to her, "Mother, you just as well give me a deed to this place" (referring to the land in contest); that she replied, "William, that is my last piece of land, and I have always had a home, and I could not be satisfied—could not rest satisfied—if I gave up the land. 'Well,' he says, 'Mother, hold it. * * * I will wait a while for a deed.'" The defendant William Henry Small continued to live in Oregon, and did not live on the place, although his mother had allowed him to use it, and take the rents and profits. He does not appear to have asked her again for a deed. After the death of her son-in-law, and without request from appellant, and without his knowledge, while the note was still unpaid, she voluntarily executed the deed to him. The appellant testified that all his father's real estate was left to his mother, to be disposed of as she saw fit; that the first time he saw his mother after his father's death was in October, 1878; that his mother told him she had willed him this land—that she had given it to him—and showed him the will; that he, through his agents, rented the place thereafter to tenants, and received the rents, and paid the expenses of keeping up the place and taxes. The appellant does not deny the conversation with his mother in which he said, "Mother, hold it; I will wait a while for a deed." The land was always assessed to defendant Nancy Small. While the evidence tends to show that defendant Nancy Small intended that appellant at some time should have the land, it does not show that she finally made up her mind to part with it until she made the deed after the death of her son-in-law Julian. Appellant was allowed to take the rents and profits, but this did not injure him, and shows no equitable ground for relief. It is not a case where the donee went into possession and expended money in valuable improvements on the faith of an oral gift. If the property had been levied upon by a creditor of appellant prior to the deed of June 10, 1896, could such creditor have held the land as against Nancy Small? It seems plain that it could have been shown to be the property of Nancy Small. The promise had not been fulfilled. There is no testimony to show a clear intention of Nancy Small at any time prior to the deed to part with the title and vest it in appellant. If so, she would have made a deed. She made deeds to her other children. When she parted with the title to them, she did it in the usual manner. She kept the title in her own name of the land she wanted for a home. She had it in her own name when she signed the note as security for Julian. When Julian died insolvent, she made the deed to appellant without his knowledge. It is at least singular that her intention to part with the home took place so suddenly, and under such circumstances. Under such circumstances the law will compel her to be just before she is generous. Appellant may take the land deeded to him as a gift, but he must take it subject to the burden of the debt incurred by the owner while she kept it in her name.

As to adverse possession, the court found that appellant's possession was "not adverse or hostile to the said Nancy Small, and his possession was permissive from her, and he held under and in pursuance and in recognition of her title, and not adversely to her during all of that time." The evidence heretofore discussed shows this finding to be true.

Appellant claims that the court made several errors in the admission or rejection of testimony. Several of the first errors assigned relate to the allowance of proof by oral testimony, and the records and papers in the estate of Julian, for the purpose of showing that the estate is insolvent, and the claim of plaintiff unpaid. The evidence was proper. It was necessary for plaintiff to show that it could not collect its claim from the estate of Julian, nor from other property of Nancy Small, before it could complain as to the deed. The deed would not have injured plaintiff if it could still collect the amount of its claim from other sources.

The other alleged errors are equally without merit. They are not of such character, even if technically erroneous, as to justify a reversal of the case.

The order should be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

144 Cal. 705

PEOPLE v. BARKER. (Cr. 1,149.)*

(Supreme Court of California. Sept. 20, 1904.)

BURGLARY—WITNESS—ABSENCE FROM STATE—EVIDENCE—ADMISSIBILITY—SUFFICIENCY.

1. In a criminal prosecution a police officer testified to a conversation with an absent witness between the time of the commission of the alleged crime and the date of the trial, in which he was told by the witness that he was going to the state of Washington. The officer also testified that he had never seen the witness afterwards, though he had made inquiries at the places where the witness had formerly resided and failed to find him. A brother of the absent witness testified that he resided in the state of Washington, and that letters had been received from him from there by the witness testifying, the last about seven or eight days before the trial. *Held* sufficient to warrant a finding that the witness was absent from the state, authorizing the admission of the testimony of the absent witness at the preliminary hearing of the charge against defendant.

2. Testimony to the fact of having received letters from a person is not hearsay.

3. Where a witness is absent when a criminal case is called for trial, letters from him, written from a place outside of the state at different times to a person in the state, are admissible as tending to show where the absent witness was at those times, in view of Code Civ. Proc. § 1963, providing that it is presumed that private transactions have been fair and regular, and that things have happened according to the ordinary habits of life.

4. Where a witness is absent when a criminal case is called for trial, a paper purporting to be a subpœna, issued by the district attorney and addressed to the absent witness, and given to an officer, is admissible to show that it could not be served on account of the absence of the witness, though not properly signed.

5. In a prosecution for burglary, where it appeared that a certain witness was not married to defendant at the time of the burglary, but was married to him afterwards, permitting the prosecutor to ask the witness where she was married to defendant is not cause for reversal, though she answered that she was married to him in the county jail.

6. In a prosecution for burglary, where it appeared that the stolen property was found in the rooms occupied by defendant and a woman whom he married shortly after the commission of the alleged crime, the fact that an adjoining room, connected with defendant's room by a door, was occupied by two other persons, who had access to defendant's rooms, so that defendant was not in exclusive possession of the room in which the property was found, does not render the stolen property inadmissible.

Department 1. Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Thomas Barker was convicted of burglary, and from the judgment of conviction, and an order denying a motion for a new trial, he appeals. Affirmed.

Frank J. Murphy, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Deputy Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

McFARLAND, J. The defendant was convicted of burglary and sentenced to imprisonment in the state prison. He appeals from the judgment and from an order denying his motion for a new trial. He asks for a reversal upon the grounds, first, that the verdict is not supported by the evidence, and, second, that the court committed errors during the trial in ruling upon the admissibility of evidence.

1. The first ground is not tenable. The evidence presented some room for a plausible argument to the jury that it was not sufficient to warrant a verdict of guilty; but there was evidence tending to show defendant's guilt, sufficient to put that question fairly within the province of the jury.

2. We do not think that there should be a new trial for any asserted error in ruling upon the admissibility of evidence. The only point under this head which calls for any considerable discussion arises on the alleged error in admitting in evidence the testimony of August Amiot, which had been given at the preliminary examination. The witness Braig, a police officer, testified that Amiot bid him good-by in San Francisco, where he had been living, and told him that he was going to Seattle, in the state of Washington, to engage in business there. The exact date of this conversation is not given, but it was between the date of the burglary and the

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*Rehearing denied October 13, 1904.

time of the trial. Braig also testified that he had never seen Amiot afterwards in San Francisco, where he had formerly resided, and that he had made inquiries for him at the places where he had formerly resided and frequented, and failed to find him. John B. Amiot, who is a brother of said August Amiot, testified, first generally, without objection, that August resided in Seattle, and afterwards that he had received letters from August from Seattle, and that the last letter so received was about seven or eight days before the trial, in which he stated that he was to go to Idaho, traveling for his firm, and would be back at Seattle in about eight days. This evidence warranted the court in finding that the witness was absent from the state, and in allowing his testimony given at the preliminary examination to be introduced. It was stronger than that held sufficient in People v. McIntyre, 127 Cal. 427, 59 Pac. 779, and People v. Goodrich, 142 Cal. 220, 221, 75 Pac. 796.

But appellant objected to the testimony of John B. Amiot that he had received letters from his brother from Seattle upon the ground that it was hearsay. This ground of objection is not tenable. The testimony of John B. was not itself hearsay. It was testimony to the fact that he received certain letters from his brother from a place outside the state; and the fact that August wrote letters from Seattle at certain times was admissible as a fact tending to show that he was there at those times. These letters were apparently written in the ordinary course of things, and there is nothing to raise a suspicion that they were not in fact written at Seattle, or that they were sent there from some other place to be mailed there, to meet some emergency, and to accomplish some fraudulent intent. It is presumed that "a person is innocent of crime or wrong," that "private transactions have been fair and regular," and that things have happened "according to the ordinary habits of life." Code Civ. Proc. § 1963. These letters sent by Amiot from Seattle were concurrent acts tending to show his presence there, not narrative of past events; and they were clearly admissible as evidence of his presence there within the rule stated in sections 108, 162c, 162d (16th Ed.) Greenl. Ev. In section 108 the author says that declarations of a person are admissible as evidence that he "is upon a journey, or leaves his home, or returns thither, or remains abroad." And see cases cited in notes to said section 108. In King v. McCarthy, 54 Minn. 90, 55 N. W. 960, a case quite similar to the one at bar, the question was whether there was sufficient evidence of the absence of one Bell to warrant the introduction of his testimony at a former trial. And the court in summing up the evidence, which was held sufficient, say that "his brother in St. Paul had since his departure received frequent letters from him, dated at Chicago, New York, Indiana, Kansas City, and St. Louis; the latest being from the last-named place about two weeks previously." And the court say: "Whether he intends to return is a fact only positively known to himself, and upon this question his declarations are admissible." And the court further says: "We do not understand that the competency of evidence upon a preliminary question of this kind, which is to a certain extent addressed to the sound discretion of the court, is governed by the same strict rules which apply to the admission of evidence upon the issues in the case. Anything which will reasonably satisfy the court that the absent witness is not likely to return within the jurisdiction of the state may be admitted."

A paper purporting to be a subpœna, issued by the district attorney and addressed to the absent witness, and given to an officer, was admitted in evidence, over the objection of appellant that it had not been properly signed; but this was an entirely immaterial matter. If the witness had been served, and he had refused to obey the subpœna, its sufficiency on contempt proceedings might have been important. It was evidently issued merely for the purpose of formally showing that it could not be served on account of the absence of the witness, which absence was well known to the prosecution.

Appellant's wife was asked by the prosecution, over objection, where she was married to appellant, and answered that she was married to him in the county jail. Whether or not this question was strictly proper, it certainly was not, under the circumstances, of sufficient importance to have been prejudicial to the appellant. It abundantly appeared from the testimony of both sides, and was uncontradicted, that the witness was not married to appellant at the time of the burglary, but was married to him afterwards, and after his arrest. The fact that the marriage took place in the county jail, where appellant was presumably confined, was a matter, considering the other facts above referred to, which could not have had any additional effect upon the jury.

Appellant objected to the introduction in evidence of the stolen property. This property was found in the rooms occupied by the appellant and the woman who afterwards became his wife, within an hour or two after the burglary; and the objection was on the ground that an adjoining room, connected with appellant's rooms by a door, was occupied by two other persons, who had access to appellant's rooms, and therefore appellant was not in exclusive possession of the room in which the property was found. This objection is not tenable. It goes only to the weight of the evidence, and not to its admissibility.

There are no other points necessary to be considered. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

144 Cal. 757

IVANCOVICH et al. v. WEILENMAN et al.

(S. F. 3,815.)

(Supreme Court of California. Sept. 21, 1904.)

PARTITION—JUDGMENT—ISSUES—CONCLUSIVENESS.

1. On an appeal from the judgment on the judgment roll alone the only question reviewable is whether the findings support the judgment.

2. Code Civ. Proc. § 758, provides that in partition, if defendants claim a lien on the property, they shall state the original amount and date of the same, and the sum remaining due thereon. Section 759 declares that the right of the several parties plaintiff as well as defendant may be determined in such action; and section 766 provides that a final judgment is binding on all parties to the action and their legal representatives, who at the time have any interest in the property divided, or any part thereof. *Held*, that where, in partition, defendants therein denied that plaintiff had any interest in the property, and the question whether the one-half of a sum voluntarily paid by defendants to redeem the property from mortgage foreclosure should be a lien on the share of the property claimed by plaintiff was litigated and decided adversely to defendants, and judgment was rendered in favor of plaintiff for one-half of the land, such judgment was conclusive of the issue of lien in a subsequent action to recover from such plaintiff one-half of the amount so paid.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Action by John Ivancovich and another against Laura R. Weilenman and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

E. E. Cothran, for appellants. Briggs & Hudner, for respondents.

COOPER, C. Action to recover from defendant Laura R. Weilenman one-half the amount paid by plaintiffs to one Rosenberg to redeem the property described in the complaint from foreclosure sale, to have said amount adjudged to be a lien against the interest of said Laura R. Weilenman in and to the said lands, and for a decree that the lien of defendant Briggs upon the interest of defendant Laura R. Weilenman is subsequent to, and subject to, the lien claimed by plaintiffs. Findings were filed, upon which judgment was entered in favor of plaintiffs against Laura R. Weilenman for one-half the amount paid to redeem the said lands, but it was adjudged that the same was not a lien upon any interest of defendant Laura R. Weilenman in any part of the lands.

Plaintiffs have appealed from the judgment upon the judgment roll alone. The only question, then, is as to whether or not the findings support the judgment. They show, in substance, that in November, 1899, the plaintiffs and defendant Laura R. Weilenman—who will hereafter be called the defendant—were the owners as tenants in common (the defendant owning an undivided one-half) of the lands described in the complaint, there being 480 acres, and executed their mortgage upon the same to one Rosenberg to secure their promissory notes amounting to $8,000. Rosenberg subsequently foreclosed his mortgage, and in December, 1900, purchased the said lands under foreclosure sale for $8,963.89. Rosenberg immediately thereupon executed a deed to plaintiffs of all his interest in said property, and assigned to them his certificate of sale in consideration of $1,000 cash and plaintiffs' notes amounting to $7,920, secured by a mortgage made by plaintiffs purporting to mortgage all the said real estate. Plaintiffs evidently thought they were getting the entire property, and that they had a right to mortgage it to Rosenberg. Defendants did not request the plaintiffs to redeem from Rosenberg, and did not join in the new notes and mortgage so made by plaintiffs to him. In May, 1901, defendant commenced an action in the superior court of the county where the lands are situated, in which she was plaintiff against plaintiffs and Rosenberg as defendants, for the partition of said lands, and alleged in her complaint that she was the owner, as her separate property, of an undivided one-half, and plaintiffs were the owners of the other undivided one-half of the said real estate as tenants in common. She further alleged in her complaint that Rosenberg had a mortgage of record executed by plaintiffs upon their undivided one-half interest in the property to secure the said $7,920, and that there were no other liens or incumbrances of record upon said lands. She prayed that partition of the property be made according to the rights of the respective parties, and that it be adjudged that the later mortgage of Rosenberg was a lien upon the portion of the property set apart to plaintiffs, and not upon the portion belonging to defendant. In such partition suit, after service of summons, the defendants therein (Rosenberg and the plaintiffs herein) filed their answers, in which they denied that this defendant, plaintiff therein, was a tenant in common or the owner of any portion of the said lands. They further averred that the said lands belonged to the defendants therein John and Luke Ivancovich as sole owners in fee, and that the mortgage of Rosenberg was upon the whole of said property. Their theory was that defendant was not the owner of any title or interest in the property. Upon the trial of said partition suit, the court found that this defendant was the owner as tenant in common of an undivided one-half of said real estate free from any lien thereon, and that these plaintiffs were the owners as tenants in common of an undivided one-half interest therein, and that the mortgage of Rosenberg was a lien only upon the interest of plaintiffs. An interlocutory decree was made and entered in said partition suit appointing a referee, directing partition of said property, and that when so partitioned the mortgage of Rosenberg should be a lien only upon plaintiffs' portion, they being defendants in said partition suit. Said interlocutory decree became final, and the referee proceeded to partition the property into two lots or parcels, which were described by metes and bounds, and designated as lots 1 and 2; lot 1 being awarded to these plaintiffs and lot 2 to this defendant. The court in said partition suit, after due notice and hearing, confirmed the report of said referee. The final decree in partition contained the following clause: "And it is hereby adjudged and decreed that the said partition hereby made and made in accordance with the partition made by said referee and as reported by him in and by his report shall be and is effectual forever, and said defendants and each of them are hereby decreed henceforth to have no interest, right, title, or claim, lien, or incumbrance in, to, or upon said lot 2 herein described, set apart, allotted, and decreed to said plaintiff Laura R. Weilenman." In this case the court finds, as to the former judgment and decree in the partition suit: "That said judgment and decree ever since said 21st day of April, 1902, has been and now is a final judgment and decree, and the same has never been appealed from, modified, reversed, or set aside, but the same is now, and has been since said date of entry, in full force and effect. That all of the facts as found by the court as aforesaid were in issue in said action, and were presented for determination, adjudication, and decision, and were all actually litigated, adjudicated, and determined in said action, and that said questions, matters, and things so litigated, adjudicated, and determined in said action are the same questions, matters, and things presented for determination in this action, and that said matters, questions, and things have been, as hereinbefore set out, already fully litigated, adjudicated, and determined." It is thus apparent that, if the former judgment in partition is a bar to this proceeding, the judgment of the court is correct. In the former case the plaintiffs were brought in to answer the claim of this defendant that she was the owner of an undivided one-half of the premises free from any lien, and particularly of the lien of Rosenberg's mortgage. They denied that this defendant owned any interest in the property. They alleged that the lien of Rosenberg's mortgage was upon the whole of the property. They did not claim any lien upon defendants' interest in the property by reason of their redemption from Rosenberg. Their theory was that they were the absolute owners of the property, and that this defendant had no interest of any kind therein. The court found against them on both propositions. It found that Rosenberg's mortgage was only upon the interest of these plaintiffs. If plaintiffs in the partition suit had desired to have the court declare that they were entitled to a lien upon the interest of defendant by reason of the redemption from Rosenberg, they should have brought the matter before the court. Defendant had asked in the partition suit to have it decreed that she was the owner of an undivided one-half of the said lands. Plaintiffs were parties to such partition suit, and the court did so decree. The adjudication became final.

It is stated in the Code of Civil Procedure, § 758, that in partition proceedings, if "defendants claim a lien on the property by mortgage, judgment or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon." Section 759 provides: "The right of the several parties plaintiff as well as defendant, may be put in issue, tried and determined in said action." The final judgment is binding and conclusive "on all persons named as parties to the action, and their legal representatives who have at the time any interest in the property divided or any part thereof." Code Civ. Proc. § 766. The rule is well settled that a judgment between the same parties is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all cases involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were met and decided. Bingham v. Kearney, 136 Cal. 177, 68 Pac. 597; Quirk v. Rooney, 130 Cal. 511, 62 Pac. 825. In Wheeler v. Eldred, 137 Cal. 38, 69 Pac. 619, the plaintiff's motion for an execution had been denied by the court below, and the judgment affirmed here. Plaintiff then applied again for an execution upon a different ground, but one which existed when the first motion was made. This court held the first motion res adjudicata, and in the opinion said: "It is also contended by appellant that because on the first motion appellant did not aver that the judgment remained unsatisfied in whole or in part, while he does so aver on the second motion, therefore the former judgment is not a bar; in other words, that the point involved was not adjudicated on the first motion because appellant did not then aver all that he should and could have averred. Under that view, after an adverse judgment, there would be no end to the number of suits which might be maintained on the cause of action already adjudicated." And the rule as to res adjudicata applies in all its force to actions in partition. In Gates v. Salmon, 35 Cal. 593, 95 Am. Dec. 139, this court said: "The whole scope and tenor of the provisions of the act relating to partition show that the intention was to make the one judgment of partition final and conclusive on all persons interested in the property, or any part of it, of whom the court could acquire jurisdiction, and not to permit the matter to be taken up piecemeal; and accordingly provision is made for bringing in not only tenants in common and joint tenants in the whole or any part of the property, but those having future rights or estates, those entitled to remainder or reversion, those having estates for life or for years, those holding liens by mortgage, judgment, or otherwise; and power is given to the court to try and determine the rights of all the parties to the action, and to order compensation to be made by one tenant to another so as to equalize the shares allotted to each." In Morenhout v. Higuera, 32 Cal. 296, this court said: "The former judgment of a court having jurisdiction of the subject-matter and the parties at common law is not only conclusive as to the matters which were actually tried and determined, but also as to other matters which they might have litigated and might have had determined. Much more so is it under the statute in relation to partition. The plaintiffs could have had their right to this land litigated and determined in the partition suit in the sense contended for by their counsel, and, not having done so, they are as much bound by the judgment as if they had." And the rule in partition cases has been applied under different circumstances in the following cases: Bradley v. Harkness, 26 Cal. 70; De Uprey v. De Uprey, 27 Cal. 330, 87 Am. Dec. 81; Bollo v. Navarro, 33 Cal. 459; Senter v. De Bernal, 38 Cal. 637; Luco v. De Toro, 91 Cal. 405, 27 Pac. 1082; Towle Bros. v. Quinn, 141 Cal. 382, 74 Pac. 1046.

We think there is no escape from the conclusion, as matter of law, that the former judgment in partition is conclusive against the plaintiffs. They have their judgment against defendant. If they are unable to collect it, they are unfortunate, but we cannot assist them in this case.

The judgment should be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

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144 Cal. 681

BICKERDIKE v. STATE. (Sac. 1,237.)

(Supreme Court of California. Sept. 19, 1904.)

BOUNTIES—KILLING WILD ANIMALS—COYOTES—STATUTES—CONSTITUTIONAL LAW—STATES—DEBT LIMIT—CLAIMS—CERTIFICATES — EFFECT—PRIMA FACIE PROOF—LIMITATIONS.

1. St. 1891, p. 280, c. 198, providing a bounty for the killing of coyotes, declared that the person killing the same should present the scalps, with an affidavit as to the killing, and deposit the same with the board of supervisors, which board should quarterly determine the number of scalps deposited, and should give to each person who may have deposited scalps a certificate, certified by its clerk, etc., which might be presented to the Controller of the state, who might draw his warrant on the State Treasurer for the sum named therein, and that, when the certificate was directed to be drawn, the board of supervisors should at the same time cause the scalps to be destroyed by fire. *Held* that, though the Controller was not authorized to draw his warrant for such claims until they had been approved by the state board of examiners, such board, though authorized to hear additional evidence, could allow the claims on the certificates alone.

2. The coyote bounty act (St. 1891, p. 280, c. 198) provided for the issuance of certificates by boards of supervisors for coyotes killed, which certificates, when presented to the State Controller and allowed as claims by the state board of examiners, entitled the owner or holder to a warrant drawn on the general fund in the state treasury. A large number of such warrants not having been paid, for failure of the Legislature to make a specific appropriation therefor, as required by Const. art. 4, § 22, and Pol. Code, § 433, subd. 17, St. 1901, p. 646, c. 214, was passed, authorizing suits against the state on such claims. *Held* that, in the absence of any showing by the state as to the validity of certain of such claims sued on, the certificates issued by the boards of supervisors were prima facie proof of the validity thereof.

3. A certificate by E., clerk of the board of supervisors of M. county, Cal., reciting that he made the same pursuant to the order of the board passed October 3, 1894, and that B. had deposited with him, as such clerk, during the quarter ending September 30, 1894, 50 coyote scalps, each containing the nose and ears, and that there was due B. from the state the sum of $250, was a substantial compliance with the coyote bounty act (St. 1891, p. 280, c. 198), requiring the board of supervisors to give to the claimant "a certificate, certified by its clerk," and sufficiently showed a determination by the board as to the deposit of the scalps, accompanied by the proof required.

4. The repeal of the coyote bounty act (St. 1891, p. 280, c. 198), providing for the issuance of certificates by boards of supervisors for coyotes killed, did not destroy the effect of such certificates as to claims already accrued.

5. Accrued and perfected claims against the state for coyote bounty, as authorized by St. 1891, p. 280, c. 198, prior to the repeal of such act, constituted property capable of assignment, under St. 1901, p. 646, c. 214, authorizing "the owners or holders of claims and demands for such bounty to bring suits thereon."

6. Under Civ. Code, § 1052, providing that a transfer may be made without writing in every case in which a writing is not expressly required by statute, claims for coyote bounty, as authorized by St. 1891, p. 280, c. 198, were assignable by parol.

7. Where perfected claims against the state for coyote bounty were transferred without writing by a delivery of the claimant's certificate issued by the county board of supervisors, and by a power of attorney executed at the same time authorizing the transferee to obtain payment of the bounty from the state as the transferror's agent and attorney, evidence of such parol transfer was not objectionable as contradicting the power, since such power did not purport to express the agreement between the parties, but constituted mere authority, without which the purchasers could not have obtained the proceeds of the claim from the state.

8. Under Code Civ. Proc. § 1856, limiting the rule that parol evidence is inadmissible to contradict a written agreement to the parties to the agreement and their representatives and successors in interest, parol evidence of a transfer of coyote bounty claims to plaintiff could not be objected to by the state, in an action thereon, on the ground that it tended to contradict certain powers of attorney executed to the transferees as a part of the transfer.

9. Under St. 1901, p. 646, c. 214, authorizing suits against the state on claims for coyote bounty, as provided by St. 1891, p. 280, c. 198, provided such suits were brought "within 12 months after the passage of the act" of 1901, suits brought within such time were not barred by limitations under St. 1893, p. 57, c. 45, requiring suits against the state to be brought

within two years, which limitation had run against such claims long prior to the passage of St. 1901, p. 646, c. 214.

10. Since a statute of limitations affects the remedy only, and does not go to the substance of the right, St. 1901, p. 646, c. 214, authorizing suits against the state on claims for coyote bounty, already barred by the two-year limitation imposed by St. 1893, p. 57, c. 45, was not in violation of Const. art. 4, § 31, prohibiting the Legislature from making any gift of public money or anything of value.

11. St. 1891, p. 280, c. 198, providing a coyote bounty, required the coyote scalps and certain proof to be deposited with the clerk of the board of supervisors, upon which the board was required to deliver to the claimant a certificate, on which the Controller of the state was authorized to draw his warrant. It being thereafter held that the Controller was not entitled to draw such warrant until the claim had been approved by the board of examiners, and that such warrants could not be paid in the absence of an appropriation from the general fund, large numbers of such claims remained unpaid, until by St. 1901, p. 646, c. 214, suits were authorized against the state thereon. *Held* that, since the certificates made by such boards of supervisors were prima facie evidence of the claimant's right, it was not necessary, in an action brought under the act of 1901, that the complaint should allege a presentation of the claims to the state board of examiners.

12. Where, in an action on a complaint containing 892 counts, the court found that all the facts set forth in the complaint were true, except the allegations in certain specified counts, and that none of the facts set forth in the answer were true, and only one count was contained in the transcript on appeal, under a stipulation reciting that the aggregate amount of all the counts was $72,330, and the aggregate amount of all others than those specially mentioned in the decision was $59,680, for which latter amount judgment was ordered, it thereby appeared that judgment was given for plaintiff only on the counts not specially mentioned, and hence any conflict in the findings as to the specified counts was immaterial on defendant's appeal.

13. St. 1901, p. 646, c. 214, authorizing suits against the state on claims for coyote bounty, authorized by St. 1891, p. 280, c. 198, was not objectionable as special legislation.

14. Where, at the time St. 1891, p. 280, c. 198, was enacted, providing for a coyote bounty, no appropriation was made from the current revenue of the state to pay claims thereunder, such claims did not constitute debts of the state, within Const. art. 16, § 1, prohibiting the Legislature from creating debts in excess of the sum of $300,000, except in case of war, etc.

15. Indebtedness of the state, evidenced by funded debt bonds issued as authorized by St. 1869–70, p. 646, c. 444, under authority of a vote of the people of the state at a general election, is not an indebtedness of the state, within Const. art. 16, § 1, prohibiting the Legislature from creating debts which shall singly or in the aggregate, with any previous debts or liabilities, exceed the sum of $300,000, etc.

16. Where, at the time St. 1891, p. 280, c. 198, creating a coyote bounty of $5 for each coyote killed, was passed, the indebtedness of the state amounted to only $5,000, such act was not in violation of Const. art. 16, § 1, limiting the indebtedness that might be created by the Legislature to $300,000, since the amount which might become due to persons under the terms of the act would not necessarily exceed $295,000; the only effect of the constitutional provision being, in such an event, to render void any indebtedness incurred in excess of the constitutional limit.

17. Claims which had been previously paid by state officers without a prior appropriation should not be taken into consideration in determining the validity of claims subsequently accruing, on the ground that the debt limit prescribed by such constitutional provision was thereby exceeded.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Charles Bickerdike against the state of California. From a judgment in favor of plaintiff, and from an order denying its motion for a new trial, the state appeals. Affirmed.

U. S. Webb, Atty. Gen., and Geo. A. Sturtevant, Deputy Atty. Gen. (Devlin & Devlin, of counsel), for the State. Geo. E. Bates, W. C. Van Fleet, and Edward F. Treadwell, for respondent.

ANGELLOTTI, J. This is an action brought under the provisions of an act entitled "An act authorizing suits against the state on claims or demands arising under an act of the Legislature entitled 'An act fixing a bounty on coyote scalps,' approved March 31, 1891, and regulating the procedure therein." St. 1901, p. 646, c. 214. The act of March 31, 1891 (St. 1891, p. 280, c. 198), provided that a bounty of five dollars should be paid from the general fund of the state, to each person who should kill and destroy any coyote or coyotes in any county of the state, for each coyote so destroyed, and contained various provisions as to the proofs of killing required and the manner of collection of the bounty. This act was repealed by an act approved January 24, 1895. St. 1895, p. 1, c. 1. In the meantime many claims for bounties under this act had been made, some of which were paid by the State Controller upon the certificates of clerks of boards of supervisors of various counties, as provided in the act. It was then determined by this court in the case of Ingram v. Colgan, Controller, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221, that the bounty act was not in conflict with any constitutional provision, but that, notwithstanding the language of the act as to the drawing of a warrant by the Controller, there was nothing in the act exempting the claims from the provisions of section 672, Pol. Code, and that such warrants could not, therefore, be drawn until the claims had been approved by the state board of examiners. Upon rehearing it was further held that the bounty act did not make any specific appropriation out of the general fund for the payment of any of these claims, inasmuch as it failed to designate the amount thereof that could be so used. There being no specific appropriation, the claims could not be paid until an appropriation should be made. Section 22, art. 4, Const.; subdivision 17, § 433, Pol. Code.

It is stated in respondent's brief that under the bounty act certificates aggregating in amount $475,100 were issued, of which $187,485 was paid by the Controller and Treasurer prior to the decision in Ingram v.

Colgan, supra. It is further stated that succeeding Legislatures passed acts appropriating money to pay the remaining $287,615, but that said acts failed to obtain executive approval. On March 23, 1901, the act authorizing suits against the state on such claims was approved. By this act it was provided that "the owners or holders of claims or demands against this state" arising under the bounty act might, within 12 months from the passage of the act, bring suit thereon and prosecute the same to final judgment; that the rules of practice in civil cases should apply to such suits, except as otherwise provided in the act, with the right of appeal to either party; that the summons should be served on the Attorney General, who should defend on behalf of the state; that the place of trial, upon the demand of the Attorney General, should be changed to the county of Sacramento; that all costs in such action should be paid by the plaintiff, and any judgment should be for the amount actually due, without costs and without interest, and that such judgment should not bear interest; and that the Attorney General should report all final judgments recovered against the state to the Legislature.

This action was brought by the plaintiff, claiming to be the assignee of many such claims or demands; the complaint containing 892 counts on as many claims, the aggregate amount thereof being alleged to be $72,330. The first count substantially alleged that after March 31, 1891, and within three months prior to the presentation of the scalps and affidavit required by the bounty act to the clerk of the board of supervisors, James Ben killed and destroyed 50 coyotes in the county of Merced, state of California; that he thereafter went before a person authorized to administer oaths, and presented the scalps of said coyotes, containing the ears and noses thereof, to such officer, and made the affidavit prescribed by law, showing the time and place that such animals were killed, and thereafter deposited such scalps and affidavit with the clerk of the board of supervisors; that thereafter, on or about October 3, 1894, the board of supervisors did determine the number of scalps so deposited by said Ben with the clerk of said board as aforesaid during the preceding quarter to be 50 scalps, and did give to him a certificate, certified by its clerk, showing the said number of scalps so deposited by him and the sum due him therefor at the rate of $5 for each scalp, to wit, $250; that thereafter the said certificate and claim or demand were assigned to plaintiff, and no part thereof has been paid. The other counts were in all particulars the same as this, except as to the county, date of determination by the board of supervisors, number of scalps, amount due, and person to whom due. The trial court found in plaintiff's favor upon most of the counts, giving him judgment for $59,680, without interest or costs. The state appeals from this judgment in favor of plaintiff, and from an order denying its motion for a new trial.

1. One of the principal questions presented by these appeals is as to the effect of the certificates issued to claimants under the provisions of the bounty act of 1891. Upon the trial of the case the only evidence offered by plaintiff to support the allegations of the complaint as to the killing of the coyotes within the state, the presentation of the claims therefor within the proper time and in the proper manner, and the action of the boards of supervisors thereon consisted of such certificates. These certificates were objected to as inadmissible for any purpose. The certificates having been admitted in evidence over such objection, the plaintiff, having introduced evidence as to the assignment of the claims to him, rested. A motion for nonsuit was made and denied, and defendant offered no testimony to rebut that of plaintiff. It was substantially provided in the bounty act of 1891 that the person killing a coyote should present the scalp, containing the ears and nose of the animal, before some person authorized to administer oaths, and make and subscribe an affidavit before such person showing the time and place that the animal was killed, and within three months from the date of the killing deposit such scalp and affidavit with the clerk of the board of supervisors of the county in which the animal was killed. It was further provided: "The board of supervisors * * * shall, quarterly, determine the number of scalps deposited with the clerk of such board during the preceding quarter, and by whom, and shall give to each person who may have deposited scalps a certificate certified by its clerk, showing the number of scalps deposited by such person and the sum due him at the rate of five dollars for each scalp. Such certificate may be presented to the Controller of the state, who may draw his warrant on the general fund in the state treasury for the sum named therein, in favor of the person entitled thereto." It was further provided that, when the certificate is directed to be drawn, the board of supervisors "shall, at the same time, cause the scalps to be destroyed by fire."

It will thus be seen that the certificate issued by the board was to at least take the place of the scalps deposited by the claimant. While, under the decision in Ingram v. Colgan, supra, the act must be construed as not authorizing the drawing of a warrant by the Controller until the claim had been approved by the state board of examiners, it appears to us to have been clearly the intent of the act that the officers auditing and allowing the claim and drawing the warrant therefor on the State Treasurer might act upon the certificate thus issued by the board. The board of examiners might hear additional evidence, but it could allow the claim upon the certificate alone. The deposit of the scalp of a coyote with the clerk of the board of supervisors, accompanied by an affidavit showing the killing of the animal within the county within three months prior to the presentation of the scalp, was evidently considered by the Legislature, which had full power to determine what should be sufficient proof, to be sufficient proof of the genuineness of the claim. The provision of the act to the effect that the supervisors should "determine the number of scalps deposited," etc., necessarily means that they must determine the number deposited in accordance with the provisions of the act, viz., those deposited, with a proper affidavit showing that the animals were killed within the county within three months prior to the presentation of the scalps. The certificate was to be issued only upon the determination of the supervisors as to such deposit of the scalps, accompanied by a proper affidavit, and could have been intended for no other purpose than to constitute evidence of such determination. Upon it, at any rate, we are satisfied the auditing officers were authorized to act. While it may be freely conceded that the system for proving the genuineness of the claims was not so perfect as to prevent the consummation of fraud, it must be acknowledged that it was for the Legislature to determine the procedure to be followed, and the method adopted was certainly as well designed to safeguard the public treasury as were those adopted in Iowa and Florida, and referred to in the cases of Murray v. Jones Co., 72 Iowa, 286, 33 N. W. 684, and Johns v. County Com'rs (Fla.) 10 South. 96.

The claimants having furnished the certificates showing their compliance with the provisions as to proof of their claims, and thus having made at least prima facie proof of their claims, the Legislature, six years thereafter, enacted the law under which this action was brought. In enacting this law, the Legislature was acting with full knowledge of the existing condition. It had been made known through the messages of at least two Governors that claims to the extent of $287,615, supported by the requisite prima facie proof, had been presented to the board of examiners. It had been suggested therein that frauds had been perpetrated in the presentation and manipulation of some of these claims, and it had been recommended by Gov. Budd that a clause should be inserted in any appropriation bill that might be passed for the payment of these claims to the effect that the board of examiners might take such evidence "as it deems necessary" as to the validity of such claims. Instead of following this suggestion, the Legislature of 1901 enacted the law authorizing actions on such claims. We entirely agree with counsel for the state that the manifest object of this act was to put the courts in the place of the auditing board of the state. With their greater facilities for procuring evidence, it was deemed that therein the state could, with the assistance of its Attorney General, produce such evidence as might be available to show that some of the claims were, as had been suggested, fraudulent. The Legislature must be deemed to have acted with reference to the peculiar circumstances of the case, and it would not be a reasonable construction of their action, taken in favor of the interests of these claimants, to hold that such action contemplated the relegation of "the owners or holders" of the claims from a class of creditors that had made a prima facie showing of the validity thereof to a position where they would be compelled to commence at the beginning and make again the showing that they had already made. It is to be observed, in this connection, that the practical effect of the construction contended for by appellant would be to render the act worthless to many owners of just claims. The individual claims were mostly for small amounts, the actions on demand of the state were to be tried in Sacramento county, and the costs were to be borne by the claimants. Aside from the fact that it would be impossible to procure the evidence as to many such claims, owing to the death of the original claimants, it would, where such testimony was available, in most cases cost more to take such evidence to Sacramento county than the claims amounted to. The Legislature was providing a method by which the holders of these certificates might collect the amounts shown thereby to be due, and it was intended that the certificates should have the same legal effect before the courts that they would have had before the board of examiners, and that, in the absence of any showing by the state as to the validity of the claim, they should constitute sufficient evidence to warrant a judgment.

It is suggested that the certificates introduced in evidence were not the certificates of the boards of supervisors, but simply those of the clerks of such boards, and that there is no proper evidence of the action of the boards of supervisors. The certificate set forth in the record was made by "J. G. Elliott, clerk of the board of supervisors of the county of Merced, state of California," and he certifies that he makes it "pursuant to the order of said board, passed on the 3d day of October, 1894." By order of said board he certifies that James Ben has deposited with him, as such clerk, during the quarter ending September 30, 1894, 50 coyote scalps, each containing the nose and ears, and that there is due Ben from the state the sum of $250. This certificate substantially complied with the act of 1891, which required the board of supervisors to give "a certificate, certified by its clerk," and sufficiently shows a determination by the board as to the deposit of the scalps, accompanied by a legal showing. The repeal of the act of 1891 did not destroy the effect of the certificate as to the claims which had already accrued. It simply prevented the creation of any further claims against the state for the killing of coyotes. Conceding the power of the Legislature to prescribe such further proofs as to the validity of such accrued claims as it deemed proper, we find no intent to so do either in the repeal of the act of 1891 or in the act of 1901 authorizing suits on these claims.

We have considered the other points made relative to these certificates, and are of the opinion that the trial court did not err in admitting them in evidence, or in holding them to be sufficient, in the absence of any counter showing, to warrant a finding as to the validity of the claims.

2. It is further contended that the plaintiff did not show that he was the owner of the claims. In the first place, it is urged that prior to the act of 1901, authorizing suits thereon, the claims were not assignable at all, for the reason that they could not be enforced by judicial proceeding. This contention assumes that action thereon could not have been maintained under the general act of 1893 (St. 1893, p. 57, c. 45) authorizing suits against the state. We regard it as entirely immaterial, in this connection, however, whether or not they were enforceable prior to the act of 1901. If not enforceable by judicial proceeding, it was solely because they were claims against the sovereign state, which could not be sued without its permission. They were claims for a bounty, the right to which had become vested by a compliance with the provisions of the statute offering the bounty. The bounty had been earned, and the state was in the same position that any other debtor would be, except that, by reason of its sovereignty, and the absence of any appropriation for the payment of the claims, the creditors were necessarily dependent upon the state making such arrangement as it would for the discharge of its obligations. We are satisfied that such claims against the state constituted property capable of assignment. The language of the act of 1901, authorizing "the owners or holders of claims or demands" to bring suit thereon, clearly indicates that it was in the contemplation of the Legislature that assignees of such claims might bring suit thereon.

It is also urged that the claims were never in fact assigned. It appeared that plaintiff was the assignee of the Kern Valley Bank, David Hirshfield, and C. Cohn, who had by a written instrument assigned to him all their right, title, and interest in said claims. The question is as to the assignment by the original claimants to the Kern Valley Bank and to said Cohn and Hirshfield. The undisputed evidence was that the Kern Valley Bank had, prior to the act of 1901, purchased directly from the original claimants a large number of these claims in suit, and Cohn and Hirshfield had purchased the remaining claims in suit; the purchase price in each instance being paid in cash by the purchaser. The transactions between the original claimants and the purchasers were not evidenced by any writing, except the powers of attorney or authorizations for deposit with the State Controller and State Treasurer, ordinarily used in the collection of amounts due from the state by both agents and assignees. These designated the purchasers as the attorneys of the claimants to receive the warrants from the Controller and the money from the Treasurer, and were signed by the claimants. The transaction between the claimant and the purchaser in each case consisted of the delivery by the claimant to the purchaser of the certificate, and the signing and delivering of the power of attorney, and the payment in cash, at the time of the purchase, by the purchaser, to the claimant, of the purchase price agreed on. It is suggested that these claims could not be transferred by parol, but we are not referred to any provision of our statutes that makes a writing essential to the validity of a sale made under the circumstances here shown. "A transfer may be made without writing, in every case in which a writing is not expressly required by statute." Section 1052, Civ. Code.

It is urged that, since powers of attorney were given at the time of the transaction, the agreements between the claimants and the alleged assignees were evidenced by writing, which alone can be looked to for the terms of the agreement, and that the parol testimony as to a purchase was not admissible, for to admit it would be to allow parol testimony to vary the terms of written agreements. The rule contended for has no place except between the parties to the agreement and their representatives and successors in interest. It cannot be invoked by strangers to the agreement. Section 1856, Code Civ. Proc.; Dunn v. Price, 112 Cal. 46, 51, 44 Pac. 354. There is, however, nothing in the parol evidence that is inconsistent with the instruments designated as "powers of attorney." They did not purport to express the agreement between the parties, had nothing to do with the sales thereunder, and were mere directions to the State Controller and State Treasurer, without which the purchasers could not obtain from the officers of the state the proceeds of the property which they had purchased. They were entirely consistent with the fact of purchase shown by the parol testimony.

The evidence in relation to the assignments was sufficient to warrant the findings thereon made by the trial court.

3. It is contended that the action is barred by section 2 of the general act authorizing suits against the state. St. 1893, p. 57, c. 45. This defense was not specially presented either by demurrer or answer, and there is no finding thereon; but it is urged that in the case of the state the benefit of the statute of limitations cannot be waived by the officers representing the state. We do not, however, deem it necessary to discuss

the question as to the effect of the failure to plead the statute. The two-year limitation fixed by the act of 1893 applies only to actions brought under the provisions of the act of 1893. This action was brought under the act of 1901, which prescribed its own statute of limitations, viz., "twelve months from the passage of this act." The intent of the Legislature of the state to waive the benefit of any defense of limitation it may have had, under section 2 of the act of 1893, against these claims, is manifest. Otherwise, the act of 1901 authorizing the institution of these suits and the prosecution of the same to final judgment would be of no avail, for at the time of its enactment, the period of limitation prescribed by the act of 1893 had long since expired as to the great mass of the claimants, viz., as to all except minors, insane persons, persons imprisoned on a criminal charge or judgment pronounced thereon, married women, and incompetent persons. Unless it clearly appear to the contrary, it cannot be held that the Legislature intended its act to be a mere form, without beneficial purpose. When it said that any owner or holder of any of these claims might, "within 12 months from the passage of the act," bring his suit, it said that any suit so brought would be within time and free from any defense of limitations.

This construction, it is urged, would render the law obnoxious to the provisions of section 31 of article 4 of the Constitution, prohibiting the Legislature from making any gift of public money or thing of value; the contention being that a waiver of the defense of limitations is a gift, within the meaning of such provision. The statute of limitations does not, however, go to the substance of the right, but only to the remedy. When the statute has made the defense available to the debtor, his debt has not been extinguished. It still exists, and may be enforced against him, unless he chooses to avail himself of the defense afforded by the statute, and specially plead it. The payment of such a debt by the debtor is not a "gift," in any proper sense of the word, and there is nothing in the constitutional provision invoked that can be held to prohibit the Legislature from paying these claims.

4. We are of the opinion that it was not essential to a statement of a cause of action in a suit brought under the act of 1901 that the complaint should allege a presentation of the claims to the state board of examiners.

5. It is contended that the findings are contradictory, in that the court found that all the facts set forth in the complaint are true, except the allegation as to certain specified counts, and at the same time found that none of the facts set forth in the answer are true. The answer was a specific denial of the allegations as to each of the 892 counts. If it be conceded that these findings are at all in conflict, it is apparent from the transcript on appeal that, so far as the specified counts were concerned, no judgment was given in favor of plaintiff, and that as to them defendant prevailed. As already stated, but one count is set forth in the copy of the complaint contained in the transcript; the others having been omitted by stipulation of the parties. In place of such counts there has been inserted a statement that the aggregate amount of all the counts was $72,330, and that the aggregate amount of all others than those specially mentioned in the decision was $59,680, for which latter amount judgment was ordered by the court and entered. In view of the stipulation of the parties, we are entitled to look at this statement, and it is demonstrated thereby that judgment was given for plaintiff only upon the counts not specially mentioned in the decision. Any conflict in the findings as to the specified counts is therefore immaterial on defendant's appeals.

What has been said disposes of all the points made by the state, except those relative to the constitutionality of the original bounty act of 1891 and the act of 1901 authorizing suits on the claims arising thereunder. There is nothing in the contention that the act of 1901 is invalid under the provisions of our Constitution relative to special legislation. Conceding, for the moment, the constitutionality of the original act of 1891, the Legislature had the right to provide whatever method it deemed proper for the proof of the claims arising thereunder and the payment of the same. It could, without further investigation, have appropriated the money to pay those who had made the showing required by such act, or it could provide for such investigation as was by it deemed essential to a proper determination of the question as to the justness of the individual claims against the state. What has already been said in regard to the claims under this act amply shows that these bounty claimants constituted a class characterized by such substantial qualities and attributes as to render appropriate legislation peculiar to itself in the matter of the determination of the validity and payment of the claims. We have already disposed of the objection that the act of 1901 is obnoxious to section 31 of article 4 of the Constitution, prohibiting the Legislature from making any gift.

There remains only the objection that the bounty act of 1891 was invalid under the provisions of section 1 of article 16 of the Constitution, which provides as follows, viz.: "The Legislature shall not, in any manner, create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except in case of war to repel invasion, or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within twenty years of the time of the contracting thereof and shall be irrepealable until the principal thereon shall be paid and discharged; but no such law shall take effect until, at a general election, it shall have been submitted to the people and shall have received a majority of all votes cast for and against it at such election." This point was made by the Attorney General in his briefs in the case of Ingram v. Colgan, Controller, supra; but, although the act under consideration was there held to be free from constitutional objection, no reference was made in the opinion to this contention.

It appears from the report of the State Treasurer for the year ending June 30, 1890, that the total bonded indebtedness of the state at that date was $2,642,000. What is also styled in the report a debt of the state consisted of Controller's warrants, aggregating $173,295.10, which it must be assumed had been drawn upon unexhausted specific appropriations provided by law to meet the same. An examination of the same report shows that there were in the various funds so drawn upon amounts in excess of the sums necessary to pay the warrants. It does not appear that any of the liabilities for which these warrants were drawn had been created by the Legislature without provision made at the same time by appropriation from the current revenue for the payment of the same, and they were, therefore, not debts, within the meaning of the prohibitory clause of the Constitution. This matter is fully and ably discussed in the opinion in People v. Pacheco, 27 Cal. 175, and the cases there cited. Of the bonded debt, which, so far as appears, constituted the only indebtedness of the state at that time, all but $5,000, to wit, $2,637,000, was evidenced by the funded debt bonds, issued under the act of April 2, 1870 (St. 1869-70, p. 646, c. 444), and the issuance of these bonds had been authorized by a vote of the people of the state at a general election. This left, at most, an indebtedness of only $5,000, created solely by the Legislature.

It seems very clear to us that such debts and liabilities as had been authorized by the people of the state at a general election in the manner provided by the constitutional provision invoked by appellant cannot be taken into consideration in determining the question as to the power of the Legislature to itself create an indebtedness. The section was not designed to limit the amount of indebtedness that might be created by the state, for under its express provisions an indebtedness may be created for any amount, and there is no other provision in the Constitution prescribing a limit of aggregate indebtedness. The section goes entirely to the manner of the creation of indebtedness. It was recognized that without some such provision the legislative department might at will create indebtedness to any amount, and it was thought that some limit should be placed upon this power. The language used indicates the intention and object of this provision very clearly, which was simply to put a limit upon the amount of indebtedness that might at any time be created by the Legislature itself. That body was to have power to create debts to the extent of $300,000 only. The indebtedness created by the Legislature itself must at no time exceed $300,000. It was deemed proper that the Legislature should have the power at all times to go to this extent, because of possible needs of the state government. If any further indebtedness became necessary, the people must authorize it by their votes at a general election; but an indebtedness so authorized became, in effect, one created by the people, and one excluded from the category of debts created by the Legislature, within the meaning of this constitutional provision. So far as is material here, the section in effect simply provides that the Legislature shall not in any manner create any debt or liability which shall, singly or in the aggregate with any previous existing debts or liabilities created by the Legislature, exceed the sum of $300,000.

The decisions in the cases of People v. Johnson et al., 6 Cal. 499, and Nougues v. Douglass, 7 Cal. 65, relied on by the appellant, are not in conflict with the views here expressed. It appeared in the case of People v. Johnson, supra, that the previous indebtedness exceeding $1,000,000 had never been submitted to and ratified by a vote of the people, as required by the Constitution, and was purely a debt attempted to be created by the Legislature. The same condition undoubtedly existed in Nougues v. Douglass, supra.

At the date of the passage of the bounty act of 1891, the indebtedness created by the Legislature did not, so far as appears, exceed $5,000. The Legislature still had the power to create a further indebtedness of $295,000. The act of 1891, which provided for a bounty of $5 for each coyote destroyed, to be paid to the person destroying it, did not of itself create any debt or liability. It was simply an offer upon condition, and only upon the performance of the condition by any person could a debt or liability arise on the part of the state. Upon such performance, however, by any person, the amount specified in the act, viz., $5 for each coyote killed by him in accordance with the provisions of the act, would become due such person from the state, and, no appropriation having been provided to meet the claim, such amount would be a debt created by the Legislature within the meaning of the constitutional provision. But the amounts which might become due to persons under the terms of said act would not necessarily exceed $295,000. The act could not, therefore, be held upon its face to violate the constitutional provision.

The Legislature had the power to create indebtedness to the extent of $300,000. The mere fact that the total amount that would ultimately be paid under the act was not named, and that under its terms, in the course of years, claims might possibly accrue and remain unpaid that, with other debts, would exceed the constitutional limit, would not affect the question as to the constitutionality of the act. The only possible effect of the constitutional provision in such a case would be to render void, as beyond the power of the Legislature, any indebtedness incurred in excess of the constitutional limit.

Whether or not the indebtedness adjudged to be due to plaintiff, viz., $59,680, was, in whole or in part, incurred in excess of this limit, is a question not presented by the record in this case. There is no issue relative thereto made by the pleadings, and no finding made by the court, and it is impossible for us to say, from the evidence in the record or from anything contained in the briefs, that the claims held by plaintiff did not entirely accrue before the aggregate amount of valid claims presented under the act had reached the sum of $295,000. It is, however, stated that the aggregate amount of unpaid claims against the state arising under this act was $287,615, and that suits were instituted under the act of 1891 for only $224,345, and that the judgments entered were for an aggregate of only $175,000. These amounts were all within the constitutional limit of indebtedness. It is further stated, however, that prior to the presentation of any of these claims, and, so far as appears, prior to the accrual thereof as debts against the state, the state officers had paid $187,485 on prior claims accruing under the act of 1891. These claims should not have been paid without prior appropriation (Ingram v. Colgan, supra); but, nevertheless, being in fact paid, they no longer constituted a part of the indebtedness of the state, and cannot be taken into consideration in determining the question as to the validity of claims subsequently accruing.

The judgment in favor of plaintiff, and the order, are affirmed.

We concur: VAN DYKE, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

BEATTY, C. J., deeming himself disqualified, did not participate.

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144 Cal. 698

BICKERDIKE v. STATE. (Sac. 1,224.)

(Supreme Court of California. Sept. 19, 1904.)

COYOTE BOUNTY—CLAIMS—ASSIGNMENT—EVIDENCE—LOST CERTIFICATES—EFFECT—APPEAL—ERRORS AGAINST RESPONDENT.

1. In an action against the state on certain coyote bounty claims, proof that plaintiff's assignor purchased them from the person claiming to be the person named as the owner in the certificate issued to such owner by the clerk of the county board, as required by bounty act (St. 1891, p. 280, c. 198), and who then had such certificate in his possession and thereupon delivered it to the purchaser, and each of the holders of such certificates transferring the same in the name of such holders, authorized the purchasers by power of attorney to receive the warrant therefor from the state Controller and the money from the state Treasurer, was sufficient to establish that such claims were transferred to plaintiff by the original owners, in the absence of evidence that the persons making the assignments were not the identical persons named in the certificates.

2. On an appeal by the plaintiff, the Supreme Court cannot consider alleged errors in the admission of evidence against the defendant.

3. In an action on certain coyote bounty certificates assigned to plaintiff, evidence *held* sufficient to establish the due execution of powers of attorney given by the original owners of such claims to their transferees to receive the warrants from the state Controller and the proceeds thereof from the state Treasurer.

4. In an action against the state on certain coyote bounty warrants, for which it was claimed the certificates of the board of supervisors of the county in which the coyotes were killed, required by St. 1891, p. 280, c. 198, were lost, a certificate of the clerk of such county that it appeared from the records in his office that, pursuant to an order of the board "passed on or about the ——— day of ———, 189–, the county clerk of said county on or about the ——— day of ———, 189–, issued to the following named persons certificates for coyote scalps bounty and for the number of scalps set opposite their respective names," etc., followed by a list of the original claimants, the number of scalps credited to each, and the dates of issuance of the certificates, ranging from January 6, 1892, to July 18, 1894, was inadmissible; being a mere statement of the officer's conclusions as to the effect of certain records in his office.

5. Where, in an action against the state on certain coyote bounty warrants, due proof of ownership of the claims in plaintiff was made, and the evidence established that county clerk's certificates, required by St. 1891, p. 280, c. 198, had been duly issued on such claims and had been delivered to the secretary of the state board of examiners, and a record in his office showed that they were on file therein in 1895, but could not be found at the time of the trial, such certificates, though lost, were sufficient to entitle plaintiff to recover, in the absence of evidence on the part of the state showing their invalidity.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Charles Bickerdike against the state of California. From an order denying plaintiff's motion for a new trial on certain causes of action alleged, on which a recovery was denied, plaintiff appeals. Reversed.

Geo. E. Bates, W. C. Van Fleet, and Edward F. Treadwell, for appellant. U. S. Webb, Atty. Gen., and Geo. A. Sturtevant, Deputy Atty. Gen. (Devlin & Devlin, of counsel), for the State.

ANGELLOTTI, J. This action was brought under the provisions of the act of March 23, 1901 (St. 1901, p. 646, c. 214), authorizing suits against the state on claims arising under the coyote bounty act of 1891 (St. 1891, p. 280, c. 198), and is the same action involved in the appeal in Bickerdike v. State (Sac. 1,237, heretofore decided) 78 Pac. 270, to which reference is made for the general facts of the case. That was an appeal by the state from the judgment in favor of the plaintiff as to most of the 892 counts of the complaint, and from an order denying a new trial in regard thereto. As to some of the counts, the findings and judgment were in favor of the defendant, and the plaintiff moved for a new trial as to 66 of these counts. His motion having been denied, he took this appeal from the order denying the motion. The plaintiff sued as the successor in interest of the original owners of the claims, claiming to be the present owner and holder thereof.

1. As to 57 of these counts, the trial court found that all of the allegations of the complaint are true, except the allegation contained in each count to the effect that, before the filing of the complaint, the certificate, claim, and demand were by the owners sold, assigned, transferred, and delivered to plaintiff, and that plaintiff ever since has been and now is the owner and holder of the same, which allegation, as to each of said counts, was found to be untrue. This finding is attacked by plaintiff, his contention being that the evidence is insufficient to justify the same. The question is as to the alleged assignment by the original owners of some of these claims to the Kern Valley Bank, and by the original owners of the others thereof to David Hirshfield and C. Cohn; it being admitted that plaintiff was the assignee of all the rights, title, and interest of said bank and said Cohn and Hirshfield.

The evidence is without conflict to the effect that each of the claims involved in these counts was purchased by either the bank or Cohn and Hirshfield from the person claiming to be the person named as owner in the certificate issued by the county clerk, and who then had such certificate in his possession, and thereupon delivered the same to the purchaser. In practically all of the transactions of purchase of the claims here involved, the person purporting to sell the claim was not personally known to the purchaser, and the only evidence that he was the owner was the fact that he had the certificate in his possession, claimed to be the person named therein as the owner, as such person purported to sell the claim, and in the name of such person authorized the purchaser by powers of attorney to receive the warrant therefor from the state Controller, and the money from the state Treasurer. There is, however, absolutely nothing in the record to overcome the effect of this evidence, and there is no pretense that it has ever been claimed by any one that the person making the assignment was not the identical person named in the certificate. We are satisfied that, under such circumstances, it must be held that the finding assailed is not supported by the evidence. It may be that the mere possession of the certificate would not afford sufficient proof that the holder was the person named therein and the owner of the claim against the state evidenced thereby. He was, however, presumptively the owner of the certificate (section 3, Bounty Act 1901; subdivision 11, § 1963, Code Civ. Proc.), which constituted the only tangible evidence of the claim, except in so far as the records of the board of supervisors might evidence such claim, and upon which the state officers might act and pay the claim. Being so in possession of such certificate, the holder exercised over the claim an act of ownership of the highest character, viz., the absolute disposition thereof by sale.

The law presumes that a person is the owner of property from exercising acts of ownership over it (subdivision 12, § 1963, Code Civ. Proc.), and we know of no reason why such presumption should not obtain under the circumstances set forth. Likewise the law presumes that a person is innocent of crime or wrong (subdivision 1, § 1963, Code Civ. Proc.) in civil as well as in criminal cases (Hunter v. Hunter, 111 Cal. 261, 267, 43 Pac. 756, 31 L. R. A. 411, 52 Am. St. Rep. 180), and it will be presumed that the persons making the transfers and executing the powers of attorney did not attempt to personate others, and by so doing fraudulently procure property to which they were not entitled, but rather that they were the persons whom they represented themselves to be, the persons designated in the certificates of which they had possession, and the owners of the claims which they purported to sell. In each transaction the person signing the power of attorney signed as his name the name appearing in the certificate as the name of the person to whom the certificate had been issued. There has never been any claim to the effect that the person so signing did not sign his true name. Identity of person is presumed from identity of name (subdivision 25, § 1963, Code Civ. Proc.), and it must therefore be presumed that the person signing the power of attorney was the person named in the certificate as the original owner of the claim. As the person who signed the power of attorney is the person who sold the claim, the proof is complete. While presumptions of the character here mentioned may be controverted by other evidence, and the effect thereof easily overcome, the court or jury is bound to find according thereto, unless they are so controverted. Section 1961, Code Civ. Proc.

It is contended that the execution of the powers of attorney was not proven. It appears that the powers of attorney were received in evidence without any specific objection on the ground that the execution thereof had not been proved; the objection of defendant being only "that they simply constituted the person therein named an agent, and did not convey to him any interest in said claim, and that the same was irrelevant, incompetent, and immaterial." Assuming, however, that the question as to the execution of these powers of attorney is before us, the evidence shows such execution.

The uncontradicted evidence of Charles Bickerdike, David Hirshfield, and C. Cohn, was to the effect that in every instance the person selling the claim executed and delivered a power of attorney directed to the state Controller, asking him to deliver his warrant for the claim to the purchaser, and also a power of attorney directed to the state Treasurer, asking him to pay such warrant to the purchaser, and admittedly the powers of attorney subsequently introduced were the powers of attorney referred to. It is true that the evidence above set forth was objected to by defendant on the ground that it was not the best evidence, but the court overruled the objection, and we cannot, on this appeal by plaintiff, consider errors or alleged errors against defendant. The evidence was admitted, and must be considered, for the purposes of this appeal, as properly before the court. It is therefore unnecessary to consider the question as to the competency or effect of the proof of the genuineness of the signature of the subscribing witness, by a person other than the subscribing witness. This question may not arise on another trial.

2. As to the remaining nine counts, the trial court found that all of the allegations of the complaint were untrue. These findings are attacked. Due proof of ownership of these claims in plaintiff was made. The evidence showed in each case a transfer of the claim and the execution and delivery of the certificate and power of attorney to the purchaser, the sending of the same by the purchaser to the National Bank of D. O. Mills & Co. at Sacramento for collection, and the delivery of the same by said bank to the secretary of the state board of examiners. All of the certificates so sent appeared "in a record kept by the said secretary" in his office, and the certificates were on file in said office in the year 1895, but none of them could be found on file in such office or elsewhere at the time of the trial, and there was no record showing the withdrawal thereof by or delivery to any person. There can be no question, under the record before us, that there was a supervisor's certificate for each one of these claims. The only other evidence offered to sustain the allegations of the complaint as to these claims was the certificate of the county clerk of Kern county, of date July 10, 1902, wherein he certified "that it appears from the records in my said office that, pursuant to an order of the board of supervisors passed on or about the ——— day of ———, 189—, the county clerk of said county, on or about the ——— day of ———, 189—, issued to the following named persons certificates for coyote scalps bounty, and for the number of scalps set opposite their respective names, to wit." The list of original claimants, the number of scalps credited to each, and the dates of issuance of the certificates, ranging from January 6, 1892, to July 18, 1894, follow. To the introduction of this certificate in evidence the defendant objected, on the ground that the same was not a certificate of any record of the office of said county clerk, was but the conclusion of the witness and hearsay, that the certificate was not required or authorized by any law, and was immaterial, incompetent, and irrelevant. The objection was sustained, and plaintiff excepted.

The ruling of the court excluding this certificate was undoubtedly correct. The certificate did not purport to contain a copy of any record of the office of the county clerk, but showed upon its face that it was nothing more than a written statement of that officer as to his conclusions as to the effect of certain records that he found therein. The officer did not certify that the document contained a copy of any record or entry, and clearly it did not contain such a copy. A certified copy of the records of the office, so far as they related to these claims, might have been admissible; but we know of no statutory provision or rule of law that would have warranted the admission of the certificate in question for any purpose. It, however, sufficiently appears from the evidence that was introduced that the certificates were in fact issued, and finally deposited with the secretary of the board of examiners, and the question remains as to whether this proof was sufficient to require findings for plaintiff; it appearing that the certificates had been lost or destroyed. We have discussed the effect of these certificates, as evidence, in the opinion in the case of Bickerdike v. State, supra. The certificate was, under the provisions of the bounty act, in effect the expression of the determination of the board as to the validity of the claim, a document expressly authorized and required by the law to be issued for the purpose of establishing, prima facie at least, the validity of such claim against the state. Its issuance was a prerequisite to the collection of any money from the state. The fact of its issuance and delivery to a person prima facie established his claim, and dispensed with the production of further evidence in support thereof. While such a certificate would ordinarily be the best and probably only evidence of its issuance and its contents, we have no doubt that, where it had been lost or destroyed, both its issuance and contents might be shown by other competent evidence, and that when this was done the claim would be established to the same extent as if the certificate itself had been produced in evidence.

We are of the opinion that the motion for a new trial should have been granted as to all the counts involved therein. The order denying plaintiff's motion for a new trial is reversed.

We concur: VAN DYKE, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

BEATTY, C. J., deeming himself disqualified, did not participate.

144 Cal. 740

BAUER v. STATE. (Sac. 1,293.)

(Supreme Court of California. Sept. 20, 1904.)

BOUNTIES—ACTION—STATUTE—ASSIGNMENT OF CLAIMS—EVIDENCE—ADMISSIBILITY—SUFFICIENCY—DEPOSITIONS.

1. In an action under St. 1901, p. 646, c. 214, authorizing suits against the state under the act fixing a bounty on coyote scalps, where plaintiff sued as assignee in trust of a large number of claimants, and presented instruments purporting to be assignments from them, evidence examined, and *held* sufficient to show that the instruments offered were all executed by the parties alleged.

2. The positive statement of a witness that an instrument was signed by a given person is not overcome because it incidentally appears that he was not present when it was signed.

3. In an action under St. 1901, p. 646, c. 214, authorizing suits against the state on claims arising under the act fixing a bounty on coyote scalps, where plaintiff sued as assignee in trust of a large number of claimants and by virtue of his substitution in place of a bank as attorney in fact for the claimants, it was error to exclude a resolution of the bank's board of directors reciting the powers of attorney and substituting plaintiff; it appearing that the powers of attorney authorized the bank to make substitution and constituted part of plaintiff's power to sue as assignee.

4. Where plaintiff's depositions were noticed to be taken on a certain day, but were not then taken, and the court was warranted in finding that the defendant had no notice of a continuance of the time for taking them, they were properly suppressed.

In Bank. Appeal from Superior Court, Sacramento county; J. W. Hughes, Judge.

Action by John J. Bauer against the state of California. Judgment for the defendant, and plaintiff appeals. Reversed.

T. C. Spelling and Grove L. Johnson, for appellant. U. S. Webb, Atty Gen., and Geo. A. Sturtevant, Deputy Atty. Gen. (Devlin & Devlin, of counsel), for the State.

LORIGAN, J. This action was brought by plaintiff to obtain a judgment against defendant on claims for bounty on coyote scalps, and was prosecuted under "An act authorizing suits against the state on claims or demands arising under an act of the Legislature entitled 'An act fixing a bounty on coyote scalps,' approved March 31, 1891, and regulating the procedure therein." St. 1901, p. 646, c. 214. Plaintiff sued as the assignee in trust of some 200 bounty claimants, and his complaint contained a separate count on each of said claims; the aggregate amount for which judgment was sought being $5,260. The evidence in the case was addressed in detail to proof of plaintiff's right to recover as assignee of one Ramon Silvas; it being stipulated that the evidence and proceedings in the case with reference to the proof of that claim should govern and apply to the other claims mentioned in the various counts in the complaint. At the close of the plaintiff's case the court granted a nonsuit, and, judgment having been entered accordingly, plaintiff appeals from such judgment upon a bill of exceptions.

It is apparent from the record that the particular ground upon which the nonsuit was granted was that in the opinion of the court there was no evidence to support the claim of plaintiff that he was the assignee, in trust or otherwise, of Ramon Silvas, or any of the other bounty claimants. Upon this particular matter it is insisted by the appellant, under his bill of exceptions, that the court improperly excluded certain evidence offered by him tending to prove that he was such assignee, and which, had it been admitted, he claims would have sustained his position in that regard; and this presents the only point which we think requires special consideration. If the proffered evidence was correctly excluded, then the judgment of nonsuit was proper; if not, the judgment must be reversed.

Plaintiff, in support of his right to maintain the action as alleged assignee, introduced in evidence, without objection, an instrument in writing, consisting of three parts; the first two being separate powers of attorney, dated October 20, 1897, and executed by Ramon Silvas and by each of the other claimants mentioned in the complaint, in favor of the California State Bank, a corporation, authorizing and empowering it "for me and in my name" to receive from the state Controller any warrant, and from the state Treasurer any money, authorized to be delivered or paid by any act of the Legislature, on his claim for such bounty, and further granting to the bank full power of substitution. The third part of the instrument was of the same date, and consisted of an authorization to said bank to pay to one T. C. Spelling, attorney for each claimant, one-third of all money collected, less charges and expenses of collection. These powers of attorney did not pretend to carry any assignment of the claims, or to confer any authority upon the bank to take any measures toward their collection, save as attorney in fact and in the name of the various claimants. The plaintiff then offered in evidence a resolution of the board of directors of the California State Bank, adopted May 17, 1901, reciting the execution of the foregoing powers of attorney, and substituting the plaintiff "in place of this bank as the attorney in fact under and by virtue of all such powers with the authority conferred thereby." To this offer defendant objected upon the ground that the instruments referred to in the resolution "were mere powers of attorney, that the California State Bank had no title to assign or substitute, and that by said assignment the plaintiff derived no title to the claims set out in the complaint and could not be substituted."

Pending a ruling on this objection, and to obviate its force, the plaintiff undertook to produce additional evidence, and in that behalf the attorney for the plaintiff, T. C. Spelling, was sworn as a witness, and testified that in the summer of 1897, while at Bartlett Springs, he undertook the procurement of coyote scalp claims against the state, and arranged with the California State Bank to have the powers of attorney above referred to taken in its name. These were printed, and some forwarded to the claimants for signature before he returned to San Francisco. When he reached that city he discovered that these powers had not been printed according to the copy he had furnished, and that certain words and provisions had been omitted therefrom. At this point in his testimony he produced a written instrument, which he testified was a pencil copy of an original, reading as follows: "Whereas, by a clerical mistake and oversight the words 'or in its own name or in the name of any person substituted by it as herein provided,' after the words 'in my name' wherever they occur, are omitted from a certain agreement in three parts of this date made, executed, and delivered by me to the California State Bank, said mistake and omission is by me hereby corrected, and the said words are hereby, and by the force and effect of this instrument, inserted and incorporated in said agreement, at all the places indicated in all the parts of said agreement, without further act on the part of any party to said agreement; and whereas, T. C. Spelling has heretofore, acting in the place of said bank, paid me the sum of twenty-five cents for an assignment of the claims and demands mentioned in said agreement, for the purpose of carrying out the purposes of said agreement by said bank, which by like clerical mistake was omitted therefrom: It is now agreed that said agreement be, and the same is hereby, corrected by inserting at the end of each of the first two parts of said agreement the words 'and for all the purposes hereof said corporation shall be, and is hereby, created and constituted the assignee in trust of the undersigned as to all said claims and demands, and this instrument shall be considered as signed as of any and all future dates when used by said bank.' Full force and effect shall be given this instrument of even date with said instrument in three parts hereby corrected, and both together shall constitute the entire agreement between the parties thereto." The witness then testified that he had had printed as many copies of this latter supplemental instrument as there had been printed powers of attorney first referred to, and that "these were signed by all who had previously signed the said instrument in three parts, one of which was signed by Ramon Silvas, and by all who subsequently signed it, and all were delivered to me as agent for the California State Bank. I was not present at the time of the signing of said papers. The nominal consideration of 25 cents was paid to each of the claimants executing these instruments. The persons referred to as having executed and delivered said writings are those named in the complaint and in said papers offered to prove the substitution of plaintiff, and were introduced on a previous trial of this action. I was not present at the payment of said consideration." The witness further testified that all these instruments from the claimants were received in the latter part of 1897, and prior to May, 1898; that about May, 1898, the witness became too ill to attend to business, and gave up his office, and stored all his papers, including the originals, one of which the paper in pencil above set forth was a copy, in a warehouse in San Francisco; that in the summer of 1898 one W. S. Cull, who had signed the original powers of attorney and the supplemental instrument, asked witness to permit him to examine the papers he had signed and delivered, and witness accompanied him to the warehouse and allowed him to do so. While there the witness took a full copy in pencil of the supplemental instrument signed by Cull, which was the copy he was testifying about; that the originals were all identical, save as to signature and dates of execution; that subsequently the case which contained all these originals broke open in the warehouse, and through the neglect of those in charge such originals were lost; that witness had made diligent search and inquiry of those in charge of and employed in the warehouse, but was unable to find them. Upon this testimony the plaintiff offered, and the court admitted in evidence, the pencil copy, but sustained the objection of defendant to the resolution of the board of directors of the California State Bank offered by plaintiff to prove his substitution in place of the bank; and, the plaintiff offering no other evidence, a nonsuit was granted.

As we gather it from the discussion between counsel and the court appearing in the record, when the final offers on this point were made, the court, notwithstanding it had admitted in evidence the pencil copy, held that the evidence, taken altogether, was insufficient to show that the originals, of which it purported to be a copy, were executed. We are of the opinion, however, that the evidence was sufficient for that purpose. The testimony of the witness Spelling was addressed solely to the matter of execution. His testimony, as we understand it, was direct and positive that the originals, identical in all respects save as to name and date with the pencil copy, had been executed by all those who had signed the original powers of attorney to the bank, and particularly by the claimant Ramon Silvas; that they had been executed by all those who were mentioned in the complaint as bounty claimants; and that as so executed they had been delivered to him as agent for the bank. It appears to us, in the face of this uncontradicted and unquestioned testimony, that it was sufficiently proven as a fact that these instruments were all executed by the parties. It is true that he testified that he was not present when these supplemental instruments were signed. But the simple circumstance that he was not present did not conclusively negative the possession of other sufficient knowledge by him upon which his unequivocal declaration that they were signed by the parties could be based. Proof of the execution of an instrument is not limited to the testimony of one who actually saw it signed. There are other methods by which the necessary knowledge may be acquired, which would permit one to swear to the fact. Code Civ. Proc. § 1942 et seq. A person may be sufficiently familiar with the signature in question to swear to its genuineness, although he did not see the party sign it. In this view the positive statement of a witness that an instrument was signed by a given person is not overcome, because it incidentally appears that he was not present when it was signed.

All the testimony relative to the execution of these instruments was given by the witness on his direct examination. No cross-examination was had. If the defendant desired to question the accuracy of the positive statement of the witness that these documents were executed, he could have done so. He could have tested the accuracy of his general statement in this particular, or investigated his ability, capacity, or qualification to testify upon the subject. Having failed to do so, his general statement of the execution of these instruments should have been accepted as sufficient proof thereof as far as plaintiff's case was concerned, as the simple fact that the witness did not see the instruments executed did not exclude all means of knowledge which he might have possessed upon which his declaration could be supported. This evidence was prima facie sufficient to show execution of these supplemental instruments, to be used in connection with the original powers of attorney, of which in terms they became a part. Together they must be deemed one instrument, and as such expressly constituted the bank the assignee in trust for the claimants as to their bounty claims, with power of substitution for general purposes of collection; and the bank, as authorized thereunder, having by proper resolution (long after such supplemental instruments were executed and became effective) substituted the plaintiff, with all the powers and authority conferred on it, the court should have allowed such resolution in evidence, as establishing the right of the plaintiff as such assignee in trust to maintain the action in behalf of such claimants. Under the act of 1901, authorizing these suits against the state, it is provided that they may be maintained by the "owners or holders of claims or demands." This general language authorizes actions either by assignees succeeding absolutely to the former owner's title by assignment, or by assignees of such claim for purposes of collection. As respondent makes no point in this respect, however, but only insists that the proof did not show that the plaintiff was assignee for any purpose, further discussion of this point is unnecessary. Our conclusion is that it was error to refuse to admit the resolution of substitution of the plaintiff in place of the bank, and that the judgment must be reversed on that account.

Another ground urged for reversal is the refusal of the court to allow certain depositions tending to support the execution of these supplemental instruments to be admitted in evidence. These depositions were noticed to be taken on a certain day. They were not so taken, and the court was warranted, under the evidence, in finding that the defendant had no notice of a continuance of the time for taking them, and, hence, properly suppressed them.

We have thus far considered this case on the particular points presented on this appeal relative to the evidence and rulings of the court thereon. Aside from insisting that the rulings of the court were correct, the respondent presents the same points against the right of the plaintiff under any circumstances to recover, as urged by it in the case of Bickerdike v. State of California, 78 Pac. 270, the constitutionality of the statute, etc. That case has just been decided adversely to the respondent upon all these points, and nothing further than a reference to the opinion in that case, where these matters are fully discussed, is necessary.

The judgment of the lower court, for the reasons that we have assigned, is reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.; HENSHAW, J.

(144 Cal. 721)

SHARP v. SALISBURY. (L. A. 1,455.)*

(Supreme Court of California. Sept. 20, 1904.)

STATE LANDS—SALE — CERTIFICATE HOLDERS — CONTEST—JURISDICTION—SUMMONS—PUBLICATION—JUDGMENT—FRAUD.

1. Where the specific averments as to efforts made by the district attorney to discover the whereabouts of the owner of a state land certificate, as alleged in an affidavit to obtain an order for the publication of summons in a suit to foreclose the rights of such certificate holder, were not denied, a denial of the conclusions stated in such affidavit that the attorney had made diligent search and inquiry to ascertain the holder's whereabouts and residence was insufficient to show that the order for publication, and judgment of foreclosure based thereon, were fraudulent.

2. The superior court does not obtain jurisdiction of a state land contest by reason of a reference of the contest by the Surveyor General, but only by the commencement of an action following such reference, in which a prima facie

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*Rehearing denied October 20, 1904.

case is made in the complaint against defendant, showing that his certificate of purchase is for some reason invalid.

3. A defendant in a state land contest is not bound to come into court and affirmatively set up his rights where the facts stated in the complaint are insufficient to establish a prima facie case.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Diego County; Geo. Puterbaugh, Judge.

Action by Frances W. Sharp against William B. Salisbury. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. H. Darew and Edwin A. Wells, for appellant.

GRAY, C. The plaintiff held a certificate of purchase for a certain section of school land in San Diego county. Suit was brought against her by the state to foreclose all her interest and annul her certificate of purchase because of nonpayment of interest on the balance due of the purchase price of said land. A decree was rendered therein against her, canceling said certificate. Thereafter a certificate of purchase for the same land was issued by the state Surveyor General to defendant. A contest was made in the land office by plaintiff against this second certificate, and the matter referred by the Surveyor General to the superior court for determination. A purported complaint was filed by plaintiff, service had on defendant, and the default of the latter entered for failure to answer. Subsequently an amended complaint was filed. The plaintiff then offered to make proofs to establish the allegations of her amended complaint; but the court refused to permit her to do so, for the reasons that the amended complaint failed to state a cause of action, and also "that the order of reference made by the Surveyor General does not give this court jurisdiction of the issues tendered by said complaint." The plaintiff refused to amend further, and judgment was entered against her that she take nothing, and that the case be dismissed, from which judgment she appeals.

We think the action of the court should be upheld, for the reason that the complaint fails to state a cause of action. The judgment roll in the foreclosure proceeding is attached as an exhibit to the complaint and made part thereof. So far as we can learn from an inspection of this roll, the judgment in the foreclosure proceeding is valid. Indeed, appellant fails to point in her brief to anything on the face of this roll that could be claimed to render the judgment void. We understand appellant, however, to contend that the facts stated in the complaint (which must be here admitted as true) show that the foreclosure judgment was obtained by fraud on a false affidavit for publication of summons. The allegations of the complaint in this regard are to the effect that the affiant who made the said affidavit, the deputy district attorney, did not in fact make diligent search or inquiry to ascertain the residence or whereabouts of the defendant in the foreclosure suit; "that if he made any search or inquiry at all thereof, the same was a sham and pretended search, and not made in good faith," etc. The affidavit for publication need not be here quoted. It was made part of the complaint, and it is sufficient to say that it was very similar to the affidavit in Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732, and on the authority of that case and the cases following it the affidavit must be held sufficient. The contradictions of this affidavit contained in the complaint were directed only at those general statements and conclusions contained in it which might be drawn from the specific statements of facts therein. The complaint does not deny or controvert that the deputy district attorney inquired of the persons named in the affidavit as therein declared by him. These specific statements as to the inquiries and efforts made and the names of the parties inquired of to ascertain the whereabouts of the defendant are the more important parts of an affidavit for publication. It is these specific allegations of specific facts that must be shown to be false in any successful effort to establish the fraudulent character of an affidavit for publication. Such allegations constitute the essential part of the affidavit, and to admit their truth is to admit the truth of what the court acted upon when it made the order of publication. The complaint for these reasons fails to show that the affidavit of publication was false in any essential particular, and consequently fails to show that the foreclosure judgment was obtained by fraud. Upon the face of the complaint, then, the foreclosure judgment must be treated as valid and binding. It follows that the complaint altogether fails to show anything that would invalidate defendant's certificate of purchase, and therefore states no cause of action.

The superior court does not get jurisdiction of a state land contest by reason of a reference of the contest by the Surveyor General. This must be followed by the commencement of an action, and unless an action is commenced, following the reference, in which a prima facie case is made in the complaint against defendant, showing his certificate of purchase to be for some reason invalid, "he is not compelled to come into court and affirmatively set up his rights. The mere fact that defendant has a certificate of purchase, and that the plaintiff protested against the issuance to him of any further evidence of title, and that the order of reference has been made, do not make a case that the defendant is required to answer." Polk v. Sleeper (Cal.) 76 Pac. 819.

Therefore, even though the defendant's default had been entered, the court was warranted in refusing to hear evidence in the matter until a complaint was filed that demanded an answer; indeed, in the absence of a complaint stating some cause of action, there was no case before the court.

We advise that the judgment be affirmed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

144 Cal. 748

PEOPLE v. PERRY et al. (Cr. 1,154.)

(Supreme Court of California. Sept. 21, 1904.)

CRIMINAL LAW — BURGLARY — MISCONDUCT OF COUNSEL—INSTRUCTIONS—APPEAL—HARMLESS ERROR.

1. Where the district attorney, in answer to a question, asked by defendant's attorney of the jury in argument, as to why a prior conviction of defendant of petty larceny, if it had occurred, had not been alleged in the information, stated that he had no knowledge of such prior conviction when the information was drawn, and, on defendant objecting to such statement, the court charged the jury that such matter was not for their consideration, defendant was not prejudiced thereby.

2. Where a witness for defendant testified on cross-examination that she was "not so very friendly" with him, defendant was not prejudiced by evidence admitted in rebuttal that during the trial the sheriff met such witness and two other ladies, one of whom was defendant's wife, and that they all then and there kissed defendant.

3. In a prosecution for burglary, an instruction that if the defendant entered the building in question in the nighttime—that is, between sunset of one day and sunrise of another day—with the intent to commit larceny, the jury should find him guilty of burglary in the first degree, was in conformity with the express provisions of Pen. Code, §§ 460, 463.

4. That the court, in instructing the jury in a criminal case, merely stated the law too emphatically, is not ground for reversal.

5. Where the jury were charged that defendant's guilt should be determined upon the evidence before them alone, and that no juror acting conscientiously could base his verdict on any other consideration, etc., defendant was not prejudiced by the refusal of an instruction that if, after considering the whole case, any juror should entertain a reasonable doubt of defendant's guilt, it was his duty not to vote for the verdict of guilty, nor be influenced in so voting by the reason that the majority of the jury should be in favor of such verdict.

Department 1. Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

William James Perry was convicted of burglary, and he appeals. Affirmed.

J. F. Quinn, for appellant. U. S. Webb, Atty. Gen., O. C. Gregor, and C. H. Cormick, for the People.

VAN DYKE, J. The defendant was convicted in the superior court of Humboldt county of burglary in the first degree, and sentenced to five years' imprisonment. He moved for a new trial, which was denied, and the appeal is taken from the judgment, and also from the order denying a new trial. The questions presented by the appellant on the appeal are: (1) Misconduct of the district attorney; (2) error in the admission of evidence; (3) errors in giving and refusing certain instructions.

1. It seems the defendant formerly resided at Pinole, in Contra Costa county, and at the trial certain witnesses who resided there were produced by the defendant to give testimony as to his good character for "honesty and integrity as a law-abiding citizen." On cross-examination they were asked by the district attorney whether they had ever heard "that the defendant was charged with burglary in the city and county of San Francisco in February, 1899," and also whether they had heard "that he was convicted of petit larceny on February 20, 1899, before the police court of the city and county of San Francisco." When the first of this class of questions was asked, an objection was made to the cross-examination, which was overruled by the court, but no exception taken by the defendant to the ruling, and no further objection or exception was made in reference to such testimony. In People v. Gordon, 103 Cal. 573, 37 Pac. 535, it is said that, a witness "having testified as to the defendant's general good character, his opinion and the value of it may be tested by asking the witness on cross-examination whether he has ever heard that the person in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him." And in People v. Mayes, 113 Cal. 624, 45 Pac. 862, it is said: "While it is not permissible to give evidence of wrongful acts for the purpose of impeaching the witness, it is proper upon cross-examination of a witness who has given testimony either for sustaining or impeaching the credibility of another witness to question him with reference to his knowledge of specific acts, and with reference to the specific acts themselves, for the purpose of overcoming the effect of his testimony upon the direct examination." Such questions should not be asked by a district attorney in the absence of information warranting a reasonable belief on his part that the fact is as implied by the questions; in other words, the questions should not be asked for the mere purpose of getting before the jury an intimation that the defendant had theretofore been guilty of specific acts of misconduct; and where it is apparent that such is the only object of the questions it is undoubtedly misconduct on the part of the district attorney. We cannot, however, say that this appears to be the case here.

Appellant also complains that the district attorney on the day before the trial asked some of these character witnesses if they had heard of the matter covered by the questions referred to. The district attorney, the same as an attorney for any party, may ask a witness while out of court, and not under the binding obligation of an oath, if certain matters are within his knowledge; and is not bound by answers that may be given when not on the witness stand. The district attorney may have thought, and probably did think, that these witnesses, friends of the defendant, who had traveled a great distance to be of service to him, would not admit, when not under oath, any facts detrimental to his cause, and had a right on cross-examination, as already stated, to ask the questions referred to.

It is also complained that the district attorney was guilty of misconduct in his argument to the jury to the prejudice of the defendant. The record in reference to this matter is as follows: "In the argument of counsel for the defendant, in discussing the questions asked by the district attorney of the witnesses produced by the defendant on good character, as to whether or not they had heard that the defendant was charged with burglary and convicted of petit larceny in San Francisco in 1899, he stated that no evidence was produced by the people to show that the defendant had in fact suffered a prior conviction of petit larceny, or been charged with burglary; and then and there stated to the jury that the cross-examination of said witnesses was merely a trick or scheme on the part of the district attorney to get evidence before the jury of facts that never existed. Thereupon the district attorney took exception to the remark of defendant's counsel, and the court thereupon stated to defendant's counsel that such evidence had been introduced under the ruling of the court, and that consequently its introduction could not be legitimately denominated a trick, and should not, therefore, be so characterized. Immediately after, defendant's counsel asked the clerk of the court for the information herein, and upon receiving the same from the clerk he then read the entire information and exhibited the same to the jury for the purpose, then stated, of showing that the prior conviction was not charged in said information, and that, in the absence thereof, it was presumed that none existed; and while so exhibiting said information to the jury used substantially the following language: 'If it is a fact that the defendant has suffered a prior conviction of petit larceny, why did not the district attorney charge such prior conviction in the information in this case?'" During the closing argument of the district attorney the following occurred: "District Attorney: Mr. Quinn has asked you the question why have we not charged a prior conviction of petit larceny in the information in this case. I will answer him. I am glad he has given me an opportunity to answer him, and I will tell you now the reason it was not charged was because when the information was drawn I was not in possession of the knowledge that he had suffered a prior conviction of petit larceny. That is the reason he was not charged, and therefore I could not charge it afterwards. Mr. Quinn: At this time I take an exception to that. District Attorney: You have asked me the question why it was. Court: I don't think it is proper on either side to discuss that question. District Attorney: I don't intend to. Court: As to whether or not there was a prior conviction, and why, if at all, it does not appear to have been charged in the information in this case, either upon the one side or the other, neither upon the one side or the other, do I think it is a proper matter for the consideration of the jury. District Attorney: I don't think so either, but, inasmuch as he challenged me, I thought it was fair. He placed me in a position that I am not willing to answer the challenge. Mr. Quinn: I would like the reporter to note an exception to the remark made by the attorney. The Court: I have directed the jury not to pay the least regard to that matter, one way or the other. District Attorney: If you withdraw your statements made in connection with the same matter I will withdraw mine. Mr. Quinn: I will take an exception; that is all." Nothing prejudicial to the defendant's interest is here shown. Though the answer of the district attorney was called for by the question of defendant's counsel, it would have been better if the district attorney had not made the statement complained of. There was no evidence in the case to show that the defendant had ever been convicted of petit larceny, and therefore defendant's counsel was justified in so arguing to the jury. The district attorney, in his answer to defendant's counsel, rather intimated, however, that as a matter of fact there had been such a conviction. But the jury were instructed by the court that the matter was not for their consideration, and that they were not to pay the least regard to the matter one way or the other. Presumably they followed the instruction of the court in this regard. From the fact that this court has in many cases been constrained to animadvert upon the conduct of district attorneys in transcending the bounds of propriety in their zeal to obtain a conviction, as is said in People v. Ward, 105 Cal. 340, 38 Pac. 946: "There seems to be a disposition on the part of counsel for defendants in all criminal cases, since the decision in People v. Wells, 100 Cal. 459, 34 Pac. 1078, to count upon the alleged misconduct of the prosecution as cause for a reversal." And the court there remarks that the case referred to, to wit, People v. Wells, was an extreme case, where the assistant district attorney had willfully and persistently offered incompetent evidence to prejudice the defendant, so that the animus of the prosecution was very apparent, and the court deemed it but just to stamp it with the seal of disapprobation, and remarks that it is only in extreme cases that the remedy there administered applies. This case clearly does not fall within the class of cases referred to by this court as extreme cases demanding any particular consideration.

2. The witness Georgia Wood, who had tes-

tified in behalf of the defendant, stated on cross-examination that she was "not so very friendly" with him. In rebuttal the undersheriff, in answer to a question by the prosecution, testified that during the trial, in the courthouse corridor, he met witness Georgia Wood and two other ladies, one being defendant's wife, and they all, Georgia Wood included, then and there kissed defendant. The court refused to strike out this testimony, on defendant's motion, on the ground that it was admitted simply for the purpose of showing the friendly feeling between the witness Georgia Wood and defendant. Although defendant's counsel contends that it was error to refuse to strike out this testimony, he is not very clear whether this worked to the prejudice of the defendant or not, as he says, "It would be very hard to judge just what effect such testimony would have on the jury." This being the case, it is very clear that it did not affect the substantial rights of the defendant.

3. The contention of appellant with reference to the instructions is that the first one given in behalf of the people is erroneous. This instruction is that, if the defendant entered the building in question in the nighttime—that is, between sunset of one day and sunrise of another day—with the intent to commit larceny, the jury will find him guilty of burglary in the first degree. This is in strict compliance with the provisions of the Code. Pen. Code, §§ 460, 463. The criticism upon instructions 11, 12, and 13 in behalf of the people seems to be that they stated the law on the subject "altogether too strong," and were therefore "harmful." But merely stating the law too emphatically furnishes no ground for reversal. Instructions 9, 10, 11, and 12 asked for by the defendant, and refused by the court, were properly refused. There was no evidence upon which to base the same. Appellant's defense was that he was drunk, and did not know anything about the crime. There was no evidence showing that the defendant received the stolen property from any other person "knowing that it was stolen," or that he "received the goods with the suspicion of the other's rightful ownership." Instruction 20 asked for by defendant and refused is as follows: "If, after a consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced, in so voting, for the single reason that a majority of the jury should be in favor of a verdict of guilty." Appellant contends that the refusal to give this instruction was error justifying a reversal, and relies upon People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50, in support of his contention. The court there say that the instruction correctly stated the duty of a juror, and should have been given, but adds: "If any juror needed an instruction upon this point, it was harmful to refuse it; if no juror needed the instruction, it would have been harmless to give it." But that case was not reversed solely or principally upon the refusal to give that instruction, but mainly upon other errors of the trial court referred to in the opinion in that case. In the later case of People v. Rodley, 131 Cal. 259, 63 Pac. 358, this court says on this subject: "Juries are impanelled for the purpose of agreeing upon verdicts if they can conscientiously do so. They are admonished at each recess of the court not to form an opinion as to the merits of the case until it shall be finally submitted to them, and when it is so submitted it is the duty of jurors to deliberate and consult together with the view of reaching an agreement, if they can, without violence to their individual understanding of the evidence and instructions of the court. They should not be lectured by the court to make them strong and steadfast in their individual opinions; neither should they be exhorted to reach an agreement; and while it is probably true that 'each juror should decide the matter for himself,' yet he should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to 'sacrifice his views or opinions of the case' when convinced that they are erroneous, even though in so doing he defer 'to the views or opinions of others.'" By an instruction previously given, however, in the case at bar the court states to the jury: "This case, like all other cases where crime is charged, should be determined by the jury upon the evidence before them, and upon that alone, and no juror acting conscientiously can base his verdict upon any other consideration." And in one of the instructions given at the request of the defendant the court stated to the jury: "To warrant a conviction of the defendant, he must be proved to be guilty clearly and conclusively, so that there is no reasonable theory upon which he can be innocent when all the evidence in the case is considered together." And, again: "You will not be warranted in returning a verdict of guilty unless you find that the evidence excludes to a moral certainty every reasonable hypothesis except that of guilt, and the conviction of guilt must flow naturally from the facts proved, and not from any forced or constrained construction, and must be consistent with all the facts, for, if any one fact is entirely inconsistent with the conclusion of guilt, your verdict must be 'Not guilty,' and in cases of reasonable doubt it is your duty to acquit." And, again: "There must be in your minds an abiding conviction to a moral certainty of the truth of the charge, derived from a comparison and consideration of all the evidence. You must be satisfied with the truth of the accusation against the defendant to a moral certainty, and beyond all reasonable doubt, or your verdict must be 'Not guilty.'" Similar instructions were repeated over and over, so that there can be no question that the case was so submitted

to the jury as to guard in every possible way the rights of the defendant to a fair and impartial trial.

We fail to find any error justifying a reversal in this case. Judgment and order appealed from affirmed.

I concur: ANGELLOTTI, J.

SHAW, J. I concur in the opinion of Justice VAN DYKE. In People v. Howard, 76 Pac. 1116, I approved the concurring opinion of the Chief Justice, in which it was held error to refuse an instruction similar to defendant's instruction No. 20 here involved. At that time my attention had not been called to the case of the People v. Rodley, 131 Cal. 259, 63 Pac. 351, cited in the opinion of Justice VAN DYKE. Upon further consideration of the question I am satisfied that the refusal of such an instruction should not be considered an error of sufficient importance to justify a reversal in any case where the jury are fully instructed that the verdict must be based upon the evidence alone. Each juror is required at the beginning of the trial to take an oath that he will well and truly try the matter in issue, and a true verdict render according to the evidence. Code Civ. Proc. § 604; Pen. Code, § 1046. The proposed instruction assumes that an instruction from the court is necessary to inform a juror that this oath means that he is to act upon his own judgment, or that it is necessary to inform him that, after having taken such an oath, it would be a violation of it to render a verdict because a majority of the jury believed it to be according to the evidence, although he himself did not so believe. The defendant has no right, as matter of law, to be so safeguarded against the misconduct of the jurors. Section 1258 of the Penal Code provides that this court on appeal must disregard "exceptions which do not affect the substantial rights of the parties." An exception which involves nothing more important than the failure of the court to protect the defendant against the very remote contingency that some juror may so misunderstand or disregard his oath and the other instructions, or the equally remote contingency that such a juror would be prevented from so doing by an instruction such as that here involved, does not, in my opinion, affect the substantial rights of the defendant.

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144 Cal. 670

COOK v. COLUMBIAN OIL, ASPHALT & REFINING CO. (L. A. 1,552.)*

(Supreme Court of California. Sept. 16, 1904.)

CONTRACTS—WELL-DRILLING—CONSTRUCTION—BREACH.

1. A contract provided that plaintiff should drill not less than 2,000 feet of oil wells at a specified price "per foot sunk," and should receive the amount earned for each foot of hole sunk in accordance with "the said scale of prices." The contract also provided that, if the drilling should be stopped by defendant before 400 feet had been sunk in any one hole, it would pay the cost of moving the drilling outfit to another place, in addition to the amount earned for the number of feet sunk, and that, should the work be stopped on any well for any cause after a depth of 400 feet had been sunk, then the plaintiff should move the rig at his own cost and expense to the place designated by defendant. *Held*, that where plaintiff in good faith drilled a hole to a depth of 580 feet, when, by reason of the breaking of a stem or bit attached to the drill, without plaintiff's fault or negligence, the well could not have been drilled deeper, and was thereupon abandoned, plaintiff was entitled to recover the contract price therefor.

2. A contract for the drilling of certain wells provided that defendant should furnish casing pipe and shoes, to be delivered on the ground, of such sizes as it might select, and should be properly inserted and used in the wells by plaintiff, and carried to the bottom, if possible, without diminishing the size, except in cases where it was found absolutely unavailable after the use of under-reamers and other appliances. Plaintiff drilled a hole 1,420 feet deep, and, being of the opinion that it was impossible to put eight-inch casing, which he had been using, to any greater depth, informed defendant of such fact, and asked for six-inch drive pipe for further use. Defendant did not comply, whereupon plaintiff abandoned the work. *Held*, that defendant's failure to furnish such pipe constituted a breach of contract entitling plaintiff to recover for the work.

Commissioners' Decision. Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by James B. Cook against the Columbian Oil, Asphalt & Refining Company. From a judgment in favor of plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

F. M. Parcells and C. A. Storke, for appellant. Reardon & Whittaker and W. P. Butcher, for respondent.

COOPER, C. This action was brought to recover a balance claimed to be due plaintiff for boring and drilling holes or wells in the lands of defendant under a written contract. The case was tried with a jury, and a verdict returned for plaintiff in the sum of $2,700. A motion for a new trial was denied, and this appeal is from the judgment and the order denying a new trial.

The appeal involves two propositions upon which appellant relies. The first is as to whether or not plaintiff is entitled to recover under the contract for one hole bored to a depth of 580 feet, and the second is as to whether the plaintiff was prevented by the fault of defendant from boring the second hole or well more than 1,420 feet in depth. There is no dispute as to the facts that plaintiff bored or drilled two holes in the lands of defendant of 580 feet and 1,420 feet, respectively, and that, if the plaintiff is entitled to recover for each foot of hole bored, the verdict is for the correct amount of the balance due to plaintiff. It will be necessary to set forth the parts of the contract material to the controversy, plaintiff being the party of the second part, which are as follows:

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*Rehearing denied October 15, 1904.

"First—That the party of the second part will furnish at his own cost and expenses all the machinery, tools, paraphernalia and materials of all kinds, including labor, fuel, water, and any and all things of whatsoever kind and nature that may be necessary and needful (except casing, pipe and shoes) to properly perform the work of drilling or boring not less than 2,000 feet of hole or wells, and to drill or bore the same at any one or more places on the said property as may be desired and designated by the party of the first part, for the agreed price per each foot depth sunk, as shown and set forth in the following scale of prices, at different depths up to 2,000 feet and in accordance with the further terms and conditions herein contained. * * *

"Provided, however, that in case the drilling of any well shall be stopped by the party of the first part for any cause after it has been begun, that the party of the first part will pay the net cost of moving the drilling outfit to any other place on the property where another well is to be started, in addition to the amount earned for the number of feet sunk, in accordance with the said scale of prices per foot; and that should work be stopped on any well for any cause after a depth of 400 feet has been sunk then the said party of the second part shall move the rig at his own cost and expense to the place designated by the party of the first part.

"Second—That in case of abandonment of any well or wells for any cause, the party of the second part will pull and remove in a careful manner all casing pipe and fittings used in said well or wells, that can be got out by a reasonable and faithful effort, by the use of all appliances and tools ordinarily used in performing such work.

"Third—That all casing pipe and shoes of the proper sizes necessary to be used in the well or wells will be furnished and delivered on the ground by the party of the first part and that it shall be of such sizes as it may select, and the same shall be properly inserted and used in the wells by the party of the second part, and carried to the bottom if possible without diminishing the size, except in cases where it is found absolutely unavailable after the use of under-reamers, and other appliances, as may be necessary and proper for keeping the hole in proper shape and condition.

"Fourth—That in case a body of asphaltum be encountered at any considerable depth, and it is found impossible after a faithful and reasonable effort so to do, that it cannot be drilled through nor penetrated by the use of any of the known tools and appliances, then the said well will be considered as completed and a settlement made in full for the depth drilled according to the said scale of prices: provided, however, that the party of the first part shall have full and free right and privilege to use and operate the machinery and outfit of the party of the second part at its own cost and expense for a period not to exceed ten days in making a further effort to sink the well or until satisfied that the hole cannot be sunk any deeper. * * *

"Sixth—That in case oil, gas or asphaltum shall be found at any depth in any well, and the party of the first part shall elect to stop the drilling in such well, the party of the second part shall properly test the well and leave the same in condition ready for the pump or other working appliance before moving the rig and outfit away.

"Seventh—It is understood by and between both parties hereto that this contract is for a total of 2,000 feet of hole or wells, and that the party of the second part agrees to put down any one hole to a total depth of 2,000 feet, if the ground is such that it can possibly be done, by reasonable effort, or that he will stop the drilling of any well at any depth, as directed by the party of the first part, and in accordance with the said scale of prices per foot sunk, and the terms and conditions herein contained.

"Eighth—That the party of the first part will pay or cause to be paid to the party of the second part the amount earned for each foot of hole sunk, in accordance with the said scale of prices at times and as follows, to wit: An advance sum of $250 (two hundred and fifty dollars) when the rig and outfit is on the ground and ready to commence the work of drilling; seventy per cent. of the amount earned as per scale when the well has been sunk to a depth of two hundred (200) feet and a like seventy per cent. of the amount earned at the completion of each two hundred feet until the well is either completed or abandoned, or the work stopped by the party of the first part, when the balance in full shall be paid after deducting the said advance payment of $250."

After the plaintiff had bored the first hole to a depth of 580 feet, because of a broken stem or bit the well could not be drilled deeper, as it caved in on the bit one hundred and fifty feet. After discussing the matter with Mr. Ayres, the defendant's superintendent, and upon his advice, plaintiff abandoned the 580-foot hole, and moved his machinery a short distance away for the purpose of commencing the second well or hole. It is conceded in the appellant's brief that this 580-foot well was "abandoned because of an accident which made it impossible to go further." We think the plaintiff is entitled under the contract to be paid for this 580 feet of hole. The contract provides for "not less than 2,000 feet of hole or wells." The scale of prices is "per foot sunk," and under the eighth clause of the contract the plaintiff is to receive "the amount earned for each foot of hole sunk in accordance with the said scale of prices." It is expressed in the contract that, if the drilling shall be stopped by defendant before a depth of 400 feet has been sunk in any one hole, that it will pay the cost of moving the drilling outfit to any other place, "in addition to the amount earned for the number of feet sunk in accordance with said scale of prices per foot." Then follows the provision "that, should work be stopped on any well for any cause after a depth of 400 feet has been sunk, then the said party of the second part shall move the rig at his own cost and expense to the place designated by the party of the first." It is evident that the above-quoted clauses meant that plaintiff should be paid the schedule price for any well or hole sunk, but that he should not be required to pay the expense of moving the rig if he was prevented by defendant from boring 400 feet in any one place. If this is not the correct construction of the contract, the plaintiff would be entitled to full pay and the expense of moving his machinery for a well 400 feet deep or less, but for any well or hole over 400 feet deep he would receive nothing, and have to move the machinery at his own expense besides, unless the well could not be drilled by reason of encountering a body of asphaltum as provided for in section 4 of the contract. Section 6 provides that in case of discovery of oil or asphaltum at any depth the defendant may elect to stop the further drilling in such hole or well. No provision is made in the said section as to compensation to plaintiff in such case, but clearly the contract contemplates that the plaintiff shall be paid the prices fixed in the schedule per foot for each foot sunk. If plaintiff had acted in bad faith, or had attempted of his own volition to drill holes or wells of only a few feet depth, so as to make up 2,000 feet of holes or wells, a very different question would arise; but such claim is not made. On the contrary, the contract provides that plaintiff, if desired by defendant, shall put down any one hole to a depth of 2,000 feet, if the ground is such that it can possibly be done by reasonable effort, or that he will stop drilling any well at any depth if so directed by defendant. The eighth clause provides that plaintiff shall be paid "the amount earned for each foot of hole sunk." We must construe the contract according to its plain common-sense meaning as gathered by reading it all together and each and every clause. When so construed, it means that plaintiff should be paid at a fixed price per foot for each and every foot of well or hole sunk by him in good faith in an honest endeavor to carry out the contract. Of course, if plaintiff, by his own fault or negligence, or by reason of not having proper machinery, had bored a hole a short distance, and for such reason had to abandon it, the loss would be his. But no such question is here presented. The plaintiff appears to have had experience in boring oil wells. His machinery is not claimed to have been unfit for the business in which he was engaged. The contract was evidently made with the view of sinking holes for the purpose of discovery. Defendant did not know how deep it would want any one well, nor how many it would desire to have bored. If plaintiff had bored a well 1,990 feet, and had been compelled to abandon it by reason of many contingencies that might have happened, appellant claims that it would not be responsible, unless it had directed plaintiff to stop drilling, or unless the body of asphaltum mentioned in section 4 had been encountered. If such is the meaning of the contract, what would become of the advance payments provided for in section 8? What, in such case, would be the meaning of that part of section 8 which provides that, if the well is completed or abandoned, or the work stopped by the defendant, the balance in full shall be paid? The 580-foot well was abandoned for a good reason, and with the consent of defendant.

As to the second proposition, there is evidence sufficient to justify the implied finding of the jury to the effect that plaintiff was prevented from sinking the 1,420-foot well to a greater depth by reason of the failure of defendant to supply the kind of casing necessary. Plaintiff testified that it was not, in his opinion, possible to put the eight-inch casing, which he had been using, down to any greater depth; that he so informed the officers of defendant, and asked for six-inch drive pipe; that defendant never furnished him with the necessary six-inch pipe; that he could go no deeper without it. Plaintiff also made a written demand upon defendant for the six-inch pipe. In a letter dated March 11, 1903, defendant, in answer to the written demand, stated as follows: "That the company is in control of a large amount of 6-inch drive pipe now at Summerland and I will order a shoe for the same immediately to be sent down. And will keep this drive pipe ready to be delivered on the ground in a few hours in case it is required and deemed advisable." In this same letter, after calling the plaintiff's attention to the provisions of the contract authorizing defendant to select the size of the pipe, defendant stated: "When it has been established by the use of all means described in the contract that it is impossible to continue the well with 11⅝ casing further we will then decide after carefully considering the nature of the material passed through at the bottom of the well just what the next size of casing to be used shall be. If it is decided to use 6-inch drive pipe, we are already provided with sufficient to begin the work and can deliver it on the ground in a few hours." Defendant never delivered the six-inch pipe on the ground. It did not attempt to show that it was possible for plaintiff to have continued with the sized casing that he had been using. Plaintiff testified: "I waited from February 24th to April 28th for the company to furnish the 6-inch drive pipe, and they never did furnish it." Appellant claims that plaintiff had sold his tools, and was not in a position to go on with sinking the well, even if the pipe had been placed upon the ground, and that his demand was only for the purpose of putting the defendant in default. On the contrary, plaintiff claims that defendant, not having found oil, had decided to abandon further work, and that it never intended in good faith to furnish the pipe when it demanded the further sinking of the well. As to the intentions of the parties or their good faith in respect to these matters it is not for us to determine. Plaintiff testified that he retained the right to use the outfit to finish the well if he desired it. In any event, we must hold that it was the duty of the defendant, before it could place plaintiff in default, to "furnish and deliver on the ground" the necessary casing pipe for the further prosecution of the work on the 1,420-foot well. If the construction we have placed on the contract is correct, the court did not err in its instructions to the jury.

We advise that the judgment and order be affirmed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

144 Cal. 724

BOSKOWITZ et al. v. THOMPSON, Collector, et al. (Sac. 1,079.)*

(Supreme Court of California. Sept. 20, 1904.)

INTERVENTION—RIGHT OF INTERVENER TO AFFIRMATIVE RELIEF—EQUITY JURISDICTION—POWER TO DECREE AND ENFORCE LIEN OF IRRIGATION BONDS.

1. In a suit by owners of land within an irrigation district against the collector of the district to enjoin the collection of a tax levied to pay interest on its bonds, holders of such bonds, while they may be permitted to intervene for the purpose of joining in the defense, cannot obtain affirmative relief to which the defendant would not be entitled. They cannot upon cross-complaints obtain an adjudication of the validity of their bonds, the district itself being a necessary party to an action for that purpose, nor can they obtain a judgment declaring their bonds to be a lien on the lands of the district.

2. A court of equity has no jurisdiction to adjudge that bonds issued by an irrigation district constitute a lien upon the lands within the district, nor to decree the enforcement of such lien, since, if it exists, it is by virtue of the statute under which the bonds were issued, and must be enforced by the levy and collection of a tax in the mode therein provided.

3. Under St. 1891, p. 149, c. 128, § 22, authorizing the board of directors of an irrigation district to levy an assessment sufficient to raise the annual interest on its outstanding bonds, the board has a certain discretion in determining the amount of the assessment, and, while its action is subject to the control of the judiciary in case of an abuse of discretion, and the collection of the assessment may be enjoined in case the board should seek to raise an excessive amount, courts have no authority to determine the amount to be raised, or that only a portion of an assessment shall be collected.

Commissioners' Decision. Department 2. Appeal from Superior Court, Tulare County; Wheaton A. Gray, Judge.

Action by C. J. Boskowitz and others against W. M. Thompson, as collector, and others. From the judgment rendered, plaintiffs appeal. Reversed.

Geo. H. Maxwell, R. M. F. Soto, and Purcell Rowe (C. L. Russell and G. W. Zortman, of counsel), for appellants. E. T. Cosper, for respondent collector. B. F. Thomas, for respondent interveners.

HARRISON, C. The Tipton irrigation district, in Tulare county, was organized as a public corporation under the provisions of the Wright act (St. 1887, p. 29, c. 34), in July, 1891, and in the year 1896 its board of directors levied an assessment of $2.47 upon each $100 assessed value of the real property in the district, for the purpose of raising $3,600 with which to pay the annual interest on $50,000 of bonds theretofore issued by it and outstanding, and the further sum of $1,242.55 for a fund created by the district, called "bond expense fund." The defendant Thompson is the collector of the district, and prior to the commencement of this action had given notice, as required by the act, that, unless the assessments upon the land in the district were paid before a certain day, the land would be sold on that day to satisfy the same. The plaintiffs are severally owners of certain lands within the district which are set forth in the complaint, and brought the present action to enjoin the defendant from selling the same, alleging as grounds therefor that the board of directors did not, prior to calling the election at which the issuance of the bonds was authorized, estimate or determine the amount of money to be raised for the purpose of constructing the necessary canals and works and acquiring the necessary property and rights therefor, and did not have the report or specifications of any engineer, or any basis or plan which might be used for determining what amount would be requisite for such purposes. Issues upon these allegations were presented by the answer of the defendant Thompson. Certain holders of the bonds so issued, amounting to $18,000, under leave of the court intervened in the action and united with the defendant in resisting the claim of the plaintiffs, and in addition thereto filed cross-complaints, in which they recounted the matters set forth in their answers, and also set forth the proceedings for the issuance of the bonds and the character of the bonds, that they were bona fide purchasers thereof, that the interest thereon for the year 1896 had not been paid, and the amount thereof, and prayed that the amount due them be adjudged to be a lien upon the lands within the district, and that the defendant Thompson be directed to sell said lands for such proportion of the assessment as would pay the amount due them. To these cross-complaints the plaintiffs filed a general demurrer, and, upon it being overruled, answered the same. Upon the trial of the cause the court found that the district is a valid corporation; that bonds to the amount of $50,000 had been issued in accordance with the provisions of the act, and had been regularly sold; that the several cross-complainants are bona fide holders of portions of said bonds as set forth in their cross-complaints; and that the interest thereon from January 1, 1896, was unpaid. It also found that no special election had been held in the district authorizing an assessment to raise the $1,242.55 for the "bond expense fund." Upon its findings of fact the court rendered judgment that the interveners are respectively the owners of the number of bonds set forth in their cross-complaints, and that each of the same, together with the interest unpaid thereon, and interest accruing after the year 1896, is a valid and subsisting lien upon the lands within the boundary of the district; enjoining the defendant Thompson from selling any portion of the lands described in the complaint, except so much as may be necessary to pay to the interveners the amounts respectively due to them on account of interest on their respective bonds; and directing him, or his successor in office, to sell, in accordance with law, such proportions of said land advertised by him as may be required to pay to the interveners the amounts found due to them respectively for interest on their said bonds for the year 1896. From this judgment the plaintiffs have appealed upon the judgment roll alone, without any bill of exceptions.

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*Rehearing denied October 20, 1904.

1. Section 387, Code Civ. Proc., authorizes an intervention by "any person who has an interest in the litigation, in the success of either of the parties, or an interest against both." The intervention takes place when a third person is permitted to become a party to the action "either by joining with plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant." Upon being permitted to intervene, the intervener is to be regarded as a plaintiff or as a defendant in the action (unless he seeks something adversely to both), according as is the party for whose success he seeks to intervene, and is limited to the same procedure and remedies as is such original party, either for the purpose of defeating the action or resisting the claim of the plaintiff. People v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399, 773. Section 442, Code Civ. Proc., gives to a "defendant" the right to file a cross-complaint whenever he seeks affirmative relief against any party "relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates." In East Riverside Irr. Dist. v. Holcomb, 126 Cal. 315, 58 Pac. 817, it was held that section 442 "is primarily applicable only to the defendant; that is, the person whom the plaintiff had originally made defendant. Before any other person could take advantage of the section, he must have been made a defendant for the purpose of filing a cross-complaint, and his cross-complaint must have been of such a character as would warrant the court to order him brought in for the purpose of filing it." In the latter part of this sentence the court had reference to section 389, Code Civ. Proc., which authorizes the court to bring in "other parties" when a complete determination of the controversy cannot be had without their presence, and "to that end" to order a cross-complaint to be filed.

The bondholders herein were not brought into the action upon the ground that the controversy between the original parties could not be determined without their presence, but they were permitted to intervene by reason of their interest in the success of the defendant. They have, therefore, placed themselves by his side for the purpose of uniting with him in defeating the claim of the plaintiffs, and their right in this action to affirmative relief against the plaintiffs is no greater than is his. It does not appear whether the interveners named any persons as parties defendant to their cross-complaints, or that their complaints were served upon any other party to the action. The plaintiffs, however, answered their cross-complaints, and it may be assumed that they are named as defendants to the claims therein set forth. It is very clear, however, that the defendant, as collector of the district, would not be entitled to the affirmative relief against the plaintiffs which is sought by the interveners, and that if he had asked for such relief the court would not have been authorized to grant it. For the purpose of defending the validity of the assessment in his efforts to collect it, the defendant Thompson sufficiently represents the district (Hughson v. Crane, 115 Cal. 404, 47 Pac. 120); but he is not authorized to represent it in any proceeding for the purpose of having it adjudged that the bonds, for the payment of whose interest the assessment was levied, constitute a lien upon the land within the district, or that the district is estopped from questioning the validity of the bonds by reason of the fact that the holders thereof were bona fide purchasers for value. In any litigation of this nature the district itself is a necessary party, and in its absence the court has no authority to render a judgment determining the questions. The interveners herein are equally precluded with the defendant from seeking such affirmative relief in the action. They have no greater right to seek such affirmative relief by means of a cross-complaint than they would have had in an original and independent action therefor. Whatever lien the bondholders have against the lands within the district exists by virtue of the statute under which the bonds were issued and the assessment levied. The lien does not exist by reason of any equity in their behalf, or spring from any contract between parties, but is purely a creature of the statute.

The collection of taxes belongs to the executive branch of the government, and can be assumed by the judiciary only under express legislative authority therefor. Courts may inquire into and determine the validity of the assessment or other proceedings, but, unless the statute has declared it to be a lien, it cannot adjudge it to be one, and if the statute has declared it to be a lien, and provided for its enforcement, its enforcement can be only in the mode provided by the statute. The right of a court of equity to adjudge that a lien exists against certain land carries with it the right to enforce such lien; but the rule is well recognized that a court of equity as such, and in the absence of statutory authority therefor, has no jurisdiction to enforce a lien that is created by statute, and for whose enforcement the statute has provided a mode. Thompson v. Allen County, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472; People v. Biggins, 96 Ill. 481; Corbin v. Young, 24 Kan. 201; Grand Rapids, etc., v. Trustees, 102 Ky. 556, 44 S. W. 98; Board of Com'rs v. King, 67 Fed. 202, 14 C. C. A. 421.

2. It appears from the record that the assessment levied by the board of directors, amounting to $4,851, if it were all collected, would be only a trifle in excess of the amount needed for the payment of the annual interest upon the bonds and for the "bond expense fund"; but, as the court has found that there had been no special election authorizing an assessment for this fund, the amount sought to be so raised, viz., $1,242.55, was improperly included in the assessment. Under the provision of section 22 of the statute (St. 1891, p. 149, c. 128), authorizing the board of directors to levy an assessment "sufficient to raise" the annual interest upon the outstanding bonds, the board has a certain discretion in determining the amount to be raised, and courts will not interfere with their action unless it can be shown that they have abused this discretion. Hughson v. Crane, 115 Cal. 404, 47 Pac. 120. Upon the determination by the court that this portion of the assesement was unauthorized, it should have also determined whether the disparity between the amount as levied and the amount which the board was authorized to raise was such as to vitiate the entire assessment. If so, it should have declared the entire assessment unauthorized and void. If not, it should not have interfered with its collection. The court did not, however, determine whether the assessment was valid or void, nor has it assumed to determine what portion of it was valid, but by enjoining the collector—the defendant Thompson—from selling any part of the lands described in the complaint, except such as may be necessary to produce sufficient money to pay the amount found due to the interveners for the interest accrued on their bonds, viz., $855, and directing him to sell such proportion of the lands as will pay them these amounts, it has assumed that the assessment is valid to that extent, and has delegated to that officer the authority to apportion that amount of money upon the lands, irrespective of the original assessment thereon, or of the amount for which the assessment should have been made. By this portion of its judgment the court has in effect directed the defendant to levy an assessment upon the said lands sufficient to raise $855. It is unnecessary to say that in giving such direction the court exceeded its jurisdiction. It found that the district had issued bonds to the extent of $50,000, all of which are presumably of as valid obligation as are the $18,000 held by the interveners. No imputation is made upon the validity of the assessment so far as it was for the purpose of raising the $3,600 with which to pay the interest upon these bonds, and no reason is suggested why the lands within the district should not bear the burden of meeting this interest, or why the interveners should have the right to collect their interest to the exclusion of the other bondholders. It may be assumed that, if the board of directors had considered that they were unauthorized to provide in the assessment for the "bond expense fund," they would have made the assessment for only sufficient to raise the annual interest upon the outstanding bonds; but as the statute has given to that board the authority to determine whether it is necessary to provide a margin in excess of the actual amount of the interest, and also the extent of that margin, whatever amount is to be raised by the assessment must in all instances be determined by the board. While its action is subject to the control of the judiciary, and the collection of the assessment may be enjoined, in case the board should seek to raise an excessive amount, courts have no authority to determine the amount to be raised, or what proportion of the assessment shall be collected. The statute has vested the board with the exclusive right to levy assessments and to determine the percentage to be levied upon the property within the district. The amount thus levied is to be uniform upon all the property within the district, and it is not within the province of the court to declare the amount which is to be raised or to determine the percentage for which an assessment should be levied. The statute gives to the collector au-

thority to sell the property in case of nonpayment of the assessment thereon which is levied by the board, but a sale by him in satisfaction of an amount directed by the court is unauthorized, and would vest no title in the purchaser.

The judgment should be reversed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion the judgment is reversed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

144 Cal. 733

BEST v. WOHLFORD et al. (L. A. 1,367.)

(Supreme Court of California. Sept. 20, 1904.)

DEED — DESCRIPTION—PAROL EVIDENCE—MAP—ADMISSIBILITY—STATUTE.

1. Where a deed to land was executed by the collector of an irrigation district in pursuance of a sale for the nonpayment of an assessment, describing the land by number of lot, block, acreage, and district, but without reference to any map, an old map of the district is nevertheless admissible, in an action to quiet title, to show the sufficiency of the identification of the land as described in the deed, under St. 1891, p. 244, c. 171, § 18, subd. 2, relating to irrigation districts, and providing that in the assessment book which the assessor is to prepare the land within the district shall be listed by township, range, section, or fractional section, and, when the land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Diego County; W. H. Conklin, Judge.

Action by A. Lester Best against A. W. Wohlford and others. Judgment for plaintiff, and defendants appeal. Reversed.

Withington & Carter, for appellants. E. E. Powers, Powers & Holland, and G. H. P. Shaw, for respondent.

HARRISON, C. Action to quiet title. The land in question is a portion of the Rancho Rincon del Diablo, and is described in the complaint as "Lot No. 4 in block No. 178 of a subdivision of the Rancho Rincon del Diablo, containing 14.42 acres of land, more or less, according to the official map thereof on file in the office of the county recorder of said San Diego county, state of California." The title thereto was originally vested in the Escondido Land & Town Company, from which corporation the plaintiff, by mesne conveyances, derived his title. In the deed from that corporation, dated August 6, 1886, the land is described as "Lot 4 in block 178, according to the map of Rancho Rincon del Diablo made by O. N. Sanford, civil engineer, which map is on file in the office of the county recorder of said county of San Diego, state of California, being part of the Rancho Rincon del Diablo." In the deed to the plaintiff, dated April 24, 1901, it is described as land in San Diego county, California, "in the Rancho Rincon del Diablo, lot 4 in block 178, according to the official map thereof on file in the office of the county recorder of said county of San Diego." At the trial the plaintiff introduced the conveyances from the Escondido Company down to himself. It was admitted that the maps referred to in each of said deeds were on file in the office of the county recorder, and showed the lots and blocks delineated thereon as mentioned in said deeds.

The defendants offered in evidence a deed of conveyance, dated October 25, 1897, from E. J. Hatch, collector of the Escondido irrigation district, to the defendant Sallie B. Wohlford, executed to her in pursuance of a sale for the nonpayment of an irrigation district assessment for the year 1894, containing the several recitals prescribed by statute for a deed upon a sale by an irrigation district for the nonpayment of delinquent assessments. The description of the property sold and conveyed is set forth therein as "land lying and being within the said Escondido irrigation district, county and state aforesaid [county of San Diego, state of California], described as follows, to wit: Lot four (4), block one hundred seventy-eight (178), 14.42 acres, Rancho Rincon del Diablo." The plaintiff objected to the introduction of this deed in evidence on the ground that the same contained no description of the property in controversy, and that it does not refer to any map, and it cannot be ascertained therefrom what property, if any, is referred to in said deed. In connection with the offer of the deed the defendants thereupon offered evidence to prove that there is, and was at the time of said assessment under which the deed was made, but one lot 4 in block 178 in the Rancho Rincon del Diablo, and that such fact is, and was at the time of such said assessment, well known. It was admitted by the plaintiff that the Escondido irrigation district was duly incorporated in 1889, and that the same included the Rancho Rincon del Diablo and no other land, and that such was the fact at the date of the assessment in 1894, under which defendants claim. He, however, objected to the introduction of any evidence showing, or tending to show, a survey or map or plat of the Rancho Rincon del Diablo by Sanford, or any map or plat not referred to or mentioned in said tax deed, as irrelevant, immaterial, and incompetent. The court sustained his objection to all of said evidence, and also his objections to the deed, and excluded it from evidence, to which ruling the defendants objected. It is to be noted that the deed to the plaintiff is of lot 4 in block 178 of the rancho, according to the official map thereof on file in the office of the county recorder, and that unless the map made by Sanford, under which the Escondido Land & Town Company originally conveyed the land, is the official map, or identical with it, the plaintiff has failed to show any title in himself.

Section 18 of the statute concerning irrigation districts provides (St. 1891, p. 244, c. 171) that in the assessment book which the assessor is to prepare the property within the district shall be listed as follows: "* * * Second. Land by township, range, section, or fractional section, and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon."

The purposes to be subserved by the description are to enable the owner to discharge his land from the lien of the assessment by paying the same; and also, in case the land shall be sold to satisfy the lien, that bidders may know what land is offered for sale, and that the purchaser may receive a sufficient conveyance. The assessment becomes a lien only upon the land which is described in the assessment book, and it is, therefore, essential that such description be sufficiently definite to inform the owner whether any of his land is burdened by the lien. The description must be such that the land claimed by virtue of the deed can be identified or located upon the ground by means thereof. Mr. Cooley states (Taxation, p. 745) a satisfactory rule to be that "the designation of the land will be sufficient if it afford the owner the means of identification and do not positively mislead him, or is not calculated to mislead him." This rule was referred to with approval in San Gabriel Co. v. Witmer Co., 96 Cal. 635, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470. The strictness of construction which at one time prevailed in matters of taxation has been greatly relaxed in modern days. The obligation of all citizens to contribute to the expenses of government is recognized, and, instead of regarding proceedings for the levying and collection of taxes as hostile to the property owner, he is considered to be interested equally with all other citizens in the prompt collection of the taxes. A tax properly imposed upon his property will be upheld if the description of the property is sufficient to give him notice that it is burdened with the tax. Rollins v. Wright, 93 Cal. 395, 29 Pac. 58; Davis v. Pacific Imp. Co., 137 Cal. 245, 70 Pac. 15.

Parol evidence will not be admitted to help out a defective description, or to show the intention with which it was made, or to resolve an ambiguity in its terms; but the rule that the description must be certain and definite and sufficient in itself to identify the land, does not exclude evidence for the purpose of applying the description to the surface of the earth, and thus identifying it with the tract in controversy. If a monument is given as the starting point, evidence may be given to show its location, but if the direction of the course from that monument is not given, evidence will not be received to show what direction was intended. If the land is described by some name or designation, evidence will be received for the purpose of showing that the tract in controversy was well and generally known by that name or designation.

The above subdivision of section 18 does not require, as does the third subdivision, which refers to lots in cities and towns, any reference to a map, nor does it require the description of the land to be given in any particular form, other than that it shall be "sufficient to identify it." The designation of a tract of land as a portion of a larger tract, by number and block, without any reference to a map, may be sufficient to identify it, and if so the omission to refer to a map is not fatal to the description. If reference is made to a map, the map thereby becomes a part of the description, and may be read in evidence to identify the land, by showing that it is delineated thereon according to the recital. Although it is not competent to show that any particular map was intended, if none is referred to, yet if it can be shown that there is only one map of a tract which includes the lot in controversy, upon which this lot is delineated or designated, and that that map is well known and generally accepted as authentic, it may be received in evidence as tending to identify the land before the court.

The provision in the section that the description is to be "sufficient to identify it" implies that evidence may be received for the purpose of showing the sufficiency of the identification, and any competent evidence which is relevant to such issue should be received by the court. Whether the description of the land is sufficient to identify it is a question of fact, to be determined from the evidence presented on that issue. Woodside v. Wilson, 32 Pa. 52. In Greene v. Lunt, 58 Me. 518, it was said: "The assessment must be complete in and of itself as much as a deed or contract. Parol proof may be resorted to for the purpose of applying the terms of the description to the face of the earth, but no further. It cannot supply any deficiency in the butts or bounds. These must be ascertained from what is written, and from that alone." The description in this case was by the number of lot and range, without any reference to any map or plat—"the Cyrus Keen place in lot 6, range 2"; "the whole of lot 4, range 3, Lunt's lower tract"—of which the court said: "These lots are sufficiently described to enable any one to identify them by having the knowledge necessary to apply the description to the face of the earth." In Law v. People, 80 Ill. 268, the court said: "Any description by which the property may be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, will be sufficient." In St. Peter's Church v. Board of Commissioners, 12 Minn. 395 (Gil. 280), the property assessed was described as "S. ½ of lots 9 and 10 in block 49, Shakopee city," of which the court said: "In the absence of specific provision affecting the question, any description which is sufficiently definite and certain to ascertain the premises is good. In this case the town consists of lots and blocks, and the description points out the lot and block by the numbers thereof, respectively, and the premises assessed, as the south half of this lot. This, we think, is a sufficient description." See, also, Noyes v. King Co., 18 Wash. 417, 51 Pac. 1052; Taylor v. Wright, 121 Ill. 462, 13 N. E. 529; Koelling v. The People, 196 Ill. 353, 63 N. E. 735; Driggers v. Cassady, 71 Ala. 529; Davis v. Pacific Improvement Co., 137 Cal. 245, 70 Pac. 15. In Fowler v. People, 93 Ill. 116, the land was described as "block 3 in Wrightwood." The court received evidence that there was but one subdivision in Cook county called "Wrightwood," and but one block 3 in Wrightwood, and held the description sufficient. Similar rulings were made in State v. Woodbridge Tp., 42 N. J. Law, 401; Stewart v. Colter, 31 Minn. 385, 18 N. W. 98; Judd v. Anderson, 51 Iowa, 345, 1 N. W. 677, the court in the last case saying: "Parol evidence is admissible, not for the purpose of adding to or varying the description contained in the certificate of purchase, but of applying that description to its subject-matter, and when it is shown that H. B. Goe owned one tract of land, and but one, in the section, the description is just as definite and certain as if it had been written out in full in the certificate." In Godfrey v. Valentine, 45 Minn. 502, 48 N. W. 325, where the land was described as "lots 9 and 10 of Hoyt's outlots," evidence was received showing that the property in question was well known by that term, and so designated by those who had occasion to refer to it, and the description was held sufficient. In Minneapolis Railway Co. v. Minnesota Debenture Co., 81 Minn. 66, 83 N. W. 485, the description was "lot 1 Auditor's subdivision No. 22." The court received in evidence a map or plat which had been made by the county surveyor and recorded in the office of the register of deeds, and also evidence that this particular tract of land was commonly known and designated as "lot 1 Auditor's subdivision No. 22." In Kershaw v. Jansen, 49 Neb. 467, 68 N. W. 616, the description was by lot and block according to a map which had been filed and afterwards vacated. It was objected that the description was defective as referring to lots which had no legal existence. The court overruled this objection, saying: "Where, for the purposes of taxation, a description is used, so certain in its terms that it must, as to the taxpayer, have apprised him of the proceedings and of the land assessed, he cannot avoid his share of the public burden merely because there is nothing of record which ascertains the property described." In Labs v. Cooper, 107 Cal. 656, 40 Pac. 1042, cited by the respondent, the diagram in the assessment as copied in the record failed to describe any parcel of land, and it was held that from the description so copied the owner could not determine that his land was affected by the assessment. The court also held that it could not take judicial knowledge of the map of Sacramento for the purpose of identifying the description with that map. In Miller v. Williams, 135 Cal. 183, 67 Pac. 788, the land assessed in the city of Santa Cruz was described by numbers in certain tracts which were not subdivisions of the city, and no map of the tract was referred to. The court held that the description did not conform to the requirements of subdivision three of the section and was insufficient. In neither of these cases did the court consider the right to offer evidence in support of the description.

It appeared by the evidence in the present case, introduced on behalf of the plaintiff, that as early as 1886, O. N. Sanford, civil engineer, had made a survey and map of the Rancho Rincon del Diablo, and that on that map the land described in the complaint was delineated as lot 4 in block 178 of the rancho. It was also admitted that the land included in the Escondido irrigation district is, and was at the time of the assessment, identical in territory with the land included in the rancho. If now it can be shown that at the time of the assessment under which the deed to the defendant was made there was but one lot 4 in block 178 of the rancho, and that such fact is, and was at the time of said assessment, well known, such evidence, if not conclusive of the fact, would very strongly tend to show that the land described in the deed to the defendant is identical with that described in the complaint. It would then clearly appear that the plaintiff was not only not misled, but was directly informed that his lot was charged with the assessment. The evidence offered by the defendant was not only relevant, but was also competent to establish this fact. The court erred in refusing to admit this evidence, and for this error the judgment and order should be reversed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order are reversed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(145 Cal. 96)

GREEN v. SOULE. (S. F. 3,035.)*

(Supreme Court of California. Oct. 7, 1904.)

BUILDING CONTRACT—NEGLIGENCE—PERSONAL INJURIES — INDEPENDENT CONTRACTOR—INSTRUCTION—VERDICT—CONFLICTING EVIDENCE —RIGHTS OF PARTIES—APPEAL.

1. A subcontractor who furnishes all necessary materials required in the plastering of the building, and has charge of that part of the work, and sole control of the workmen engaged therein, is an independent contractor, as to the original contractor; and the fact that the building is to be erected under the supervision of an architect, and that the right to make alterations is reserved, does not change the relation.

2. In an action against a building contractor for personal injuries alleged to have resulted from the contractor's negligence in leaving obstructions in a street, where it appeared that defendant made a subcontract with another person to do the plastering, the subcontractor agreeing to furnish all necessary materials and perform all the labor, and the evidence showed that the subcontractor had the entire charge of that part of the work, and sole control of the workmen engaged therein, it was error to refuse to charge that, if the injuries were the result of negligence on the part of the subcontractor, they must find for the defendant; the evidence tending to show that the mortar box and some lumber used by the plasterer were among the obstructions in the street.

3. Where there is no conflict in the evidence as to the terms of a contract involved in litigation, and its provisions are not ambiguous, the effect of the contract is a question of law for the court.

4. On a motion for a new trial, the parties are entitled to the independent judgment of the

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*Rehearing denied November 5, 1904.

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 1243.

court as to whether a verdict is supported by the evidence, even where the evidence is conflicting.

5. A verdict on conflicting evidence is conclusive on appeal.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Marian G. Green against A. C. Soule. Judgment for plaintiff, and defendant appeals. Reversed.

Robert Ash, for appellant. E. A. Bridgford, B. G. White, and John R. Wilson, for respondent.

SHAW, J. The action is to recover damages for personal injuries arising from the negligence of the defendant. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

The complaint alleges that one Charles Gebhardt made a contract in writing with the defendant for the erection of certain buildings at the corner of Eddy and Franklin streets, in San Francisco; that there was an ordinance of the city and county of San Francisco providing that any person by whom, or under whose immediate authority, as principal contractor or employer, any portion of a public street should be made dangerous should, while the danger continued, maintain a good and substantial barrier around the dangerous portion of the street and cause to be maintained during every night, from sunset to daylight, a lighted lantern at the ends of the dangerous portion of the street; that the defendant, in the erection of said building, caused to be placed on the southerly line of Eddy street, in front of the building, a mortar bed, boxes, barriers, and other building materials extending from the sidewalk to within four feet of the car track in the center of the street, the said obstructions being from two to three feet in height, and rendering the street dangerous to travelers; that on the night of December 7, 1900, the defendant, having failed to erect any barrier or place any lights at said obstructions, the plaintiff, passing along the street in a buggy, ran over the obstructions, and was thereby thrown out of her vehicle and injured. The evidence showed without conflict that Gebhardt, the owner of the premises, made two separate contracts for the erection of different parts of the building—one with the defendant, and the other with one C. G. Stuhr. By the contract with the defendant it was agreed that the defendant should furnish the necessary labor and materials, and perform all the excavations, concrete, brick work, marble steps, carpenter work, glass, bell and electric work, vestibule tiling, plastering, tinning and iron work, and "other works shown and described in and by and in conformity with the plans, drawings, and specifications for the same, * * * hereto annexed." The plans and specifications were not introduced in evidence. It will be observed, however, that the above enumeration does not expressly include the plumbing or sewer work connected with the building. By the contract with Stuhr it was agreed that Stuhr should furnish the necessary labor and materials and perform and complete all the gas fitting, sewering, plumbing, and other works described in and by and in conformity with the plans, drawings, and specifications annexed to the said contract. These plans and specifications were not introduced in evidence. The testimony shows, however, without contradiction, that the defendant had nothing whatever to do with the placing of the sewers in the building, or with making the excavations necessary for that purpose, and that that part of the work was done under the contract with Stuhr, and not under that made by the defendant. The evidence shows further that the defendant made a subcontract with D. Leahy, whereby, for a specified sum, Leahy agreed to furnish all the necessary materials and perform all the labor required in the plastering of the building in accordance with the plans and specifications, and that in pursuance of this contract Leahy did the plastering and had the entire charge of that part of the work and sole control of the workmen engaged therein. A number of witnesses for the plaintiff testified that immediately after the accident to the plaintiff they examined the street in front of the building, and found obstructions in the street from two to three feet high, extending from the sidewalk to within two or three feet of the street car track in the center of the street, consisting of lumber, barrels, boxes, mortar beds, and other building materials. None of them gave any statement concerning the relative location of the different materials mentioned, nor did they expressly state that they were all mixed together in the pile; and on these points, so far as the plaintiff's testimony was concerned, the jury were left to conjecture. For the defendant several witnesses testified positively that they examined the premises the following morning; that there was a pile of broken concrete and pieces of asphaltum, taken from the street pavement in digging the trench for the sewer connection, extending along the east side of the trench from the sidewalk to within two or three feet of the car track, and from two to three feet high, and that there were no other materials or obstructions in the street except the mortar box used by the plastering contractor, Leahy, and this box did not extend into the street to exceed five feet from the sidewalk. The sewer trench had been filled in to the level of the street the day before the accident, but according to the testimony of these witnesses the concrete and asphaltum had been left in the pile alongside the trench. The distance between the curb and the nearest rail of the car track was shown to be about seventeen feet. It was also shown without conflict that the defendant had nothing to do with the employment of the men engaged under Leahy, the subcontractor for the plastering, nor any control of them while engaged in the work.

The court instructed the jury that "an independent contractor is a person who is employed in the exercise of an independent and distinct employment, and not under the immediate control or supervision of the employer," and that, if they should find that the injury complained of was caused by an obstruction erected by Leahy in carrying out a contract between himself and the defendant, and should also find that Leahy was an independent contractor, then they should render a verdict for the defendant. Instructions numbered 7 and 8 asked by the defendant and refused by the court, were as follows: "(7) A subcontractor under an original contractor may be an independent contractor as to such original contractor, and I instruct you that D. Leahy, the contractor for plastering the building, was an independent contractor as to the defendant, A. C. Soule, when he became the contractor for the work of plastering the house. (8) If you believe from the evidence that the injury complained of was the result of negligence on the part of the subcontractor, D. Leahy, then you must find for the defendant." We think the refusal of these instructions was error. "An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished." Am. & Eng. Ency. of Law (2d Ed.) vol. 16, p. 187. "The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for." Id. The fact that the work is to be done under the supervision of an architect, or that the employer has the right to make alterations, deviations, additions, and omissions from the contract, does not change the relation from that of an independent contractor to that of a mere servant. Id.; Frassi v. McDonald, 122 Cal. 402, 55 Pac. 139. These principles apply "likewise in favor of the principal contractor as against any liability on his part for the acts of a subcontractor or of a subcontractor's servants." 16 Ency. of Law (2d Ed.) p. 194, and cases cited. There was nothing in the contract for the plastering which contemplated or required that the person doing the plastering should place his materials on the street or sidewalk, and therefore it could not be contended that the contract itself was for the creation of an obstruction in the street which would constitute a nuisance. There was no conflict in the evidence with respect to the terms of the contract between the defendant, as the principal contractor, and Leahy, as subcontractor for the plastering; nor were its terms in any respect ambiguous or uncertain, so as to require any fact to be established in order to determine its effect. The meaning and effect of the contract, and the relation of the parties to it thereby created, consequently became a question of law to be decided by the court. 11 Ency. Pl. & Pr. pp. 78–80, 88, 89. Under the evidence there can be no question but that Leahy occupied the relation of independent contractor to the defendant. He exercised an independent occupation, his contract required him to bring about the result of plastering the house, and he was left entirely free to select for himself the means and mode of doing the work and the persons to be immediately employed therein, without any control or right of control in the defendant. It was, therefore, the duty of the court, on request, to instruct the jury that Leahy was an independent contractor, and not leave it to the jury to determine according to their own notions the effect of the contract in that respect. 11 Ency. Pl. & Pr. pp. 80, 89. The instruction was important because of the vague and unsatisfactory state of the evidence in regard to the character of the obstructions which caused the injury. There was a conflict as to whether or not there were any boxes, barrels, and lumber in the street at the point where the buggy upset, and it was uncertain whether, if in fact there were any such material there which caused the injury, such material was a part of that in use by the defendant or a part of that in use by Leahy, the plasterer. There was some evidence that the persons who made the excavation for the sewer connection used lumber belonging to Leahy for the purpose of holding up the sides of the trench while they were digging it, and that the trench was filled in again the day before the accident. The lumber would then be no longer necessary for use in the sewer work, and it may be that this was the lumber observed by the witnesses for the plaintiff who testified that the obstructions consisted in part of lumber, and that it was carelessly left in the street by Leahy after it was returned to him. The boxes and barrels testified to may also have been those left there by Leahy, and not by the defendant. All these things were questions to be determined by the jury, and the instructions requested by the defendant should have been given for their guidance in considering of their verdict. For this error the order denying a new trial must be reversed.

It is earnestly contended by the appellant that the evidence was insufficient to justify the verdict. The principal claim as to this point is that it was proven without conflict that there was at the time of the injury an obstruction made by the sewer contractor, consisting of a pile composed of sand, broken concrete, and pieces of asphalt pavement, extending from the sidewalk to within two or three feet of the car track, and some two or three feet high alongside of and directly east of the sewer trench; that the trench itself had been filled up the day before; that all the other obstructions were situated along the street further to the east; that the plaintiff was driving along the street from west to east, and consequently must have been first struck and upset by the pile of asphaltum and concrete, for which the defendant was in no wise responsible. Some five witnesses for the defendant testified directly that there was such a pile of paving material at that time and place, and that there were no other materials on the street at the point where plaintiff said her buggy was upset. The defendant also testified that there were marks on this pile of material the next morning, showing where the wheel of some vehicle had run upon and over it. The only contradiction of the fact of the existence of this obstruction in the street was the testimony of Cleary, a witness for the plaintiff, who testified that he was the sewer workman who excavated and filled the sewer trench; that practically all the sand and concrete taken from the trench was replaced therein; and that the asphaltum was first taken off the top of the trench, and was then piled on the sidewalk. This evidence, though not very satisfactory, is sufficient to raise a conflict which cannot be decided by this court. If the court below was satisfied that the witnesses for defendant were entitled to equal credit with Cleary, it might well have ordered a new trial. But this court cannot pass upon the credibility of witnesses, and hence cannot interfere upon this ground. We frequently have cause to believe that the judges of the superior court are too reluctant to exercise their power of granting a new trial for insufficiency of the evidence, and too much inclined to acquiesce in a verdict of the jury which does not meet with their own approval. There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions, and it is well established by the decisions of this court. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. "Where the decision is against the weight of the evidence, it is the duty of that court to grant a new trial." Irving v. Cunningham, 58 Cal. 309; Mason v. Austin, 46 Cal. 387; Hawkins v. Abbott, 40 Cal. 639; Bjorman v. Fort Bragg Co., 92 Cal. 500, 28 Pac. 591. If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses, and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of the evidence. He must exercise a wholesome and discreet supervision over the jury in this respect. Dickey v. Davis, 39 Cal. 569. "There, although there may be what to us, judging from the cold record, seems a substantial conflict in the evidence, the court having heard the evidence, and having had ample opportunity to judge as to the demeanor, manner, and credibility of the witnesses, may, if he is dissatisfied with the verdict, and is of the opinion that it is clearly against the weight of the evidence, set it aside, and grant a new trial. The judge of the superior court is in a position to determine between the apparent and the real, to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to readily comprehend." Bates v. Howard, 105 Cal. 178, 38 Pac. 716. Of course, the judge should give due respect to the verdict of the jury, and may sometimes properly deny a new trial in cases where, if submitted to him without a jury, he might, upon the evidence, have made a different decision. He must be clearly satisfied that the verdict is wrong; otherwise he should let it stand. But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in rendering a verdict in the first instance, but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence.

We have considered the case upon the theory that the answer sufficiently denies the allegation that the defendant placed in the street the mortar beds, boxes, and barrels extending from the sidewalk to within four feet of the car track. We have done so because the plaintiff does not raise the question, and the case appears to have been tried upon the theory that the denial is sufficient. As the question may be raised upon another trial, the attention of counsel is directed to the form of the denial, so that, if objection is then made, the defendant may amend as he may be advised.

The order denying the new trial is reversed, the judgment vacated, and the cause remanded for further proceedings.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

145 Cal. 82

In re FAY'S ESTATE.

SCOTT et al. v. FAY et al. (S. F. 3,776.)

(Supreme Court of California. Oct. 5, 1904.)

OLOGRAPHIC WILL—VALIDITY—ERROR IN DATE—RULES OF CONSTRUCTION—APPEAL FROM ORDER REFUSING PROBATE.

1. An olographic will, defined by Civ. Code, § 1277, as "one that is entirely written, dated, and signed by the hand of the testator himself," is not rendered invalid by the fact that the date therein written is erroneous, and not the date on which the will was actually written.

2. A will should be construed as valid in preference to holding it void, especially in view

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¶ 2. See Wills, vol. 49, Cent. Dig. §§ 962-964.

of the provision of Civ. Code, § 1326, that of two modes of interpreting a will that is to be preferred which will prevent a total intestacy.

3. An appeal lies from an order refusing probate of a will under Code Civ. Proc. § 963, subd. 3, and is in time if taken within 60 days after the entry of such order.

4. Persons for whose benefit a trust is created by a will are parties aggrieved by an order refusing probate of the will, and entitled to appeal therefrom, and on such appeal the question of the validity of the trust will not be considered.

Commissioners' Decision. In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Appeal by Mary J. Scott and others from an order refusing to admit to probate an instrument purporting to be the olographic will of John Fay, deceased. Reversed.

Louis S. Beedy, for appellants. Bart Burke and Chas. J. Pence, for respondents.

COOPER, C. This is an appeal from an order refusing to admit to probate an instrument purporting to be the olographic will of deceased. The instrument was entirely in the handwriting of deceased, and bore date "May twenty-fifth, eighteen hundred and fifty-nine." It is not claimed that the deceased was not of sound mind, nor that the purported will was not his free act and deed. In the instrument the deceased made provision for his son Luke Fay, who was born in 1861; for his son John Fay, who was born about 1865, and for his daughter, Mary Montealegre, who was married to Carlos F. Montealegre in January, 1887, and died March 29, 1900. It is thus evident from the testimony that the instrument was not written in 1859, but at some time between the marriage of the daughter and her death. If we were to indulge in conjecture, we would say that the will was written May 25, 1889, the words "fifty-nine" being, by mistake or carelessness, inserted instead of the words "eighty-nine." There does not appear to be any explanation as to the discrepancy in the date which the instrument bears and the actual date or time when it was executed. No reason is suggested, and none suggests itself to us, as to any object the deceased could have in dating the instrument "eighteen hundred and fifty-nine." He had the right to make an olographic will, provided he complied with the statute in so doing. It is declared in the Civil Code (section 1277) that "an olographic will is one that is entirely written, dated and signed by the hand of the testator himself." This is the same provision as in the Code Napoleon. The instrument in this case is an olographic will, unless we hold that the word "dated" in the above section means the actual and correct time when the instrument was written. The Legislature has not used the words "truly dated" nor "correctly dated," but the word "dated," which must be construed according to the approved usage of the language (Civ. Code, § 13), and in its primary and general sense (Code Civ. Proc. § 1861). If we should hold that the word "dated" means the true and correct time when the will was written, then any difference shown between the date given in the instrument and the time when it was written would invalidate it. If, under such rule, a testator, in his right mind, by his own hand, should write his will, and date it January 1, 1903, and it should be shown by oral evidence to have been written January 1, 1904, the will would be void; and yet we know by constant experience that business men many times during the first few days of the new year write the date of the old. And also many times we get the wrong impression as to the day of the month, and instead of the correct date write the date as of the day preceding or even of the following day. The word "date" or "dated" is often used as referring to the date or time written in an instrument. Thus it is provided in our Code that any date may be inserted in a negotiable instrument, whether past, present, or future. Civ. Code, § 3094. The Century Dictionary defines the verb "date" "to mark with a date, as a letter or writing." A will other than an olographic will is not required to be dated, and as to all other wills parol evidence is admissible to show the true date, even if contradictory of the written date. Underhill on Wills, § 268. An olographic will must be dated for the reason that the Legislature has said so, but we do not think it would be a sound rule to hold that any mistake or error in the date would invalidate the will. It will be presumed that the date given is the true date. We apprehend that cases will rarely occur in which this is not so. If it becomes necessary in any case upon a question as to the sanity of the testator or probably other questions, the true time at which the will was made may be inquired into; but we hold that simply showing that an olographic will was made at a time different from that written therein will not invalidate it. The date is not the material thing, although made necessary by the statute. It is a means of identification, and aids in determining the authenticity of the will; but the main and essential thing is that the will be wholly written and signed by the hand of the testator. The origin of olographic wills arose probably under the civil law, where among unsolemn privileged wills was that of a father bestowing his property on his children; all in his own handwriting. Brown's Civil and Admiralty Law, vol. 1, p. 290. An olographic will may be proved in the same manner that other private writings are proved. Code Civ. Proc. § 1309. A private writing may be proved by evidence of the genuineness of the handwriting of the maker. Id. § 1940. We do not mean to be understood as holding that an olographic will must not be dated, because that is made essential by the statute. Our attention has not been called to any case directly in point, nor have we been able to find any. It is said in Bement & Dougherty v. Trenton Locomotive, etc., Co., 32 N. J. Law, 515: "The primary signification of the word 'date' is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time given or specified, time in some way ascertained and fixed. This is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution as given or stated in the deed itself. The date of an item or of a charge in a book of account is not necessarily the time when the article charged was in fact furnished, but simply the time given or set down in the account in connection with such charge." In Underhill on Wills (section 181) it is said: "Where the date is given, it may be contradicted by parol, though until that is done it will be presumed, in a case of holograph, that the will was executed upon the date which is stated in it." The language of the Civil Code of Louisiana is the same in meaning as the section of our Code in regard to olographic wills. It was held by the United States Circuit Court in Gaines v. Lizardi et al., 3 Woods, 77, 9 Fed. Cas. 1042, that where the proof showed that an olographic will was written and signed by the testator, and bore date of some day in a designated month, but did not show of what particular day, it was a sufficient compliance with the provisions of the Code as to dating. The case involved the probate of an olographic will which had been lost or destroyed, but it illustrates the point in the case at bar. In case of an olographic will which has been lost or destroyed it might be impossible to prove the day of the month, or even the month in which it was executed, and yet the evidence might be clear and convincing that the will was entirely written, dated, and signed by the hand of the testator. Should the courts in such cases exclude the will from probate because the correct time at which it was written could not be proven? In Estate of Skerrett, 67 Cal. 587, 8 Pac. 181, the deceased in his lifetime signed a deed purporting to convey certain property to his sister. The record in the case shows that the deed was dated April 26, 1881, and acknowledged before a notary April 27, 1881. The deed was never delivered, and therefore could not take effect as a deed. It was not of a testamentary character, and could not be given effect by itself as an olographic will. But a copy of the deed in the handwriting of deceased was found after his death in an envelope with a letter addressed to the sister. The letter was without date, but showed an intention clearly expressed in the handwriting that his sister should have the property. The time at which the copy of the deed was made by deceased did not appear, nor was there anything to indicate the time when the letter was written, except that it was some time after the acknowledgment of the deed. This court said: "Neither the copy of the deed nor the letter, taken by itself, constitutes a will. The one is not testamentary in its character, and the other has no date. But taking them together as the deceased left them, forming one document, it is complete. The first part furnishes the date, and the latter the testamentary character." Now, it appears evident in the above cited case, from the contents of the letter, that the copy of the deed and the letter must have been made after the date of acknowledgment. There was in fact nothing to show when the copy was made, but it contained a date, and with the letter the olographic will was held good. The case was followed and approved in Re Soher, 78 Cal. 478, 21 Pac. 8. In Estate of Lakemeyer, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96, an olographic will was headed, "New York, Nov. 22, '97," and it was held that the will was dated, the abbreviation "'97" meaning 1897. Therefore it appears to be the rule of this court, as all other courts, to construe wills as valid, in preference to holding them void.

It is provided in the Civil Code (section 1326) that of two modes of interpreting a will that is to be preferred which will prevent a total intestacy. The Supreme Court of Louisiana adopted the above liberal rule in Heirs of McMichael v. Mrs. F. Bankston et al., 24 La. Ann. 451, in which it was held that where two words in an olographic will were not in the handwriting of deceased, but did not change the meaning nor alter the dispositions made by the testator, the will would be upheld. When a man of sound mind and memory, by his own hand and signature, has plainly made a disposition of his property, the courts should carry out his intention if it can be done without violating the mandates of the law.

Respondent contends that this appeal was not taken within 60 days after "the rendition of the judgment," and hence the evidence cannot be considered on this appeal. The appeal was taken within 60 days after the entry of the order, and was within time. The section of the Code in regard to rendition of judgments does not apply. Code Civ. Proc. § 963, subd. 3; In re Smith's Estate, 98 Cal. 636, 33 Pac. 744; Estate of Scott, 124 Cal. 675, 57 Pac. 654. The stipulation shows "that the testimony of the appellant John Fay and the testimony of Luke Fay, set forth in full in said transcript, was the only evidence adduced at the hearing of the petition for the probate of said will contained therein." Appellants are parties aggrieved, and entitled to appeal. They are beneficiaries under a trust created by the will, and the court will not here determine the validity of the trust clause as to appellants. Code Civ. Proc. § 1299; Estate of Mary Cobb, 49 Cal. 599; Estate of Murphy, 104 Cal. 554, 38

Pac. 543; Graham v. Burch, 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339.

It follows that the order should be reversed.

We concur: GRAY, C.

For the reasons given in the foregoing opinion, the order appealed from is reversed: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

145 Cal. 62

ALCORN et al. v. BRANDEMAN. SAME v. HOWARD. SAME v. GIESEKE.

(Sac. 942–944.)

(Supreme Court of California. Oct. 3, 1904.)

ESTOPPEL—PRESENTATION OF QUESTION BY DEMURRER—CONSTRUCTION OF COMPLAINT.

1. The question whether plaintiffs, suing to recover lands as heirs at law of a decedent, are estopped to impeach a decree making a partial distribution of the estate by which they were given certain other lands, while those in controversy were distributed to defendant's predecessor in title, cannot arise on the face of the complaint, so as to be presented for consideration by a demurrer, where the proceedings for distribution and decree are set out merely to show the source of defendant's claim, and the complaint does not show that plaintiffs took under the decree, but alleges its invalidity, and that it was made without their consent or knowledge.

2. Where plaintiffs sue as heirs and as grantees of a remaining heir of an intestate to recover certain real estate, claiming two-thirds of the land described in the complaint as heirs and one-third under the deed, the fact that they may be estopped by their conduct from claiming under the deed does not render the complaint insufficient to support their claim as heirs at law of the decedent for the other two-thirds of the land described therein.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, San Joaquin County; Edward I. Jones, Judge.

Several actions by James Ben Alcorn and others against Henry Brandeman, C. A. Howard, and E. E. Gieseke. From judgments sustaining demurrers to the complaints, plaintiffs appeal. Reversed.

J. B. Hall (J. F. Ramage, of counsel), for appellants. S. M. Spurrier and A. C. White, for respondents.

LORIGAN, J. The appeals in all these cases are taken from judgments on demurrers to the complaints, the plaintiffs declining to amend, and in the main no different questions are presented now than were submitted and disposed of in the case of Alcorn et al. v. Buschke et al., 133 Cal. 655, 66 Pac. 15, wherein the complaint, except as to the names of the defendants and the descriptions of the property, was identically the same as those now challenged on these appeals. The allegations of the complaint, the grounds of attack upon it, and the conclusion of the court thereon are set forth fully in the opinion in that case, and discussion of them here is unnecessary. (In the opinion in that case as reported there are two errors in dates. The deed from Sebree to the plaintiffs was June 6, 1900, instead of June 6, 1890, as stated, and in the first paragraph, on page 657, 133 Cal., and the second column of page 16, 66 Pac., the date of the deed by Kyle, as attorney in fact, to Jenning, stated as October 17, 1896, should be June 26, 1896.)

It is contended, however, by respondents that one point is advanced by them on these appeals which was not presented or passed on in the above case. This is relative to the effect of a decree of distribution, the general terms of which are set forth in the complaint.

The plaintiffs sue as heirs at law and as grantee of one Sebree, the remaining heir at law of one McKinney, who died intestate, seised of the property mentioned in the complaint and other property. Pending the administration of such estate, Sebree, who was administrator thereof, petitioned for a partial distribution of the estate, which was granted, the decree distributing to the defendants' predecessor the land described in the complaint, and to the plaintiffs and Sebree, as heirs at law of the decedent, other lands of the estate.

Notwithstanding this court held in Alcorn v. Buschke, supra, that such decree was void for the reasons therein stated, still it is now insisted by respondents that it nevertheless appears from the allegations of the complaint, as they construe them, that the plaintiffs are estopped by their own conduct, and the conduct of Sebree, from questioning the validity of the decree, and asserting title to the premises in dispute which the defendants claim under it. In this regard it is claimed that they are especially estopped from asserting claim, under the deed from Sebree to them, of his one-third interest in the property as heir at law, because of Sebree's conduct in petitioning for and obtaining the decree of distribution of the particular land in dispute in favor of defendants' predecessor in interest, under whom defendants claim, and of which action and conduct on Sebree's part they had full notice and knowledge when they took the conveyance from him. And that as to the original interests (two-thirds) which plaintiffs claim as heirs at law of McKinney, respondents insist that as it equally appears from the complaint that plaintiffs actually took under the decree the other lands of the estate particularly distributed to them, and took advantage of and enjoyed the benefit which the decree gave them in that respect, they are estopped from now questioning its validity as to the interest acquired to the land in dispute by the respondents under the same decree; that they could not accept the decree in as far as it conferred advantages on them, and repudiate it as far as it attempted to confer advantages on others; that they must elect to be bound by it in its entirety or reject it in its entirety, and, having elected to accept the benefits it conferred on them, are estopped to dispute defendants' rights under it, or to now question its validity.

As far as concerns the interest which the plaintiffs acquired to the lands in dispute under their conveyance from Sebree, a question may arise, not only as to the effect of the decree of partial distribution, obtained at his request, upon whatever interest he might have had in the property distributed to respondents' predecessor under it, but whether his petition asking for such distribution to defendants' predecessor in interest, and the distribution under it, did not operate as a ratification of a deed made by one Kyle under the power of attorney set forth and discussed in Alcorn v. Buschke, supra. This would not, however, of itself affect the sufficiency of the complaint in the cases now under consideration, because, independent of the one-third interest which plaintiffs claim to have acquired from Sebree, as heir of McKinney, the complaint would still be sufficient to support their claim as heirs at law of the said decedent for the other two-thirds of the land described in it, unless the point made by defendants that they are estopped by the decree of distribution can be availed of on the face of the complaint, and we do not perceive that it can.

While the complaint sets forth in general the proceedings for distribution, and shows that distribution of the land in question was made to respondents' predecessor in interest, and that other lands were distributed under it to plaintiffs and Sebree, there is nothing whatever to indicate that the plaintiffs actually took any lands under said decree, or derived any advantage or benefit under it. The proceedings in partial distribution were averred by plaintiffs, in their complaint to quiet title, solely as being one of the sources of respondents' claim of title to the property in question, and which proceedings they alleged were totally void; that they neither authorized or were cognizant of them, and never consented, agreed to, or approved of the object thereof. Under these circumstances, the benefit of the rule of law which respondents contend for is not available to them upon the face of the pleading. If the facts (which they incorrectly infer are all set forth in the complaint and upon which assumption he makes the claim of estoppel) exist, they will have an opportunity of availing themselves of the rule of law contended for, by appropriate pleading and proof.

This additional point now urged on these appeals being without present merit, and as all the other points made to sustain the judgment have heretofore been disposed of adversely to respondents in the case of Alcorn v. Buschke, supra, the judgments in the three above-entitled causes are reversed, and they are remanded, with directions to the lower court to overrule the demurrers interposed in each case.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; VAN DYKE, J.

I dissent: BEATTY, C. J.

145 Cal. 88

ROGERS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 2,485.)

(Supreme Court of California. Oct. 5, 1904.)

CONTEMPT — CERTIORARI—RES JUDICATA — HABEAS CORPUS — GRAND JURY—WITNESS — REFUSAL TO ANSWER QUESTIONS — CONSTITUTIONAL LAW—STATUTES.

1. Since under the statute a judgment on habeas corpus remanding a petitioner is not a bar to a subsequent application of the same kind, a decision of the Supreme Court on habeas corpus, remanding a petitioner who had sought his discharge from a judgment fining him for contempt of court, is not available as res judicata on certiorari to review the judgment.

2. On certiorari to review a judgment fining plaintiff for contempt in refusing to answer questions propounded by the grand jury, the transcript showed that the plaintiff, in response to the first order to show why he should not be punished for contempt, presented a verified answer seeking to show that he was justified in his refusal on statutory and constitutional grounds. The affidavit of the foreman as to the ground on which the order was based stated that the questions were asked plaintiff in the investigation by the grand jury of a charge of forgery against another person, and that the questions were material in that investigation. The court ordered plaintiff to answer. *Held*, that a second affidavit of the foreman, subsequently presented, simply alleging that, when plaintiff appeared in response to another subpœna, the same questions were again put to him, and that he again refused to answer, notwithstanding the previous order of the court to do so, is insufficient as a basis for proceedings for contempt, since it fails to show that the charge against such other person was under investigation when plaintiff was again called to testify, and there is no mention of any other charge to which the questions might have been material or pertinent.

3. Under Code Civ. Proc. § 2066, providing that a witness can be compelled to answer only such questions as are legal and pertinent to a matter in issue before a tribunal, a witness cannot be adjudged guilty of contempt for a refusal to answer questions that are not legal and pertinent.

4. A judgment for contempt for refusal of a witness to answer questions is reviewable on certiorari, on the question whether the answers would have a tendency to degrade the witness or his character, in violation of the direct provisions of Code Civ. Proc. § 2065.

5. A judgment for contempt for refusal of a witness to answer interrogatories is reviewable on certiorari, on the question whether the interrogatories were material and pertinent to any matter then in issue, in violation of the direct provisions of Code Civ. Proc. § 2066.

6. Where a third person had been charged with criminal misconduct in relation to the distribution of an estate, and he himself testified that he had been guilty of various crimes, including forgery, and the grand jury commenced

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¶ 3. See Contempt, vol. 10, Cent. Dig. §§ 34, 35; Witnesses, vol. 50, Cent. Dig. § 39.

an investigation, and asked certain questions of a witness relating entirely to his conduct and acts in the matter of the estate, and as to his knowledge and information as to whether one claimed as an heir was in fact the true heir of the deceased, and the reason why such witness abandoned the cause of his clients, who were heirs of the estate, and whether he had received any money for so doing, as the questions in connection with the admitted facts were all material on the question as to whether such witness had himself been guilty of criminal misconduct, the witness could not be required to answer them under the direct provisions of Code Civ. Proc. § 2065, as the answer might have a tendency to subject him to punishment for a felony.

7. Where an indictment had been found against a certain person for forgery, and was pending in court, the investigation of the charge on which the indictment was based was concluded, and was no longer pending before the grand jury, and questions thereafter propounded to a witness before the grand jury as to that charge were no longer material and pertinent to any issue before such jury, save the single question of the guilt or innocence of the witness in connection with such crime, and his refusal to answer was justifiable.

In Bank. James Taylor Rogers was fined for contempt by the superior court of the city and county of San Francisco for refusing to answer questions, and brings certiorari to review the judgment. Judgment annulled.

Houx & Barrett, for petitioner. I. Harris, for respondent.

ANGELLOTTI, J. Certiorari to review a judgment of the superior court of the city and county of San Francisco imposing upon plaintiff a fine of $500 for contempt of court. The judgment in the contempt proceedings against plaintiff declared him guilty of contempt for his refusal to answer any of 11 questions propounded to him by the grand jury of the city and county of San Francisco, after having been directed by the superior court to answer the same, and adjudged that for said contempt he pay a fine of $500, and, further, that he be imprisoned in the county jail of said city and county for five days. Having been imprisoned under said judgment, he sought his discharge by habeas corpus, but was by this court remanded upon the ground that, so far as the record then before the court showed, at least one of the questions propounded was relevant and pertinent to the matter under investigation by the grand jury, and it had not been made to appear that his answer to the question would either have a tendency to incriminate him or degrade his character, and that, therefore, his refusal to answer this question was not justified in law, and he had properly been adjudged to be in contempt. In re Rogers, 129 Cal. 468, 62 Pac. 47.

The defendant pleads the judgment of this court in the habeas corpus matter in bar of this proceeding, but we are satisfied that it can have no such effect. It is well settled that the doctrine of res adjudicata is not, in the absence of statutory provision, applicable to the decision of a court or judge remanding a person in habeas corpus proceedings. Church on Habeas Corpus, § 386; In re Ring, 28 Cal. 247–251; Bradley v. Beetle, 153 Mass. 154, 26 N. E. 429; People v. Brady, 56 N. Y. 182. Under our statute, a judgment on habeas corpus remanding a petitioner is not, as a matter of law, a bar to a subsequent application of the same kind to the same or another court (In re Ring, supra), and it certainly can have no such effect in this proceeding. This is true, whether all of the material facts were presented at the first hearing or not. Bradley v. Beetle, supra.

The transcript of the record certified to this court shows that the plaintiff, in response to the first order to show why he should not be punished for contempt for failing to answer the questions propounded by the grand jury, presented a verified answer, and a copy of this is contained in such transcript. The affidavit of the foreman of the grand jury upon which the order was based was presented and filed July 24, 1900, and stated that the questions were asked plaintiff in the investigation by the grand jury of a charge of forgery against one Chretien, and that the questions were pertinent and material in such investigation. In his answer, plaintiff sought to make it appear that he was justified in refusing to answer any of the questions by section 2065, Code Civ. Proc., which provides that a witness need not give an answer which will have a tendency to subject him to punishment for a felony, or which will have a direct tendency to degrade his character, unless it be the very fact in issue, and by section 13 of article 1 of the state Constitution, which provides that no person shall be compelled, in any criminal case, to be a witness against himself. He also alleged certain facts tending to show that the investigation against Chretien had been concluded, and that an indictment had been found and presented. No showing as to the facts was made in reply to the verified statement of plaintiff, and the court did not find that such statement was in any respect untrue, but simply found "that the matters and things set up in said answer do not constitute just and legal cause why the said questions should not be answered by said Rogers," and ordered and adjudged "that the said questions propounded to said * * * Rogers were legal and proper, and that it was the duty of said Rogers to answer the same," and further ordered that he answer each and all of said questions "whenever thereto subpœnaed and requested, and when next appearing before said grand jury."

The second affidavit of the foreman of the grand jury, presented August 3, 1900, simply alleged that, when the witness appeared on that day in response to another subpœna issued, the same questions were again put to him, and he again refused to answer, notwithstanding the previous order of the court requiring him to so do. This affidavit is entirely silent upon the question as to whether any investigation was then being made by the grand jury as to the charge against Chretien mentioned in the first affidavit, or as to any charge against Chretien. The second order to show cause was thereupon made, and, upon the hearing, the court refused to allow the plaintiff to file his affidavit in reply to the order, doubtless upon the theory that the questions thereby presented had been disposed of on the previous hearing. Thereupon the court found that the refusal of the plaintiff to answer the questions was a "direct disobedience of the order of the superior court made * * * July 25, 1900," and that he was therefore guilty of contempt, and pronounced the judgment in question. It is apparent that if the order of July 25, 1900, was invalid, the judgment subsequently pronounced is void; for it is entirely based upon the previous order, and the punishment was imposed solely for the disobedience of said order. The second affidavit of the foreman of the grand jury is manifestly insufficient as the basis of a proceeding for contempt on account of the refusal of a witness to answer questions, for it entirely fails to show that the charge against Chretien was under investigation by the grand jury at the time plaintiff was again called before that body to testify as a witness, and there is no mention in either affidavit of said foreman of any other charge to which the question might have been material or pertinent. A witness can be compelled to answer only such questions as are legal and pertinent to a matter in issue before a tribunal, and for a refusal to answer questions that are not pertinent to the issue being tried he cannot be adjudged guilty of contempt. Code Civ. Proc. § 2066; Ex parte Zeehandelaar, 71 Cal. 238, 12 Pac. 259; Overend v. Superior Court, 131 Cal. 280, 286, 63 Pac. 372; In re Rogers, supra. A grand jury, like a court, may ask only such questions as are pertinent to a matter then under investigation, and, if there be no matter under investigation, a refusal to answer questions cannot be made to constitute a contempt. "When the contempt is a constructive contempt, namely, committed without the presence of the court, the affidavit of facts forming the basis of judicial action must show upon its face a case of contempt; and, if it does not, then the court is wanting in jurisdiction, and the order of contempt is void." Overend v. Superior Court, supra.

It is, therefore, only by reading the second affidavit of the foreman of the grand jury in connection with the prior affidavit and proceedings, and upon the theory that a disobedience of the order of the court requiring the witness to answer the questions or any of them would, of itself, without regard to the conditions existing at the time the witness again appeared before the grand jury, constitute a contempt, that the judgment of contempt can possibly be justified. This is apparently the theory upon which the superior court proceeded, and, unless such order was a valid and enforceable order, the judgment of contempt was, as already said, unauthorized. The order in question admitted the truth of the matters and things set up in plaintiff's answer, finding simply that such matters and things did not constitute just and legal cause why the said questions should not be answered. There is thus presented only a question of law, viz., the question as to whether the allegations of the answer, taken as true, established a case in which the witness was justified in refusing to answer, upon the ground either that the answers would have a tendency to incriminate him or degrade his character, or that they were not material and pertinent to any matter then in issue. The decision of the court adjudicating one guilty of contempt is, upon both these questions, reviewable either on habeas corpus (Ex parte Zeehandelaar, supra; In re Rogers, supra), or upon certiorari (Overend v. Superior Court, supra). See, also, Schwarz v. Superior Court, 111 Cal. 106, 112, 43 Pac. 580. If such a case is shown, the superior court was without power to adjudge plaintiff guilty of contempt.

We have carefully examined the allegations of the answer in connection with the questions propounded to the plaintiff, and are satisfied that he was justified upon both grounds in refusing to answer each and all of the questions. It appears from the answer presented in the contempt proceedings that distribution of the residue of the estate of one Joseph Sullivan, deceased, including several thousands of dollars in money, had been made by the superior court of the city and county of San Francisco to an alleged heir, "John Sullivan," under such circumstances as to give rise to the suspicion that the property of the estate had, through fraud on the part of parties and attorneys appearing in the matter, been distributed to a spurious heir, and divided among those participating in the fraud. Chretien appeared as the attorney for John Sullivan. The plaintiff, who had appeared for certain persons alleged to be heirs, and filed a petition for distribution of the residue to them, claiming that he had become satisfied that his clients were not entitled to share in the estate, had abandoned his claim, and had thus allowed the distribution to be made to "John Sullivan." Chretien, plaintiff, and others were charged by a statement published in the San Francisco Call, a daily newspaper, with serious criminal misconduct in relation to the distribution of the estate, and an investigation was had by the superior court having jurisdiction of the estate, resulting in an order purporting to vacate the decree of distribution. In that investigation Chretien himself testified that he had been guilty of various crimes relative to said estate, including that of forgery of various receipts purporting to have been given by "John Sullivan" for moneys received therein. Within a few days thereafter there were published in the San Francisco Examiner, a daily newspaper, two statements, purporting to have been severally made by Chretien and another, accusing plaintiff in effect of having received $600 for the abandonment of the claim of his clients, and charging that the estate had been robbed through the instrumentality of spurious heirs, and accusing plaintiff of consciously aiding therein. It was under these circumstances that the grand jury commenced the investigation, and, upon the theory that the same were pertinent and material in the investigation of the charge of forgery against Chretien, the 11 questions were asked of plaintiff. These questions related entirely to his (the plaintiff's) conduct and acts in the matter of said estate of Joseph Sullivan, the allegations contained in the papers filed by him therein, his knowledge and information as to whether or not John Sullivan was, in fact, the true heir of deceased, his reasons for the abandonment of the cause of his clients, and as to whether he had received any money therefor.

Considered in connection with the admitted facts, the questions asked were all material and pertinent upon the question as to whether the plaintiff had himself been guilty of criminal misconduct, and, with the exception of one or two, were material only upon that question. The one or two questions that might possibly be considered pertinent to the investigation of the charges against Chretien went to the question of the information of plaintiff as to the falsity of the claim made by Chretien on behalf of the alleged heir, "John Sullivan," at the time that he (plaintiff) withdrew his opposition to distribution to said "John Sullivan," and thus aided in the accomplishment of a crime. It was charged, in effect, that he had willfully aided and abetted in the commission of a felony, the obtaining of the property of this estate, amounting to several thousands of dollars, by fraud and false representations. It requires only a reading of the questions asked to demonstrate that they were asked for the purpose of obtaining evidence upon which to proceed against the plaintiff himself, rather than Chretien, for a felony. That the answers to such questions would, if the charges made were well founded and the witness answered truly, serve such purpose, is too clear for question. However commendable may be a desire to ascertain the truth and to punish offenders against the law, so long as we adhere to the settled policy of this country and of England that no person shall be compelled to be a witness against himself in a criminal proceeding, so long must a witness be protected in his refusal to answer questions, the answers to which will serve to show that he has been guilty of a felony for which he may be prosecuted. Where it is made to appear that such is the nature of a question asked, a court is without power to compel an answer, and its adjudication of contempt is a nullity.

The answer in the contempt proceedings, presented in response to the first order to show cause, further in effect alleged that the grand jury had already, upon the testimony adduced before it, and without the evidence of plaintiff, found and presented to the superior court an indictment against Chretien, upon the charge stated in the affidavit of the foreman of the grand jury, which was one of forgery of the indorsement of a certain check, and that such indictment was pending in said court. The truth of these allegations being conceded, it is apparent that the investigation of the charge mentioned in such affidavit had been concluded, and that said charge was no longer pending before the grand jury. Under these circumstances, the questions were no longer material or pertinent to any issue before the grand jury, so far as the record shows, save and except the single question as to the guilt or innocence of the plaintiff himself. Whatever may have been the situation when the questions were first asked, the superior court had no power to compel the plaintiff to answer them, after the issue to which they were material had been determined, and the investigation thereof by the grand jury finally concluded.

For the two reasons stated, the judgment of the superior court must be held to have been beyond its jurisdiction. It is unnecessary to notice other points made by the plaintiff. It may be contended that the conclusion here reached is at variance with the conclusion in the habeas corpus proceeding (In re Rogers, supra), wherein this court remanded the plaintiff, to suffer the imprisonment imposed by the judgment. We have already shown that such disposition of the habeas corpus matter is no bar to this proceeding. It was said in the opinion filed therein that it was not made to appear that "his answer to the question would either have a tendency to incriminate him or degrade his character." Such may have been the condition of affairs in that proceeding. The opinion does not show, and the record of the proceeding does not disclose, what was made to appear therein. Nor was anything said in the opinion as to the effect of a showing that the investigation of the charge against Chretien had been finally concluded prior to the making of the order requiring plaintiff to answer the questions. Regardless, however, of the question as to whether the habeas corpus matter was, upon the record then before the court, correctly decided, it is clear to us that upon the record now before the court the plaintiff is entitled to the relief sought.

The judgment of the superior court imposing a fine of $500 upon the plaintiff is annulled.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; VAN DYKE, J.; LORIGAN, J.

I concur upon the ground last stated: HENSHAW, J.

145 Cal. 66

PEOPLE v. COULTER. (Cr. 969.)

(Supreme Court of California. Oct. 3, 1904.)

CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—INCORPORATION OF EVIDENCE—PRESUMPTION—HARMLESS ERROR.

1. A person convicted of burglary in the second degree cannot complain on appeal that the verdict was contrary to the evidence, because it showed without contradiction that defendant was guilty of burglary in the first degree.

2. On appeal from a conviction for burglary, the bill of exceptions stated that witnesses for the people and for defendant were sworn and examined, and that the testimony included certain testimony set out in detail and relating solely to the time when the burglary was committed. One ground of the motion for new trial was that the verdict was contrary to the evidence. *Held* that, while it would be presumed that the bill of exceptions contained all the evidence as to the time of the commission of the crime, it could not be presumed that it contained all of the evidence submitted.

Beatty, C. J., and Henshaw and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Charles Coulter was convicted of burglary, and appeals. Affirmed.

H. H. McCloskey, for appellant. U. S. Webb, Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

ANGELLOTTI, J. The defendant was convicted of the crime of burglary of the second degree, and adjudged to suffer imprisonment in the state prison for three years. He appeals from the judgment and from an order denying his motion for a new trial.

The motion for a new trial was made upon several grounds, one being "that the verdict is contrary to the evidence." This is the only ground relied on upon this appeal; counsel for defendant stating in his brief that the venue was not shown, the date of offense was not shown, the ownership of the property entered or of the property taken was not proven, the right of the defendant to take the articles was not questioned, and that no wrongful intent was shown. An examination of the bill of exceptions discloses the fact that the bill does not purport to state all the evidence. So far as applicable to the questions involved in this appeal, it is as follows, viz.: "The opening statement was made by the district attorney, and witnesses were then sworn and examined on behalf of the people, and the people rested. Witnesses for the defendant were then sworn and examined, and the defendant rested. Witnesses were then sworn and examined in rebuttal. Whereupon the testimony was closed. The testimony given during the trial included the following: Joseph Catania testified as follows: 'Q. About what time in the morning was it when you heard this glass crack, you think? A. It was just about exactly 10 minutes to 5.' The witness further testified that not more than two or three minutes after he saw the defendant put a wire through the window, pull out articles, and hand them to another man. George C. Douglass, the police officer who arrested the defendant, testified that it was about 25 minutes past 5 when Catania ran up to him and told him about the burglary. When the testimony was all in the cause was argued and submitted by the respective counsel."

The copy of the minutes of the trial contained in the judgment roll shows that three witnesses were sworn and examined on behalf of the people, twelve witnesses on behalf of the defendant, and five witnesses for the people on rebuttal. It is apparent that there was no attempt to state in the bill of exceptions the evidence given upon the trial, and that the only object of inserting the particular portion set out was to point out some particular error relied on, and claimed to be an error by reason of that particular testimony. A bill of exceptions must contain so much of the evidence only as is necessary to present the questions of law upon which the exceptions were taken (section 1175, Pen. Code), and where it is made to appear affirmatively that only a portion of the material evidence is included, and that there has been no attempt to state anything about the nature of the omitted evidence or its effect, it is clear that the portion inserted is so inserted for another purpose than that of supporting the claim that the verdict is contrary to the evidence in some other respect than that as to which the inserted evidence is applicable.

It will be observed that the inserted evidence is directed solely to the question of time; the substance thereof being that it was not later than a few minutes after 5 o'clock a. m. when the burglary was committed. It may well be that, under the authorities, it will be presumed that the inserted evidence was all the evidence introduced on the question as to the time of the commission of the offense, and, therefore, as to whether the burglary was of the first or second degree. The crime being alleged to have been committed on the 14th day of February, 1902, this evidence showed a burglary committed between sunset and sunrise, which was a burglary of the first degree, while the verdict was that the defendant was guilty of burglary of the second degree only. The only claim really presented by this bill of exceptions is that by reason of the fact that all of the evidence given upon the question of time showed that the defendant was guilty of the more serious offense of burglary of the first degree, instead of the lesser offense of burglary of the second degree, of which he was convicted, the verdict was "contrary to law or evidence." It is well settled that a de-

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¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 3188.

fendant cannot complain where the determination of his case was more favorable to him than the evidence warranted (People v. Muhlner, 115 Cal. 303, 47 Pac. 128, and cases there cited); but we can conceive of no other reason for the statement that the evidence given included the portion inserted as to time than the desire to present on this appeal the question as to whether the evidence as to time was such as to render the verdict contrary to the evidence. We adhere to the rule declared in People v. Muhlner, supra, and other cases, and can therefore see no reason why the fact that the evidence as to time was as stated in the bill of exceptions renders the verdict contrary to the evidence.

The claim of defendant's counsel now appears to be that where a defendant has specified as one of the grounds of his motion for a new trial that the verdict is contrary to the evidence, without specifying either in his motion or in his bill of exceptions the particulars wherein the evidence is claimed to be insufficient, this not being necessary in criminal cases, it will be conclusively presumed on appeal that the bill of exceptions contains the substance of the evidence as to every fact put in issue by the information or indictment and the plea of not guilty, unless it be stated that facts concerning which no evidence is inserted were proven, or that evidence was introduced tending to prove them. The true rule does not, we are satisfied, go to the extent claimed by counsel. Where the trial court denies the motion of a defendant for a new trial, it devolves on him, if he wishes to have the action of the court reviewed on appeal, to present the draft of a bill of exceptions purporting, at least, to contain a fair statement of the evidence material to the determination of the questions desired to be determined on appeal. Although he may have specified in his motion insufficiency of the evidence as one of his grounds for a new trial, there is no law requiring him to further press this ground on appeal, after the ruling against him by the trial court, and in the great majority of cases it would be useless to so do, in view of the well-settled rule that the appellate court will not disturb the action of the trial court as to matters concerning which there was simply a conflict of evidence. If, therefore, notwithstanding the statement of that ground in his motion, he should, after the denial of his motion, present a bill of exceptions containing absolutely no evidence, and the bill of exceptions presented to the appellate court contained no evidence, or any reference thereto, except a statement that witnesses were sworn and examined, there would be no presumption that there was, in fact, no evidence given on the trial. The presumption would rather be that the defendant had abandoned this particular ground for a new trial, and that all reference to the evidence had therefore been intentionally omitted. The presumptions are all in favor of the correctness of the action of the trial court, and it is not to be presumed that such court has refused to allow the insertion of such evidence as the defendant may have desired, so far as the same is necessary to the determination of any question sought to be presented on the appeal.

It would not be incumbent on the district attorney, in such a case, to propose amendments in order to make the bill show the evidence. It is not for him to prepare a bill of exceptions for the defendant. His duty is confined to proposing such amendments in regard to the matters set forth in the bill as will make the bill show the truth as to those matters. And so, when the bill proposed by the defendant in terms purports to give the evidence as to only one matter or issue out of many, and is expressly confined to that purpose, as we think it is in the case at bar, there can be no presumption, arising from the absence from the bill of evidence on the other issues, that there was, in fact, no evidence thereon. In such a case the presumption is only as to the completeness of the record as to the evidence upon the particular matter to which, by its terms, the bill is limited. If, on the other hand, the proposed bill can be said to fairly purport to give the substance of the evidence in the case, or to state what the same tended to show, the matter of the insufficiency of the evidence to sustain the verdict is presented, and the district attorney must see that the bill truly presents the actual condition as to the evidence on all the issues; for, under the authorities, it will be presumed on appeal that the bill of exceptions does contain all the evidence, even though there be no statement therein to the effect that no other evidence was given. The true rule, we are satisfied, goes no further than this. In this state it is not essential that the bill should, in terms, state that the evidence contained therein was all the evidence given. It is enough to raise the presumption that it does contain all the evidence, that the bill on its face fairly purports to state the evidence or its effect. But there can be no good reason for a rule establishing a conclusive presumption to the effect that a bill of exceptions does contain all the evidence in a case, simply because insufficiency of evidence was one of the grounds specified in the motion for a new trial, where the bill affirmatively shows that the fact is otherwise, and that it does not contain all the evidence, and the rule invoked by defendant's counsel has never been held to include such a case.

All that was said in the three cases principally relied upon by defendant was said with reference to cases very different from this, and the language used therein by this court must be read in connection with the facts of those cases. In People v. Fisher, 51 Cal. 319, it fully appears from the opinion that the bill of exceptions did purport to contain the evidence; for it stated that the several witnesses testified in substance as therein stated. There was nothing in the bill from which it could be reasonably inferred that there was other evidence. It was in reply to the contention of the Attorney General that, in the absence of an affirmative statement that there was no other evidence, it must be presumed, in accordance with the rule that formerly prevailed in several states, that there was such evidence sufficient to support the verdict, that the opinion of the court was directed; and the language there used cannot be held applicable to a case where the bill affirmatively shows that it does not state all the evidence, or the effect thereof. In People v. Buckley, 116 Cal. 146, 47 Pac. 1009, the record shows that the bill did purport to give the substance of the testimony of each witness, and the statement of evidence constituted over 75 pages of the transcript, ending with the words, "This closed the testimony." In People v. Griffith, 122 Cal. 214, 54 Pac. 725, over 50 pages of the transcript consisted of evidence, and it was stated at the end that "this was all the evidence." These cases bear no analogy to the case at bar. This is a case where the record shows affirmatively that there was evidence, presumably material, that is not contained in the bill; and in support of the action of the trial court it must further be presumed that such evidence, so omitted, was sufficient to sustain the verdict of the jury. The mere fact that the evidence as to the time of the commission of the offense was as stated in the bill, which is, under our views, the only point made by the insertion of the portion of the evidence contained therein, would not warrant the granting of a new trial.

The judgment and order are affirmed.

We concur: SHAW, J.; McFARLAND, J.; VAN DYKE, J.

(Oct. 20, 1904.)

BEATTY, C. J. I dissent. Aside from the special importance of this appeal to the defendant, the case is of general importance on account of the question of practice which it involves—a question destined apparently never to reach a definite settlement in this court. There is no doubt that a defendant in a criminal case, who has moved for a new trial on the ground that the verdict is contrary to the evidence, is entitled to a reversal of the order denying his motion, when it appears by the record on appeal that there was a total failure of proof as to any material allegation of the indictment or information. But there has long been a question as to the method by which the record in such case can be made to show the failure of proof. In civil cases a party moving for a new trial on the ground that the verdict or other decision is contrary to the evidence (except when he moves on the minutes of the court) must prepare a statement or bill of exceptions as a foundation for the motion, and must specify therein the particular findings, or, in case of a general verdict, the particular issues, as to which he claims that the decision is contrary to the evidence. If he neglects to make such specification, his motion as to this ground fails; but if he makes a sufficient specification, it devolves upon the party resisting the motion to see to it that the proposed statement or bill of exceptions is, if necessary, so amended before settlement as fairly to show all the evidence in support of the finding or verdict. And on appeal the presumption is that there was no evidence given at the trial upon the controverted issues, except that which is contained in the settled statement or bill of exceptions. The propriety, convenience, and economy of this rule in civil cases is universally recognized, and there is no reason why the same rule should not obtain in criminal cases, so far as it can be made applicable in view of the different order of procedure prescribed in moving for a new trial. In civil cases the motion is made after judgment; in criminal cases it must be made before judgment and without any settled statement or bill of exceptions, so that the only specification of particular allegations respecting which it is claimed that the proof has failed are such as counsel may make in the course of his oral argument.

It would have been a wise provision if the statute had required the defendant, in proposing a bill of exceptions to the order denying his motion, to specify the particular allegation or allegations of the indictment or information which he claimed to be unsupported by the evidence; for then the district attorney would have had the same guide in proposing amendments to the bill that the resisting party has in civil cases, and the justice and propriety of applying to the settled bill the same presumption that attaches in civil cases would have been unquestioned. But unfortunately no such provision has ever been made, and, since the verdict may be attacked in this court upon any ground the defendant may select, it devolves upon the district attorney, according to one line of decisions, to see that the proposed bill is, if necessary, so amended as to contain some evidence, if evidence there was, sufficient to support the verdict upon every material issue. These decisions, it will be seen, bring the practice into close analogy with the practice in civil cases, and are founded upon the doctrine that, when the motion for a new trial is based upon an alleged failure of the evidence, the presumption here is, and ought to be, that, if the settled bill of exceptions contains no evidence tending to prove a material allegation of the indictment, then that there was no such evidence. The principle of these decisions is the same that in the law of evidence imposes the burden of proof upon the party holding the affirmative of the issue. Another line of decisions reverses this principle in its application to this particular matter of procedure, and imposes upon the defendant the task of demonstrating by the record the negative proposition that there was no evidence to support one or more of the material allegations of the indictment or information, and is based upon the doctrine that in this court the presumption is, and ought to be, that there was abundant evidence given at the trial to support the verdict, although none is contained in the record, unless it is affirmatively shown by the bill of exceptions that it contains all the evidence.

It may be conceded that the language of the statute affords as much support to either of these conflicting lines of decision as it does to the other, and it may also be true that either rule, if consistently maintained, would protect the rights of defendants. But when counsel, in reliance upon recent and deliberate decisions of the court reviewing and commenting upon previous and conflicting decisions, has brought himself within the protection of the rule first above stated, we are not justified in denying his appeal upon the ground that the bill of exceptions does not respond to the test which we have discarded. It is not, however, on account of the particular injustice which in my opinion this defendant has suffered in consequence of the changed views of the court, that I feel compelled to give full expression to the reasons for my dissent. The more important consideration, as regards the public, is that in a mere matter of procedure, where a rule once established should be adhered to unless its enforcement is found to involve grave inconvenience, we are by this decision discarding a plain, simple, and convenient rule, and substituting in its place one difficult of comprehension, more difficult of application, productive of increased trouble and delay in the disposition of criminal causes, and of increased expense to the counties of the state. For what is the test now prescribed for determining whether there was a failure of evidence as to a material allegation of the charge? "It is not essential," the court say, "that the bill should, in terms, state that the evidence contained therein was all the evidence given. It is enough to raise the presumption that it does contain all the evidence that the bill on its face fairly purports to state the evidence or its effect." This, then, is the test of sufficiency for future cases. The old rule which required the bill to show expressly that it contained all the evidence—a rule which at least had the merit of simplicity and certainty—is abandoned, and in its place is substituted the requirement that the bill must, on its face, fairly purport to state the evidence or its effect. But when will a bill fairly purport to state the evidence or its effect? The criterion proposed is as uncertain as the length of the chancellor's thumb, and if a bill stops short of an explicit statement that it contains all the material evidence, there will be varying opinions, according to the composition of the court, as to what it fairly purports to contain. Some way or other, however, the bill must be such as to induce the presumption that it contains all the evidence, and since counsel generally prefer to leave nothing to chance that can easily be made secure, the practice hereafter will be to put in all the evidence, in order to insure the insertion at the end of the bill of the old formula, "The foregoing was all the material evidence introduced at the trial," or some statement equally explicit. In short, we shall have fallen back into the old rut, from which an adherence to the decision in People v. Fisher, 51 Cal. 319, would have extricated us, and we shall have hereafter the same inordinately bulky records that have afflicted the court for so many years, with all their attendant inconvenience to the parties and expense to the counties of the state for copying, printing, etc., and the consequent delay in bringing up the record for review.

And what is the reason to be gathered from the opinion of the court for this abandonment of a plain and simple rule, based upon a reasonable presumption, in favor of a rule so vague and uncertain, and necessarily involving the mischievous consequences which years of experience have taught us are entailed by a practice based upon the opposite presumption?

Partly, it would seem, the present opinion of the court, like the opinion in department, is based upon the assumption that the bill of exceptions as it appears in the record before us is purely the work of defendant's counsel. It is spoken of as his bill, and its assumed deficiencies, attributed in the department opinion to an attempt on his part to throw upon the district attorney the labor of putting into the bill the evidence which it was his duty to have set forth in the draft as proposed by him, are now accounted for on the supposition (unwarranted, I think) that it was prepared for the sole purpose of presenting a point which counsel have never made—the point, that is to say, that a conviction of burglary in the second degree cannot be upheld in view of testimony showing that it was committed between sunset and sunrise.

It ought not to be necessary to call attention to the fact that a settled bill of exceptions is the result of the joint efforts of counsel for defendant, the district attorney, and the trial judge. It may contain no part of the bill as proposed by the defendant. It may contain more or less than the defendant's draft. It is not what he states, but what the court states, to have been the evidence bearing upon the several exceptions reserved. But, conceding that it may have been the intention of counsel to urge in this court the absurdly untenable proposition with reference to which the court supposes the bill was framed, it still does not follow that it was the only point upon which he was relying for a reversal. On the contrary, the district attorney and the trial judge were plainly informed by the only means known to the law that he was also relying upon the point that the verdict was contrary to the evidence, and if he wholly failed to set out any of the evidence which tended to support the verdict he was clearly within his right in omitting to do so, according to the very latest decisions of this court bearing upon the point.

In People v. Fisher, 51 Cal. 319, in which the court considered and construed the provisions of the Penal Code relative to the settlement of bills of exception, the ground of the decision was thus stated: "The presumption in this court is that there was no evidence introduced in support of a fact in issue, unless the bill of exceptions contains the substance of the evidence introduced to prove the fact, or states that the fact was proven, or that evidence was introduced tending to prove it." And the rule based upon this statement of the presumption attaching to bills of exception was laid down in accordance with its principle—the principle, that is to say, which in the law of evidence imposes the burden of proof upon the party holding the affirmative of the issue. In conformity to this principle it was declared to be the duty of the district attorney, when the ground, or one of the grounds, of the motion for a new trial was insufficiency of the evidence, to have a statement inserted in the bill of exceptions that the facts as to which there was no controversy were proven, with the substance of the evidence as to the controverted facts, or sufficient of the evidence to establish them prima facie, which is all that is necessary in a criminal case to prevent a reversal in this court. And the opinion of the court pointed out how easily, and in what little space, a perfect case for the people could be put into the record if the case had, in fact, been proved. The opinion of the court recognized the fact, familiar to all, that the controversy in regard to the sufficiency of the evidence is usually confined to some one or two facts—the venue, for instance—and that as to other facts it is sufficient to state in three words that they were proven, while as to the controverted facts it properly devolves upon the district attorney to have inserted in the bill enough of his evidence to sustain the verdict. It was plain, also, that the practice thus enjoined, if conformed to, would not only shorten the statement of the evidence and lessen the expense of copying and printing, but would lighten the task of the district attorney and the trial judge, as well as the counsel for the defendant. This wise and commendable decision was followed in People v. English, 52 Cal. 211, and then it appears to have been forgotten. A new court came in with the new Constitution, and People v. Fisher and People v. English, without citation or reference, were silently overruled by a reversion to the old rule as stated in People v. Williams, 45 Cal. 25, and quoted in the department opinion in this case. See People v. Leong Sing, 77 Cal. 117, 19 Pac. 254; People v. Carroll, 80 Cal. 153, 22 Pac. 129; People v. Tonielli, 81 Cal. 279, 22 Pac. 678. But when the attention of the present court was again called to the Fisher and English Cases, and to the manifest advantages of the rule of practice which they enjoined, we gave them our unequivocal indorsement. See People v. Buckley, 116 Cal. 146, 47 Pac. 1009, and People v. Griffith, 122 Cal. 214, 54 Pac. 725.

An attempt is made in the opinion of the court to distinguish these cases by arguing that the bills of exception, as contained in the several records, covered a large number of pages, and fairly purported to contain all the evidence. But this ignores the principle of those decisions. If they had been based upon the doctrine here asserted, that the bill must demonstrate that there was no evidence given at the trial to prove the material allegations of the charge, it would have been necessary for the court to dispose of the contention of the Attorney General that the record did not purport fairly, or otherwise, to contain all the evidence. It will be seen, however, by reference to the several opinions, that they put this argument aside as having no bearing upon a conclusion founded solely upon the doctrine that, when the ground of the motion for a new trial is failure of proof, it is the duty of the district attorney to make the record show that he proved his case, if in truth he did prove it. The difference between the record in this case and the records in the Fisher, English, Buckley, and Griffith Cases does not, therefore, constitute a ground of distinction. They were decided upon a principle which had no regard to this supposed difference—a principle utterly inconsistent with the present decision, which affirms a conviction upon a record which admittedly contains no evidence to sustain the material allegations of the charge.

It remains only to notice the point, so strongly insisted upon in the department opinion and restated in the present opinion of the court, that the defendant cannot be allowed in cases like this to shirk the duty of setting forth in his draft of the proposed bill the substance of the evidence given at the trial, and thereby impose upon the district attorney the burthen of preparing a bill for him. This ground of the decision totally ignores what is so clearly shown in the opinion of the court in People v. Fisher, that the task thus imposed upon the district attorney is the lightest possible. There is, in fact, no course that the defendant could possibly pursue which would impose so little labor on the district attorney and trial judge in a case of this character as to propose a bill of exceptions containing not one word of the evidence given at the trial. It would save them the reading and comparing and correcting of the long and redundant statement to which we are accustomed, requiring hours of their time and attention, and impose upon them the comparatively trivial task of drafting an amendment which could easily, in any ordinary case, be compressed into a single page of manuscript in five minutes' time. Take the present case as an illustration, and suppose the defendant's draft to the bill to have been as meager as the settled bill in the record. It could have been read through almost at a glance, and if in truth the charge was proved, as alleged in the information, an amendment in the following words would have made an invulnerable case: Geo. H. Kahn, a witness for the people, testified: On the 13th and 14th of February last I was the proprietor of the store known as 201 Kearny street, in the city and county of San Francisco, and owned the articles in the show window. During the night of February 13th-14th that show window was broken and various articles stolen therefrom (describing them). Joseph Catania, a witness for the people, testified: On the morning of February 14, 1902, I was standing near the show window of the store at 201 Kearny street in this city, and at about 5 o'clock heard the glass crack. A minute or two later I saw this defendant put in a wire, abstract several articles, and hand them to another man. The two then ran away.

Compare the labor of the district attorney in preparing this amendment, and of the judge in acting upon it, with the task that would have been imposed upon them if the course enjoined upon counsel for defendant by the opinion of the court had been pursued—if, in other words, the substance of the testimony of the 20 witnesses, shown by the minutes of the court to have testified at the trial, had been fully or substantially set forth in the proposed bill. And compare the size of the record, as so amended, with what it would have probably been if all the evidence had been brought up. Compare it, for example, with the record in the recently decided case of Doshia Nolan, 77 Pac. 774, a common instance, in which 115 pages of the printed record are devoted to the cross-examination of a single witness—a cross-examination full of repetitions, and which for every practical or useful purpose might have been so condensed as to cover 5 pages at the outside. And it is to be remembered that every unnecessary page allowed to go into a bill of exceptions costs the county a dollar for printing for no purpose except to cumber the record and delay the hearing. It may be that this defendant was shown to be guilty, and that a reversal of the judgment on this appeal would have enabled him to escape deserved punishment; but an affirmance of the judgment in his case is dearly purchased at the cost of unsettling a rule of practice which experience has demonstrated to be as useful and convenient and economical as it is simple and definite.

We concur: HENSHAW, J.; LORIGAN, J.

Supplemental Opinion.

(Oct. 20, 1904.)

ANGELLOTTI, J. The dissenting opinion in this case having been prepared some time after the filing of the majority opinion, it would seem proper to notice briefly one or two suggestions made thereby. It may be freely admitted that it is most important, as regards the public, that in a matter of procedure a rule once established should be adhered to. It was attempted to be shown in the majority opinion that it has never been held that a presumption to the effect that a bill of exceptions contains all the evidence will obtain, where there is an affirmative showing on the face of the bill that it does not contain all the evidence, or any statement of the substance thereof. The cases cited, both in the majority and dissenting opinions, were all cases where there was nothing upon the face of the bill to indicate that it was not a complete statement as to the effect of all the evidence given on the trial, and the presumption that it was a complete statement, therefore, existed. Whatever was said by the court in those cases was said with reference to the facts then before the court. If, however, the bill itself affirmatively shows the fact to be that it does not contain a statement as to the effect of all the material evidence, there can be no reason why the appellate court should declare, in the face of the affirmative statement to the contrary, that it must be held that there was no other evidence. We can hardly believe that if the bill in this case had declared "there was other evidence given on the trial material to the issues involved" it would have been asserted by any one that a presumption to the contrary would still have obtained, and yet such bill in effect does so state.

Nor is there anything uncertain in the rule laid down in the majority opinion to the effect that it is essential to the existence of the presumption invoked that the bill should on its face fairly purport to state the evidence or its effect. What is meant by the expression "fairly purport to state the evidence or its effect" is amply illustrated by the record in the cases relied upon in the dissenting opinion. If there is apparent any attempt to state the effect of the evidence given on the trial—that is, all the evidence—it must be held that the bill fairly purports to state all the evidence, and the presumption will obtain; but where, by its terms, the bill is limited to the statement of only a portion of the material evidence, as here, where it simply states that "testimony given during the trial included the following," it cannot be said that the bill "fairly purports" to give all the evidence or its effect.

Nor can we see any force in the suggestion that the decision in this case will result in increasing the size of transcripts on appeal. Experience has demonstrated that some attorneys always insist upon unnecessarily long and elaborate bills of exceptions. This has been the fact at all times, and whatever the rule of practice governing bills of exceptions. The record in the Doshia Nolan Case, 77 Pac. 774, referred to in the dissenting opinion, is but a sample of the record in many cases brought to this court while the rule contended for by the dissenting opinion must, if ever, have been in force, and what is said regarding that case shows that the supposed rule did not operate to prevent unwieldy records on appeal. It has never been necessary, and it will not be necessary under the decision in this case, for a defendant, desiring to present the contention of insufficiency of the evidence, to state all the evidence, word for word, as it fell from the mouths of witnesses. As to those matters concerning which there is no dispute, the briefest statement as to the effect of the evidence will be, as is well shown by the dissenting opinion, all that is requisite; and as to the one or two matters concerning which the dispute exists the statement should be sufficiently elaborate to show the facts. This has always been, and will continue to be, the rule. It is the duty of the judge settling the bill to strike therefrom all unnecessary matter, and to see that it is no more lengthy than the necessities of the case require; and we know of no other remedy in those cases where attorneys persist in proposing for insertion matters unnecessary to a determination of the questions desired to be presented on the appeal.

We concur: SHAW, J.; McFARLAND, J.; VAN DYKE, J.

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145 Cal. 104

PEOPLE v. MAHONY. (Cr. 1,164.)

(Supreme Court of California. Oct. 7, 1904.)

PRESENTING FRAUDULENT CLAIM—INDICTMENT.

1. An indictment under Pen. Code, § 72, making it an offense to, with intent to defraud, present for allowance to a county or city officer any false or fraudulent claim, is insufficient, in alleging merely that defendant presented a certain false and fraudulent claim, without alleging wherein it was fraudulent, to satisfy sections 950–952, providing that an indictment shall set forth the acts constituting the offense, and the particular circumstances of the offense charged.

Department 1. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Albert B. Mahony was indicted for presenting a fraudulent claim. A demurrer to the indictment was sustained, and the people appeal. Affirmed.

U. S. Webb, Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People. Geo. D. Collins, for respondent.

ANGELLOTTI, J. This is an appeal by the people from a judgment in favor of defendant, sustaining and allowing his demurrer to an indictment found and presented against him by the grand jury of the city and county of San Francisco; the grounds of demurrer specified, in addition to want of facts to constitute a public offense, being that the indictment did not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code.

The superior court, apparently being of the opinion that the objection on which the demurrer was allowed might be avoided in a new indictment, directed that the case be submitted again "to the grand jury now in session," but the attorney for the people preferred to stand upon the indictment already presented, and took this appeal.

The indictment was based upon the provisions of section 72 of the Penal Code, and alleged that the defendant did, "with intent to defraud the city and county of San Francisco," present for allowance to the auditor of said city and county "a certain false and fraudulent claim, bill, account, and writing, in the words and figures following, to wit:

"Co. Clerk F. No. 170.

"Legal Department. County Clerk's Assistants.

"Auditor's No. Treasurer's No. $100.00

"San Francisco, Oct. 31, 1903.

"A. Davidson presents this demand on the Treasury for the sum of One Hundred Dollars, being for his salary as Copyist for the month of Oct., 1903.

"As authorized by Article III, Chapter IV, Article V, Chapter V, Section 2, of the Charter of the City and County of San Francisco, approved January 19, 1899, in relation to certain Deputies, Assistants and Copyists of County Clerk.

"A. Davidson, Signature.

"Allowed, Payable out of the General Fund.

"..................190..

"............................

"Auditor City and County.

"By..........................

"Deputy."

"Correct, Albert B. Mahony,
"County Clerk.
"By..........................
"Deputy.

"Received Payment, ...

"Auditor's Receipt No........

"Legal Department County Clerk's Assistants. General Fund.

"When Paid, Delivery Stamp,

"This Demand can only be paid out of the income and revenue provided, collected and paid into the General Fund of the Treasury for the fiscal year 190..

"Registry Stamp."

It further alleged "that said Albert B. Mahony then and there well knew that said false and fraudulent claim * * * was then and there false and fraudulent." There was no allegation of any fact tending to show wherein the claim set forth was in any way false or fraudulent; the allegations in this respect, in addition to setting forth a copy of a claim in favor of one Davidson, which was valid upon its face, and certified as correct by the defendant as county clerk, being in the general language of the statute prescribing the offense. The falsity or fraudulent character of this claim, if it was in fact false or fraudulent, arose from some fact or facts not alleged, and concerning which the indictment furnished absolutely no information. An examination of the copy of the claim set forth shows that this apparently valid claim may have been false in any one of many ways, and fraudulent for any one of a great variety of reasons. Nothing, however, but the conclusion that it was both false and fraudulent, is alleged; and the defendant, who must be presumed to be innocent of any crime, was left entirely in the dark as to any facts upon which the allegations of falsity and fraud were based.

It is urged in support of the indictment that it is generally sufficient to describe the offense substantially in the language of the statute. This is undoubtedly the general rule, but, as has been said, such rule simply means "that, when the statute defines or describes the acts which shall constitute a particular offense, it is sufficient in an indictment to describe those acts in the language employed in the statute; applying them, of course, concretely to the person charged." People v. Ward, 110 Cal. 369, 372, 42 Pac. 894. In such cases the statutory description gives to the accused sufficient notice of the charge against him. In the vast majority of cases the statute declaring the public offense does so define or describe the acts constituting it, but in many cases it does not; and to these cases is applicable the qualification to the general rule described by Mr. Justice Harlan, in U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819, as a qualification, "fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense." Our Penal Code provides that the indictment or information must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended" (section 950, subd. 2); that it must be direct and certain as regards "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense" (section 952, subd. 3); and that it is sufficient if, among other things, the act charged as the offense is set forth "in such a manner as to enable a person of common understanding to know what is intended." These provisions but recognize the principle universally recognized in civilized countries that one accused of crime shall be allowed to know the charge against him, so that he may have an opportunity to present his defense thereto, if any he has. See People v. Palmer, 53 Cal. 615; People v. Ward, 110 Cal. 369, 42 Pac. 894. The qualification to the general rule is peculiarly applicable in cases where fraud is an element of the offense, and the statutory definition of the crime simply includes the general term "fraud" or "fraudulently," without any description of the acts which shall constitute the fraud. This is necessarily so, in view of the fact that fraud is but an inference of law from certain facts. This was clearly set forth by this court, in bank, in the case of People v. McKenna, 81 Cal. 158, 22 Pac. 488, where the defendant was charged, in the language of the statute defining the offense, with having defrauded one of personal property "by false and fraudulent representations and pretenses." After stating that fraud is merely an inference of law from certain facts, that the question as to whether a thing was done fraudulently is a matter of law, and that an allegation of fraud in general terms presents no issuable fact, the court said: "It is a sound principle that an indictment charging fraud of any kind should aver with particularity the facts relied upon to show fraud. Many of the niceties and technicalities which existed under former methods of pleading are not allowed to prevail under the provisions of our Code, but the rule still exists that an indictment must be certain and clear as to the particular circumstances of the offense charged, when they are necessary to constitute a complete offense (Pen. Code, § 952, subd. 3)." In People v. Neil, 91 Cal. 465, 27 Pac. 760, it was held by this court, in bank, following People v. McKenna, supra, that an information charging one, in the language of section 45, Pen. Code, with fraudulently voting when not entitled to vote, was insufficient as against demurrer. In the opinion in that case, Hirschfield's Case, 13 Blatchf. 331, Fed. Cas. No. 15,372, was approvingly cited, wherein it was held that a charge that one had fraudulently registered, although in the words of the statute, was insufficient; and it was said that something more must be stated, in order to give the accused any proper notice of the charge which he was to meet, it being impossible for him to determine from the charge what he would be required to show in his defense.

These decisions of this court are in line with the decisions generally on the question of the necessity of alleging the facts upon which a charge of fraud is based, and are apparently conceded by learned counsel for the people to be correct. It is sought, however, to distinguish them from the case at bar, but we can see no distinction material to the question under discussion. It was essential to the commission of the offense sought to be charged by the indictment before us that the claim presented by defendant for allowance was in fact false or fraudulent. It was alleged that it was both false and fraudulent. The allegation that it was fraudulent was the allegation of a mere conclusion of law, assumedly based upon certain facts not disclosed by the indictment. What the extraneous facts claimed by the district attorney to render it fraudulent, and alleged by the indictment to have been known to defendant, were, the indictment fails to show, and the defendant was left in absolute ignorance as to the particular charge he would be compelled to meet in this connection. It may be that the claim itself is set forth with sufficient certainty to enable the defendant to plead a judgment on the merits in bar of any subsequent prosecution, but this is only one object of the rule requiring the acts claimed to constitute the offense to be sufficiently set forth; the other equally important object being to apprise the accused, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense. The rule stated by Mr. Justice Temple in Capuro v. Builders' Ins. Co., 39 Cal. 125, as applicable to civil cases, viz., that, while the party alleging fraud is not required to allege with minuteness all the particulars and circumstances which constitute the evidence of the alleged fraud, he must make the charge with sufficient distinctness to enable his adversary to come prepared with his evidence upon the general questions of fraud which will be raised, is applicable as well to criminal cases. No other rule would be consonant with a due regard for the liberty of the individual and the protection of property.

We are satisfied that where it is sought to charge one with the presentation of a fraudulent claim, under section 72, Pen. Code, the particular acts which make the claim fraudulent should be so alleged as to make the fraud appear upon the face of the indictment. See, in this connection, United States v. Goggin (C. C.) 1 Fed. 49.

It is unnecessary to determine whether the allegation that the claim was false, as well as fraudulent, adds anything to the indictment. The particular objection that we are considering is not that the indictment does not state facts constituting a public offense, but that it does not conform to the requirements of sections 950, 951, 952, Pen. Code, in that it does not sufficiently set forth "the acts constituting the offense," and "the particular circumstances of the offense charged," so as to enable the defendant to know what was the precise charge against him, and to prepare his defense thereto. Being advised by the indictment that the people charge that the claim was fraudulent, as well as false, even if there be any distinction between these terms as used in connection with a claim such as is set forth in such indictment, he is certainly entitled, upon objection made by demurrer, to know with reasonable certainty the facts relied upon by the people as constituting the alleged fraud. We do not wish to be understood as holding that it would be sufficient, in alleging an offense under section 72 of the Penal Code, to allege simply that a claim was false, without alleging wherein it was false. It is very easy for the pleader to set forth specifically wherein a claim presented for allowance is claimed to be erroneous, and it certainly would be more in accord with the rule that we have discussed as applicable to this case that this should be done.

The Attorney General, in support of this indictment, relies almost entirely upon the decision of this court, in department, in People v. Carolan, 71 Cal. 195, 12 Pac. 52. The question here involved received little consideration in the opinion in that case; being disposed of by the simple statement that the indictment was sufficient—charging the offense, as it did, in the language of section 72, Pen. Code. No authority was cited in support of this conclusion, and so much of the record of that case as is now accessible indicates that no authorities therein were cited to the court. The conclusion therein reached is so opposed to later decisions rendered by this court in bank, and also to fundamental principles recognized by the decisions generally, that it cannot be now accepted as authority.

The judge of the superior court did not err in sustaining the demurrer to the indictment. The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(145 Cal. 118)

In re SMITH'S ESTATE. (S. F. 3,992.)*

(Supreme Court of California. Oct. 8, 1904.)

WILLS—CONSTRUCTION—SHARE OF CHILD BORN AFTER EXECUTION—SPECIFIC AND RESIDUARY LEGATEES.

1. Civ. Code, § 1306, provides that when a testator has a child born after the making of his will, which is not provided for or mentioned in the will, such child shall succeed to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate. Section 1308 provides that in such case, if there is no property undisposed of by the will, the share of the post testamentary child shall be taken "from all the devisees or legatees in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest * * * would thereby be defeated," in which case such devise or bequest may be exempted from such apportionment. A married woman, having one child, made a will by which she left all of her property to her husband during his life, and then to the child by name. It also provided that the sum of $125 per month should be paid to the mother of testatrix during her lifetime. Six days after the making of the will testatrix gave birth to a son, and a few days later she died. *Held*, that the one-third share of the estate which descended to the son under the provisions of section 1306 should be taken in equal proportions from the specific legacy to the mother and the residuary bequests to the husband and daughter; that there was nothing either in the language of the will or the circumstances under which it was executed which evidenced an "obvious intention" on the part of the testatrix that the specific legacy should be exempted.

Department 1. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Appeal by Ella J. Chamberlain from a decree making partial distribution of the estate of Ella Roberta Wilson Smith, deceased. Affirmed.

Wright & Lukens, for appellant. Garret W. McEnerney, for respondent.

ANGELLOTTI, J. This is an appeal by Ella J. Chamberlain, the mother of deceased, from a decree of partial distribution, refusing to award her $125 per month for the period of her life, and awarding her only $83.33⅓ per month for that period. The will of the deceased was as follows:

"I, Ella Roberta Wilson Smith, being of sane and sound mind do hereby declare this my last will, and do hereby give and bequeath all of which I may die possessed, to my beloved husband to be for his benefit and maintenance during his life. At his death to go to my beloved daughter Roberta Genevieve Smith.

"To my mother I desire shall be paid $125.00 per month as long as she shall live.

"Ella Roberta Wilson Smith.

"February 1st, 1903."

Six days after the making of this will, the deceased gave birth to a son, and on February 27, 1903, 20 days after the birth of such son, she died, leaving surviving her husband and mother, and her two children, Roberta Genevieve and Randolph Wilson, the post testamentary son. She left estate, consisting of personal property valued at $200, and real property valued at $99,175, all of which was separate property. The net income from this property was $300 per month. No part of the annuity to the mother having been paid, she petitioned the court in probate for a decree directing the administrator with the will annexed to pay and deliver to her the arrears of the said annuity at the rate of $125 per month, as provided in the will. The court decreed that she was entitled to receive only $83.33⅓ per month, and ordered this amount paid to her from March 27, 1903, "so long as she shall live," and she has appealed, claiming that under the provisions of the will she is entitled to $125 per month.

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*Rehearing denied November 7, 1904.

The question presented by this appeal is as to the effect upon the annuity to the mother of the birth of the post testamentary child, in view of certain provisions of our Civil Code. Section 1306, Civ. Code, is as follows: "Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." It is not disputed that the post testamentary child comes within the terms of this section and is entitled to the benefit of its provisions. Therefore, subject to the provisions of section 1308, Civ. Code, and subject to administration, the post testamentary child succeeded immediately, by operation of law, to an undivided one-third of the property of the testatrix. As to such portion, the deceased is to be regarded as having died intestate (Smith v. Olmstead, 88 Cal. 582, 26 Pac. 521, 12 L. R. A. 46, 22 Am. St. Rep. 336), and, so far as such child is concerned, the will is to be considered as not existing.

The effect of this being to deprive both the husband and the daughter of one-third of the portions attempted to be given them by the will, the question is as to whether the annuity to the mother must also be cut down one-third. Section 1308, Civ. Code, provides that: "When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted." Concededly, the annuity here involved is a legacy. Civ. Code, § 1357. There is no estate not disposed of by will. The legacy to the mother of deceased must therefore contribute, in proportion to its value, to make up the share of the child, unless the obvious intention of the testatrix in relation to such legacy, as distinguished from her intention as to the other dispositions made by the will, would thereby be defeated. No such obvious intention is apparent from the words of the will. As stated by this court in Estate of Ross, 140 Cal. 282, 293, 73 Pac. 976, 980, "The general rule announced by the section (section 1308, Civ. Code) is that all devises and legacies must contribute in proportion to value, and that the exemption of a specific devise is only warranted when the obvious intention of the testator in relation to it would be defeated if contribution was required." By the will in that case, a lot of land was specifically devised to a stepdaughter, and, with the exception of two nominal legacies, the residue of the property was bequeathed to two daughters, and it was held that the pretermitted child of a deceased child succeeded to an undivided one-third of the whole of the property, including that specially devised, and that the specific and residuary bequests must alike contribute in proportion to value. The mere fact, then, that one legacy is specific, as is claimed by appellant for the annuity here involved, and that another legacy is in its nature residuary, does not show the obvious intention contemplated by section 1308, Civ. Code. Under that section all legacies and devises, whatever their character, must contribute in such a case, unless the obvious intention of the testator in relation to some particular legacy or devise would be thereby defeated. By her will the deceased purported, in terms, to dispose of all her property. She must be assumed to have had in mind all her property and its condition, and to have distributed the same among the objects of her bounty in such proportions as she thought proper. The amount fixed upon by her for her mother must be deemed to have been so fixed, not only in accordance with her views as to her mother's needs, but in accordance with her views as to what, under all the circumstances, including the needs of all, would be a fair division among those near and dear to her. There is absolutely nothing in the language of the will to indicate any other intention on the part of the testatrix than that, the husband holding during his life all the property of which she died possessed, and her daughter taking all of the same absolutely upon his death, the mother should receive $125 per month therefrom during her life. These were the proportions deemed just by the testatrix. The intention that the portions of the estate thus attempted to be given to the father and daughter were to be enjoyed by them unimpaired was as obvious as the intention that the mother should have the full amount of her legacy. There is nothing to indicate that the legacy to the mother was, under all circumstances, to be kept intact, in the event that the bequests to the father and daughter became in part ineffectual. So much for the language of the will.

Appellant claims, however, that the circumstances under which the will was made must be taken into consideration in determining the intention of the testatrix, and invokes the provisions of section 1318, Civ. Code, which declares that "in case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will taking into view the circumstances under which it was made exclusive of his oral declarations." Assuming the applicability of this section, and that we may consider the circumstances under which the will was made for the purpose of determining the "obvious intention" of the testatrix in this regard (see, however, Estate of Ross, supra; In re Stevens, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; Estate of Wardell, 57 Cal. 484; Estate of Tompkins, 132 Cal. 173, 176, 64 Pac. 268), we do not see that the case of appellant is materially strengthened. The circumstance strongly relied on by her is that at the time of the execution of the will the deceased was within a few days to give birth to a child. It was urged that she must therefore have had this child in mind, and made this will because of her approaching confinement and the danger attending the same. The child, therefore, it is said, must have been in her mind, and she must be presumed to have known that such child, if born alive, would, under the law, succeed to one-third of her estate, and to have made the provision of $125 per month for her mother with the intention that she should be paid that sum in full, notwithstanding the fact that the estate from which said annuity was to be paid would be reduced one-third by the birth of the child. The provisions of the will would indicate that, if the testatrix had this child in mind at the time of the execution of the will, her omission to provide for him was intentional, and that she, in fact, did not know that the law would give him one-third of her estate if she failed to provide for or mention him in her will. It is impossible to account for her attempted disposition of all of her property to others, under such circumstances, upon any other theory. Assuming, however, in accordance with the presumption invoked, that she did know the law, she knew not only that if the child was born alive, and had not been provided for or mentioned in her will, he would succeed to one-third of her estate by operation of law, but also that under the law, unless her intention to the contrary was made obvious by the terms of her will, all devises and legacies contained therein, including the legacy to her mother, must contribute in proportion to value to make up the share of the child. Having this knowledge, she executed the will before us, without indicating therein any intention that the legacy to the mother should not contribute with the others to make up the portion that the law would give to her after-born child, or that such legacy should, in this respect, stand upon any other footing than that occupied by the other bequests. We are satisfied that it is not shown by the will, either taken alone or in connection with the circumstances under which it was made, that there was any such "obvious intention" in relation to the annuity to the mother as will exempt it from contribution to the share of the post testamentary child.

The decree of the superior court is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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145 Cal. 135

McCARDLE v. BARSTOW. (S. F. 3,823.)*

(Supreme Court of California. Oct. 14, 1904.)

ELECTION CONTEST — PLEADING—ADMISSIBILITY OF BALLOTS—REVIEW OF RULING—PRACTICE.

1. An election contest may be instituted by the filing of a petition verified like an ordinary pleading, which is a sufficient verification "by affidavit" within the requirement of Code Civ. Proc. § 1115.

2. In an election contest the question whether ballots have been so taken care of as to preclude any reasonable suspicion that they are not in their original condition is one largely within the judgment and discretion of the trial court, and its determination of it will not be disturbed on appeal if the evidence fairly warrants the conclusion which the court below reached.

3. A stamp or cross placed on a ballot in the blank opposite the words "no nomination" is a special mark, which renders the ballot invalid.

4. Where the contestant for a county office who charged irregularities in all or nearly all of the precincts offered in evidence the ballots from certain precincts until the judicial count of such precincts, taken with the official count of the remaining precincts, gave him a plurality, it was within his legal right to withdraw his objections to the vote of the uncounted precincts, and the contestee, by offering the ballots therefrom in evidence, waives the right to object that they were not so preserved as to be admissible.

In Bank. Appeal from Superior Court, Fresno County; E. N. Rector, Judge.

This was an election contest for the office of county recorder of Fresno county by Charles M. McCardle, contestant, against R. N. Barstow, contestee. From a decision in favor of contestant, contestee appeals. Affirmed.

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*Rehearing denied November 12, 1904.

¶ 1. See Elections, vol. 18, Cent. Dig. § 277.

Johnston & Jones, M. B. Harris, and F. H. Short, for appellant. H. H. Welsh and Everts & Ewing, for respondent.

HENSHAW, J. This is an election contest over the office of county recorder of the county of Fresno. The official canvass of the board of supervisors showed that the contestee had received a plurality of 24 votes over the contestant, and he was declared elected. Contestant instituted this contest, and, as a result of the recount, was found and declared by the court to have received a plurality of 41 votes over the contestee. The contestee appeals.

Contestant's petition was properly verified. Kirk v. Rhoads, 46 Cal. 403.

The contestee made a preliminary objection to the introduction of any and all of the ballots offered, upon the ground that they had not been safely preserved in accordance with the law, and that their integrity was not assured. The court overruled the objection. The same question was presented to this court as to certain of these ballots in the contest of Davis v. Grunig (Cal.) 76 Pac. 1102, and it was there said by this court in bank that, after a careful examination of the evidence, we discovered nothing which would warrant us in holding that the court erred, and the language of this court in Hanna v. Green (Cal.) 76 Pac. 708, was quoted to the following effect: "The question whether ballots have been sufficiently taken care of so as to preclude any reasonable suspicion that they are not in their original condition is a question which is largely within the judgment and discretion of the trial court, and its determination of that question should not be disturbed here if the evidence fairly warrants the conclusion which the court reached on the subject."

The ballots containing a stamp or cross in the blank opposite "no nomination" were properly rejected, as has been repeatedly held by this court. Maddux v. Walthall (Cal.) 74 Pac. 1026.

The contestant having charged irregularity and misconduct, upon the part of the election officers in most, if not all, of the precincts, presented the ballots to the court from certain precincts, and they were counted, the contestee making his objection to the introduction in evidence of any and all of the ballots upon the ground of their lack of proper preservation. The count proceeded under these circumstances until the point was reached where the judicial count of the precincts whose ballots were offered, taken with the supervisors' official count of the remaining precincts, gave contestant a plurality. Contestant then withdrew his charges of misfeasance and malconduct as to the uncounted precincts, and rested his contest. Contestee then felt obliged to offer the ballots from the remaining uncounted precincts in the hope thus to swell his vote. He thus put himself in the position of offering evidence in the form of ballots, the integrity and admissibility of which he had been stoutly objecting to. He here complains somewhat bitterly of the course pursued by contestant, but we do not perceive that contestant was not strictly within his legal rights in waiving and withdrawing his objections to any of the uncounted precincts. And, upon the other hand, contestee, as to the ballots which he himself offered, and, by offering, affirmatively declared to the court to be worthy of credence, cannot here be heard to say that they were inadmissible. But this question is rather of academic than of vital interest in this case, since we have held that the ballots were admissible, and since, so holding, we have been compelled to count the thousand or more contested ballots which have been presented to us for consideration. It is unnecessary to enter into a detailed discussion of the count which we have thus made. It is sufficient to say that the result has been to increase McCardle's plurality over Barstow to more than a hundred.

The judgment appealed from is therefore affirmed.

We concur: VAN DYKE, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; ANGELLOTTI, J.

145 Cal. 124

CALIFORNIA ELECTRIC LIGHT CO. v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. (S. F. 3,069.)*

(Supreme Court of California. Oct. 12, 1904.)

ACTION AGAINST DECEDENT'S ESTATE—EVIDENCE.

1. In an action by a corporation against a decedent's estate, where it is claimed by defendants that the claim in suit was brought for revenge, because a claim of a witness connected with plaintiff's management against the estate had been rejected, it was proper to admit in evidence a letter written by such witness before the death of decedent in relation to the claim in suit.

2. Where defendants on cross-examination examined a witness as to other matters than those testified to by him on direct examination, and presented a new issue, it was proper on redirect examination to admit evidence as to such issue, under Code Civ. Proc. § 2048.

3. In an action by a corporation against a decedent's estate, where it is contended by defendants that the claim in suit was trumped up by a third person after the latter's claim against the estate was rejected, evidence is admissible which shows that plaintiff's president knew of the claim in suit before decedent's death.

4. Evidence in an action against a decedent's estate *held* to justify judgment for plaintiff.

5. Where a case was in equity, and the verdict of the jury was, at most, only advisory to the court, that the court admitted improper evidence to go before the jury will not justify a reversal, as the correctness of the decision of the court, and not the verdict, is the question to be determined.

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*Rehearing denied November 11, 1904.

¶ 2. See Witnesses, vol. 50, Cent. Dig. § 1003.

6. The fact that the evidence might warrant a different inference does not authorize the court to set aside a verdict for want of evidence.

Department 1. Appeal from Superior Court, City and County of San Francisco; Chas. W. Slack, Judge.

Action by the California Electric Light Company against the California Safe Deposit & Trust Company and another. Plaintiff had judgment, and defendants appeal. Affirmed.

Page, McCutchen, Harding & Knight, for appellants. W. S. Goodfellow, Chas. A. Shurtleff, and Garret W. McEnerney, for respondent.

VAN DYKE, J. This was an action to recover a secret commission claimed to have been received by the defendants' testator, while an officer of the plaintiff corporation, on the sale by plaintiff of certain of its property. From a judgment for plaintiff and an order denying defendants' motion for a new trial, the defendants now prosecute this appeal.

George H. Roe, of whose last will and testament the defendants are executor and executrix, respectively, was in his lifetime the secretary and manager of the plaintiff, California Electric Light Company. The plaintiff was incorporated prior to 1890. The cause of action here arose in the years 1892 and 1893. Mr. Roe died December 10, 1894. The action is based upon a claim duly presented to the executors, and by them rejected. The action is one in equity for an accounting against the executors of the will of George H. Roe, deceased, and the defendants requested the court below to impanel a jury to advise it upon the issues raised by the pleadings; and, at their request, certain interrogatories were submitted, which, together with the answers of the jury, are as follows: "(1) Was there a secret agreement made between George H. Roe and C. R. Lloyd, by which, in consideration of his assistance to be rendered in procuring a commission to be allowed and paid by the plaintiff, the California Electric Light Company, of one thousand shares of the capital stock of the Edison Light & Power Company, George H. Roe should receive one-half of said commission? Yes. (2) Did George H. Roe, pursuant to such secret agreement, receive one-half of such commission, to wit, five hundred shares of the capital stock of the Edison Light & Power Company? Yes." The trial of the cause occupied pretty much all the month of November, 1897. Thereafter, to wit, March 15, 1898, the court adopted the verdict of the jury, and made additional findings of fact, and stated the account between the parties, and awarded a judgment in favor of the plaintiff for $71,324.26, payable in due course of administration, with legal interest from that date. The appellants rely for a reversal upon four rulings of the court upon the admission of evidence, and upon insufficiency of evidence to support the findings. The four rulings of the court referred to are designated as exceptions Nos. 9, 10, 37, and 42.

Exception No. 9 was taken to the admission of a letter of August 6, 1894, written by Lloyd, at New York, to Roe, in San Francisco, and contained, as Lloyd stated, in an envelope returned to him by Mrs. Roe after Roe's death, with the indorsement: "Letter from C. R. Lloyd to be returned to him unopened in case of my death." The theory of the defendants, as developed at the trial, was that Lloyd, who was the principal witness on behalf of the plaintiff, was actuated by a motive of revenge against Roe's executors for having failed to comply with his demand for the payment of his claim against said estate of $21,000; and it is also the contention of the defendants that this suit was instigated by Lloyd after his claim against Roe's estate had been rejected. In seeking to show that this was the case, Mr. McCutchen, counsel for defendants, on cross-examination of Lloyd, asked the following questions: "Q. After he was dead you made a claim against his estate to recover $21,000 of it back? A. Before he died I wrote— Q. (Interrupting.) Just answer my question, please. A. I made the claim when he was living. Mr. McCutchen: I insist upon an answer to the question, and, if the witness has any explanation, he can make it. * * * The Court: You will have to answer that question, Mr. Lloyd. I will let that portion stand, 'I made the claim while he was living.' The question virtually is, did you make the claim after he was dead? Mr. McCutchen: That is my question. A. I made it during his lifetime, and after he was dead, and you know it, in both instances. The Court: Mr. Lloyd, I have cautioned you several times now about making these remarks. The Witness: I beg your pardon. The Court: Strike out that 'and you know it.'" Upon redirect examination, counsel for the plaintiff produced and submitted to Mr. Lloyd a letter which he had written on August 6, 1894, to George H. Roe. After Mr. Roe died, this letter was returned to Mr. Lloyd by Mrs. Roe, the widow of George H. Roe, in a sealed envelope, and had indorsed upon it, in the handwriting of George H. Roe: "This letter is to be returned to Charles R. Lloyd, unopened, in the event of my death." The plaintiff then offered the letter in evidence. After some discussion between court and counsel in reference to the admission of the letter, the court put this question to defendants' counsel: "Is it your theory, Mr. McCutchen, that this claim is an afterthought, and pressed by Mr. Lloyd because his own claim against the Roe estate was rejected? Mr. McCutchen: Yes, sir. The Court: That is your theory? Mr. McCutchen: Yes, sir. The Court: Well, then, that will settle it. If that is true, then this letter is admissible upon that theory, as showing that the claim was made prior to the institution, or rather the claim involved in this suit was made prior to the claim against the Roe estate. This letter is dated August 6, 1894. Mr. McCutchen: I understand your honor does not admit this letter as an admission of Mr. Roe? The Court: No, sir." The letter referred to was written from New York, as stated, August 6, 1894, and is quite lengthy, going over many matters that seemed to have occurred between Lloyd and Roe in reference to the Electric Light Company and the Edison Company. He says in the letter, among other things: "I have no desire to quarrel with you and will avoid doing so unless it becomes necessary to protect the company from injury. If that occasion should arise, it will mean your resignation, and the return by you to the California Electric Company of the $71,000 I gave you of the $100,000 worth of stock paid to me." The registered letter receipt and the registered return receipt were also read in evidence, and the envelope with the indorsement as stated. The Code of Civil Procedure (section 2048) reads as follows: "The opposite party may cross-examine the witness as to any facts stated in his direct examination, or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination." In this case the attorney of defendants, in the cross-examination referred to, examined the witness as to other matters than those testified to by him on the direct examination, and in effect presented a new issue; that is, that, after the executors in the Roe estate had rejected the claim of Lloyd for $21,000, he instigated the bringing of this suit, and had invented or concocted the claim that Roe had received half of his commission, and retained the same. It was proper, therefore, on redirect examination, to admit the evidence in question, as showing that the claim was made prior to the institution of the suit, and prior to the claim against the Roe estate, in corroboration of the witness Lloyd's testimony to that effect; and the court, it seems, was very careful to limit it to that purpose. On this subject, in People v. Doyell, 48 Cal. 90, the court say: "Such declarations may, however, be admissible in contradiction of evidence tending to show that the account is a fabrication of late date, when it may be shown that the same account was given before its ultimate effect and operation could have been foreseen, and also, perhaps, in other peculiar cases." And in Barkly v. Copeland, 74 Cal. 4, 15 Pac. 307, 5 Am. St. Rep. 413, it is said: "It has been frequently held that, when the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist." Citing a number of cases from other jurisdictions, and Wharton on Evidence, § 570.

In response to the cross-examination of Lloyd he was permitted to testify without objection as follows: "I had said to Mr. Roe in his lifetime that he had received $71,000 out of this transaction. On one occasion I wrote to him in Santa Barbara while he was there. I wrote to him on several occasions with respect to that, and I wrote him from New York some time in the latter part of 1894. That letter was returned to me some time after his death." Again, without objection: "In the lifetime of Mr. Roe I made a claim against him for the return of the $21,000. I once wrote him a letter to Santa Barbara. I have the original letter in pencil from which the letter to Mr. Roe was copied. I wrote it out myself in ink from the pencil copy. I retained the pencil copy, and have it with me. I left the finished draft with Miss Buttner, at Sunol, where I was staying for a few days, to mail. I inclosed the letter in an envelope, and addressed it to George H. Roe, at the Arlington Hotel, Santa Barbara. He was there at the time. After the letter was inclosed in an envelope and addressed, I left it at the Buttner house, in Sunol, with directions to mail it." Miss Buttner, the stenographer, was permitted to testify to the writing and mailing of the letter of February 18, 1894, without any objection. This letter was admitted by the court for the sole purpose of showing that Lloyd did not invent the claim that Roe had received half of his commission after Lloyd's individual demand against the Roe estate was rejected, and was limited to that purpose, and not admitted as an admission on the part of Roe of the truth of the contents of the letter. In the letter, which is quite lengthy, he calls the attention of Roe again to the $71,000 which he had received as half of the commissions in the transaction referred to in the New York letter, saying: "You are not entitled to more than one-half the San Francisco commission, and if that stock deal or the sale of the Engineering Co. does not go through soon, I hope you are man enough to refund me that $21,000 without my having to press you for it. I wish to be on friendly terms with you and regret much more than you do our present differences." Upon the authorities referred to in support of the ruling of the court in reference to the New York letter, it was not error to admit the letter written to Roe at Santa Barbara. This is the second point urged by appellants in support of their contention for a reversal, and it is designated as exception No. 10 in the transcript.

P. B. Cornwall, who was president of the plaintiff corporation during the transactions out of which the suit in question arose, was asked whether he ever had a conversation with the witness Lloyd relating to the 1,000 shares which were voted to him by the California Electric Light Company. It was stated by plaintiff's counsel that the purpose was to prove that he told Mr. Cornwall, as Lloyd had stated in his testimony, that he had divided the commission he received with Roe. "The Court: I want to know first, Mr. Cornwall, when this conversation occurred? A. It occurred between 4 and 6 months before Mr. Roe's death. I think it was in July, but it may have been about the 1st of August. It was a street conversation. Mr. Lloyd stopped me near the Merchants' Exchange, and spoke about selling me some electric light machinery. I did not care to buy. I had suffered through former connections, and it led to a conversation about the transactions he had had with the California Electric Light Co., and I think I put my hand on his collar, and put it to him very squarely: 'Did not Mr. Roe get a portion of that commission that you got from the California Electric Light Company—that thousand shares of stock?' He hesitated a moment, and answered that he got more than half of it. I was president of the California Electric Light Company during 1891, and some of 1892. I was president as long as I remained director. The negotiations between the California Electric Light Company and the Edison people went on for over a year—I think, commencing before 1891." The court overruled defendants' objections to this testimony, which is noted as exception No. 37, and the third point made by appellants in support of their contention for a reversal. The testimony was properly admitted to refute the assumption of defendants' counsel in the cross-examination of the witness Lloyd that the matter referred to had been concocted by Lloyd after the death of Roe, and after his claim on the Roe estate had been rejected. The court below, as in the case of the letters already referred to, was careful to limit this testimony to this purpose.

The fourth point made by appellants in support of their contention for a reversal is based upon the admission of a letter from Lloyd to Cornwall referring to this conversation. In his cross-examination it appeared that, upon the death of Roe, Lloyd telegraphed to Cornwall, telling him that Roe had died, and to await an important letter mailed the day before. On redirect examination the telegram was admitted in evidence, and an extract from a letter dated December 8th, two days before Roe died, was also admitted in evidence, which reads as follows: "Please consider this letter confidential, as you did a statement I made to you at the Merchants' Exchange in July of this year." This constitutes exception No. 42. As in the cases of the preceding letters and conversations, this was properly admitted for the purpose of refuting the charge assumed on the cross-examination that Lloyd had concocted the story after the death of Roe, and after his claim on the Roe estate had been rejected; and if, in admitting this evidence, or in the reading of the letters in question, the jury in any way could have been influenced in returning their verdict, this would not justify a reversal. The case was in equity, and the verdict of the jury was at most only advisory to the court. The court, in adopting the verdict of the jury, acted upon its own judgment, and, in addition thereto, filed its own findings and decision. The correctness of the decision of the court, and not the verdict as rendered by the jury, is the question to be determined here. Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Schneider v. Brown, 85 Cal. 205, 24 Pac. 715; Sweetser v. Dobbins, 65 Cal. 529, 4 Pac. 540; Richardson v. Eureka, 110 Cal. 446, 42 Pac. 965; Scheerer v. Goodwin, 125 Cal. 154, 57 Pac. 789.

In the fifth point made by appellants for reversal, it is claimed that the evidence does not support the judgment in reference to the amount found due—in other words, that the judgment is in excess of the amount which should have been rendered. The commissions sued for were paid in stock, as found by the jury. The amount of the judgment was dependent upon the number of shares of stock. The court in its finding stated that the 500 shares received by Roe were delivered in two lots; the first lot being 400 shares out of a certain lot of 786 shares received by Lloyd from the plaintiff, and the second being 100 shares out of a lot of 280 shares subsequently delivered by Lloyd to Roe. The evidence discloses that there was another deal between Lloyd and Roe, by which Lloyd was to deliver to Roe 375 shares of the same stock at the same price—$100 per share—and that expenses were incurred by Lloyd amounting to $39,000, one-half of which was charged to Roe. In order to make up the amount of money that was due from Lloyd to Roe, counting the shares as money at $100 each, it is necessary to take the 400 shares at $40,000, the 280 shares at $28,000, and one-half of the expenses, or $19,500, which makes a total of $87,500. The objection of the appellant is that the court charged the expenses against the shares due to Roe upon the other transaction—the one not here in issue—whereas the appellants claim that it should have been divided between the two transactions, and a part of the expense charged against the other transaction and the remainder charged against the transaction here in issue, and hence it would not be in accordance with the evidence to charge 100 of the last lot of 280 shares against this transaction, but that the evidence requires the charge of a somewhat less amount instead. It is evident, however, that, if the 100 shares of the last lot of 280 shares were appropriated by the parties themselves to make up the total of 500 shares due upon the transaction here in issue, the court would be fully justified in making the same appropriation, and rendering judgment accordingly. There is evidence tending to show that the last 100 of the 500 shares were so appropriated out of the 280 shares included in the last lot. Lloyd testified as follows: "Besides the delivery of the 400 shares of stock to Mr. Roe, I gave him 280 shares more. * * * The 280 shares were given to him to make up the half of the total commission made in New York and San Francisco, stating the amounts that I received from the California Electric Light Company at $100,000, and the amount that I received in New York as $75,000, amounting to $1,75,000." He then mentioned the items of expenses amounting to $39,000, and, continuing, said: "I gave Roe $71,000—$3,000 with my note and 680 shares of stock, or $68,000 in cash. The 680 shares was one-half of the total net commission of $100,000 and $36,000." If the whole of the expenses, $39,000, was deducted from the $75,000 due by the other transaction, it would leave a remainder of $36,000. This testimony seems to indicate that the 500 shares were appropriated and delivered to Roe upon the transaction here in question without any reduction for expenses. He testified to other facts in connection with these which seemed to contradict this inference, or at least to show that the expenses should not have been so apportioned; but it was for the court below to determine what was the proper construction of this testimony, and the fact that it might warrant a different inference does not justify us in setting aside the verdict for want of evidence. We think it must be held that the evidence supports the judgment in this particular.

The judgment and order appealed from are affirmed.

We concur: SHAW, J,; ANGELLOTTI, J.

145 Cal. 116

BAUM v. ROPER et al. (S. F. 2,937.)

(Supreme Court of California. Oct. 8, 1904.)

REVIEW ON APPEAL—SUFFICIENCY OF FINDINGS—SEPARATE ISSUES DEPENDENT ON SAME FACTS.

1. Where the answer in an action for the recovery of real estate set up as a defense that the action was barred by Code Civ. Proc. § 318, which requires the plaintiff or his predecessors to have been seised or possessed of the property within five years, and the court found that the action was not barred by said section, such finding was, in effect, that plaintiff or his predecessors had been in possession within five years, and was a sufficient determination of an issue raised by another defense pleaded, which depended upon such question of fact, although no finding was expressly made on that issue.

Department 1. Appeal from Superior Court, City and County of San Francisco; Chas. W. Slack, Judge.

Action by Clara Baum, administratrix of the estate of Julius Baum, deceased, against Edward Roper, Kate Roper, and David J. Spence. From the judgment, defendant Spence appeals. Affirmed.

J. B. Mhoon and T. M. Osmont, for appellant. W. B. Kollmyer and Naphtaly, Freidenrich & Ackerman, for respondent.

SHAW, J. This is a second appeal from the judgment rendered in the superior court on February 6, 1897. The judgment as rendered was against all the defendants, but the clerk, by inadvertence in making the entry thereof, failed to insert the name of the present appellant, David J. Spence, in the judgment as entered. This omission was not observed, however, at the time, and all the defendants joined in an appeal to this court, and the judgment was affirmed. See Baum v. Roper, 132 Cal. 42, 64 Pac. 128. In the subsequent decision of Spence v. Troutt, 133 Cal. 605, 65 Pac. 1083 (erroneously reported as Spencer v. Troutt), it was held that, so far as Spence was concerned, the first appeal, although the opinion showed a full consideration of all the points in the case, and was rendered after hearing argument in his behalf, was nevertheless a nullity, because as to him the judgment was not entered, and this court could not acquire jurisdiction of an appeal taken from a judgment before the entry thereof, and that Spence had the right to take an appeal within six months from the time of the amendment inserting his name therein. This amendment was made on May 29, 1901, and this appeal was taken on June 7, 1901. Inasmuch as this appeal was taken more than four years after the rendition of the judgment, it is apparent that we cannot consider the objection that the evidence does not support the decision of the trial court. Code Civ. Proc. § 939, subd. 1. We have, however, re-examined the evidence and reconsidered the points presented on the first appeal and decided by this court in Baum v. Roper, supra, and are satisfied with the conclusions there reached upon a consideration of the same record.

The appellant now makes the additional point that the judgment is erroneous because there is no finding on the issue tendered by the answer relating to the effect of the act of March 5, 1864 (St. 1863–64, p. 149, c. 154), upon the right of the plaintiff to maintain the action. The act provides that in any action begun more than one year thereafter for the recovery of real property in San Francisco, or affecting the title thereto, none of the provisions of the act of March 11, 1858 (St. 1858, pp. 52, 66), ratifying certain ordinances of San Francisco, nor any of the provisions of the ordinances therein recited, should be deemed to aid the right or title set up or claimed by any party, unless such party or his privies in estate shall have had actual possession of the land in dispute within five years next before the commencement of the action. The answer pleaded this statute, and alleged that neither the plaintiff nor his predecessors in interest had had the actual possession of the land within five years next before the beginning of the action. There is no express finding upon these allegations. We are of the opinion, however, that the findings made include a finding of the facts set forth in the answer. The answer alleged that the action was barred by the provisions of section 318 of the Code of Civil Procedure. This is merely a statutory method of alleging the facts which, under that section, constitute a bar to the action, namely, that the plaintiff and his predecessors have not been seised or possessed of the property within five years next before the commencement of the action. This is substantially the same as the allegation aforesaid intended to invoke the operation of the act of 1864. The court finds that the action is not barred by the provisions of said section 318. In substance, this is the same as a finding that the allegation that neither plaintiff nor his privies in estate have been in possession of the property within the five years next before the beginning of the action is not true. There was no evidence or claim that either of them were under any disability. Therefore it does, in substance, amount to a finding on the issues tendered by the answer.

We have considered this point on the theory that there was evidence sufficient to require such a finding with respect to the effect of the act of 1864. The appellant, however, does not cite us to any evidence showing that the plaintiff required aid from the act of 1858 or the ordinances referred to in that act in order to establish his title. The title seems to be established by proof of adverse possession long after that act took effect, and irrespective of any deraignment of title from the city of San Francisco.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

(145 Cal. 42)

CAHILL et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 3,937.)

(Supreme Court of California. Sept. 30, 1904.)

JUDGMENTS—MOTION TO VACATE OR MODIFY ORDER—REFUSAL TO ENTERTAIN—MANDAMUS—JURISDICTION TO SET ASIDE ORDER IN PROBATE—LACHES.

1. That the facts stated in a motion to vacate or modify a judgment or order do not justify the granting of the relief prayed is an objection which goes to the merits, and affords no ground for the refusal of the court to consider and act on the motion.

2. Under Code Civ. Proc. § 1085, which provides that the writ of mandate may be issued to "compel the performance of an act which the law specially enjoins, as a duty resulting from an office," a proceeding will lie in the Supreme Court for a mandamus against a judge of a superior court to compel him to entertain and consider a motion to vacate an order in probate, where his refusal was not reviewable on appeal, and was based solely on want of jurisdiction, as matter of law, under the constitutional and statutory powers of the court to vacate such order, and not upon evidence or the determination of any question of fact.

3. A superior court has power, under Code Civ. Proc. § 473, to vacate or modify an order in probate setting apart a homestead.

4. The defense of laches differs from that of limitation, in that, in order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must have been such lapse of time that it may reasonably be supposed that such prejudice will result if the remedy is allowed.

5. Where parties in interest promptly took an appeal from an order of a superior court refusing to entertain a motion to modify an order previously entered setting apart a homestead from the property of a decedent, which appeal was dismissed on the ground that the order was not appealable, whereupon the appellants at once instituted proceedings in mandamus within a year after the order was entered, there was not such laches as to bar their right to maintain such proceedings.

McFarland, J., dissenting.

In Bank. Application by James Cahill and William Cahill for a mandate directed against Frank J. Murasky, judge of the superior court of the city and county of San Francisco. Writ granted.

See 76 Pac. 383.

R. C. Harrison, for petitioners. Geo. A. Connolly, for respondents.

SHAW, J. This is a proceeding in mandamus to compel the superior court and Frank J. Murasky, as judge thereof, to hear and consider a motion of the petitioners, duly presented to said court, to modify, and in part vacate, a previous order of the court in the matter of the estate of Patrick H. Cahill, deceased, setting apart a homestead to the widow of the deceased out of the property of the estate.

The motion for the modification was made and presented within six months after the order setting apart the homestead. When the motion was presented to the superior court the widow appeared thereto and objected to the hearing. The objections were, first, that the court had no jurisdiction to vacate the former order; and, second, that the facts stated as the grounds of the motion did not justify a modification or vacation of the order.

The ground last stated furnished no reason for refusing to hear and consider the motion. It was addressed to the merits, and could only be considered after the court had, upon the consideration of the first objection, decided that it had jurisdiction to entertain the motion and make the order applied for. Both objections were taken up together and argued and submitted simultaneously. This was manifestly done merely for convenience, and in order to avoid the delay that would be occasioned by another hearing in case the objection to the jurisdiction should be overruled. The objection to the jurisdiction was not based on any facts, nor upon any defect in the service of the notice on the widow, but solely on the proposition that the original order had become final and was beyond the power of the court to revoke or modify. The preamble to the order thereupon made shows that the court never reached the consideration of the motion, but decided that the first objection was sound, and that it was without power to modify or vacate the former order, or to entertain a motion to that effect. The order accordingly stated that "upon this ground, and this only, the motion to vacate the decree heretofore made setting apart the homestead is denied." The order thus made is therefore, in substance, no more than a dismissal of the motion for lack of jurisdiction. As the case stands, the superior court has refused to act upon the motion, and has not acted thereon.

Another objection is made here to our consideration of the question of the power of the court to modify the order. It is that the court below has determined that it did not have jurisdiction, and that that determination is conclusive, and cannot be reviewed in this court upon this proceeding. The order refusing to vacate or modify the order setting apart the homestead is not appealable. Estate of Cahill (Cal.) 76 Pac. 383. An appeal from the original order would have been useless, for, as it was made without notice or contest, there could be no bill of exceptions showing the facts on which it was based. Therefore, if the decision of the court that it did not, as matter of law, have jurisdiction to act, is conclusive as to the law, the petitioners are without remedy, although the original order may have been manifestly erroneous, or may have been fraudulently obtained, and the court may have been utterly mistaken in its view that it was without power to modify it. That it was mistaken in that view is definitely settled by the decision of this court in Levy v. Superior Court, 139 Cal. 590, 73 Pac. 417, holding that the superior court has power to vacate such an order under section 473 of the Code of Civil Procedure.

This court has held that where the jurisdiction of the superior court to try a cause, or hear an appeal, depends on the existence of certain facts, and that court has, upon evidence consisting either of affidavits or of the record, made its determination as to the facts, although erroneously, this court cannot in mandamus proceedings go behind this determination, and itself consider, from evidence, whether or not the jurisdiction existed; and this seems to be the law even where there is no conflict in the evidence, and the court below has acted judicially only to the extent that it has determined the existence of facts from evidence, and where the facts thus determined did not, in law, justify the decision of the superior court that it did not have jurisdiction. Thus where the lower court, acting as a court of appeal, has decided that the record in a case from a justice's court did not give the superior court jurisdiction of the appeal because the notice of appeal did not have a revenue stamp attached, or because in an appeal on questions of law alone there was no statement on appeal, and has thereupon dismissed the appeal (People v. Weston, 28 Cal. 640; Lewis v. Barclay, 35 Cal. 213); or where the superior court upon affidavits removed the cause to the United States district court and refused to proceed further therein (Francisco v. Manhattan Ins. Co., 36 Cal. 286); or upon the facts stated in a petition to be allowed to intervene had refused to allow the intervention (People v. Sexton, 37 Cal. 532); or after considering the condition of its calendar, and other facts and circumstances tending to excuse the failure to try a criminal case within 60 days after the filing of the information, had refused to dismiss the cause (Strong v. Grant, 99 Cal. 100, 33 Pac. 733); or upon the facts stated in an accusation filed under section 772 of the Penal Code had refused to issue a citation against the accused officer (Kerr v. Superior Court, 130 Cal. 184, 62 Pac. 479)—in all these cases the determination of the superior court as to its jurisdiction of the particular cause upon the facts shown has been deemed final and conclusive upon this court, where a review of that determination was sought by proceedings in mandamus.

The distinction between this class of cases and the case at bar is this: In all these cases the superior court was called upon to consider either the sufficiency of certain facts established by the record, or certain facts determined by that court upon evidence properly addressed to it, to give it jurisdiction to proceed with the particular case then before the court, and with its decision, after such consideration, this court cannot interfere by mandamus. In the case at bar there was no question of fact involved, and the superior court decided that, as matter of law purely, it could not in any case vacate an order made under the provisions of section 1465, Code Civ. Proc., setting apart a homestead. This was a proposition not dependent on any facts whatever, but wholly upon a consideration of the powers of the court as defined by the Constitution and by statute.

The Code provides that the writ of mandate may be issued to "compel the performance of an act which the law specially enjoins as a duty resulting from an office." Code Civ. Proc. § 1085. The law specially enjoins upon the superior court, and upon the judge thereof, the duty of hearing and determining all matters which are within its jurisdiction and which come properly before it. The motion under consideration did come properly before that court, but the judge decided, as matter of law, and upon the statute and Constitution only, that the court had no power in any case to make orders of the kind there applied for, and upon that ground only refused to proceed to the merits of the application. If the person holding the office could thus decide what were the duties pertaining thereto which the law specially enjoins him to perform, the writ of mandate would be practically useless. The decision refusing to act which gives occasion for the writ would also furnish sufficient cause for denying it. As was well said in Temple v. Superior Court, 70 Cal. 211, 11 Pac. 699: "The court cannot, by holding without reason that it has no jurisdiction of the proceedings, divest itself of jurisdiction and evade the duty of hearing and determining it." To the same effect are Merced M. Co. v. Fremont, 7 Cal. 130; Ortman v. Dixon, 9 Cal. 23; Heinlen v. Cross, 63 Cal. 44; People v. Barnes, 66 Cal. 594, 6 Pac. 698; Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006.

The respondent further claims that the petitioners are barred of their remedy in mandamus by reason of their laches. "Laches" is defined as "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." Am. & Eng. Encyc. of Law (2d Ed.) p. 97. "In determining what will constitute such unreasonable delay, regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant, or of other persons, have been prejudiced by such delay." Taylor v. Bayonne, 57 N. J. Law, 378, 30 Atl. 431; People v. Syracuse, 78 N. Y. 56; Chinn v. Trustees, 32 Ohio St. 236; 19 Am. & Eng. Encyc. of Law (2d Ed.) p. 755; Merrill on Mandamus, § 87; Wood on Mandamus, 40. "Where the delay is satisfactorily explained, the equity of the complainant, if clearly established, remains unaffected, and the court will decree for him, notwithstanding great efflux of time." 18 Am. & Eng. Encyc. of Law (2d Ed.) p. 100. The statute of limitations applies to special proceedings of this kind. Code Civ. Proc. § 363; Barnes v. Glide, 117 Cal. 6, 48 Pac. 804, 59 Am. St. Rep. 153. The defense of laches is different from the defense of the statute of limitations, in this: that, in order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed; whereas in the case of the statute of limitations there need be nothing more than mere lapse of time in order to constitute a bar. The consequence of this distinction is that in cases where the defense of laches is interposed, or where it is claimed to appear on the face of the petition or complaint, the petitioner or the plaintiff may present circumstances excusing or justifying the delay, and showing the absence of prejudice therefrom, and if the court, in its sound discretion, deems the showing sufficient, the proceeding will not be barred. Many cases have been cited by the respondents in support of the proposition that the lapse of time between the refusal to act upon the motion and the beginning of the proceeding in this court for mandamus of itself constitutes laches sufficient to bar the proceeding; but upon an examination of them we find that, with very few exceptions, there appears in each case cited some circumstance from which it appeared that prejudice actually had occurred or might occur, or such lapse of time that it was supposed that prejudice had occurred or would occur if the writ was granted. The few exceptions are not well-considered cases, and are not sufficient to establish a rule contrary to that above cited from the authorities.

The order of the superior court refusing to consider the motion for a modification was made on April 10, 1903, but was not entered until after May 6, 1903. Within 60 days from the entry petitioners attempted to appeal therefrom to this court. On December 7, 1903, the widow moved to dismiss the appeal on the ground that the order was not appealable. This court on March 28, 1904, granted the motion and dismissed the appeal. An application for rehearing was made and denied, and on April 28, 1904, the remittitur was issued. This application for a writ of mandate was filed five days thereafter. The respondents herein do not allege that any circumstances exist, or that anything has occurred by reason of the delay, that has caused or would cause any prejudice whatever to the widow or to any other person. The lapse of time has not been so great that, under the circumstances, we can suppose or presume that prejudice will ensue if the mandate is issued. Until the decision dismissing the appeal, it had never been directly held by this court that an order refusing to vacate or modify an order setting apart a homestead was not appealable, and there was a very general impression that such an appeal could be taken. If so, the remedy would be ample, and there could be no writ of mandate. During the delay the petitioners were diligently prosecuting the remedy by appeal which they were advised they had. We think, under the circumstances, the delay was sufficiently excused, and that the court below should be compelled to proceed to hearing and determination of the motion upon its merits.

Let the writ issue as prayed for.

We concur: BEATTY, C. J.; VAN DYKE, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

McFARLAND, J. (dissenting). I dissent. In the first place, if what respondent did could be construed as a refusal to act for want of jurisdiction, it does not appear that respondent had jurisdiction. In Levy v. Superior Court, 139 Cal. 590, 73 Pac. 417, and cases there cited, it was merely held that section 473, Code Civ. Proc., which provides for relieving a party from the judgment or order taken against him "through his mistake, inadvertence, surprise, or excusable neglect," applies to certain probate orders, and that only under said section can orders not appealable be reached. But in the case at bar the petition to set aside was not based on section 473, but merely on certain alleged errors in the order sought to be vacated. In the second place, the respondent acted in the matter, and ordered that "the motion to vacate the decree hereinbefore made setting apart the homestead is denied," and, in my opinion, the reasons upon which the action was based are immaterial. Having acted, respondent cannot be compelled by mandamus to act differently.

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145 Cal. 138

PEOPLE v. WELLS. (Cr. 1,162.)

(Supreme Court of California. Oct. 15, 1904.)

ASSAULT—INTENT—MISTAKE AS TO PERSON ASSAULTED — EVIDENCE — INSTRUCTIONS—TESTIMONY OF DEFENDANT — INSANITY AS DEFENSE—MEASURE OF PROOF.

1. The holding of a loaded pistol within a few inches of another person's face, pointed directly at him, where the act was accompanied by threatening language, warrants a conviction for an assault with a deadly weapon, although defendant's intention was to assault a different person.

2. On the trial of a defendant for assault with a deadly weapon, consisting of a pistol, evidence that defendant discharged the pistol shortly after the assault is admissible as tending to show that it was loaded when the assault was made.

3. Evidence that, on the arrest of a defendant for an assault with a pistol, brass knuckles were found on his person, should not be admitted on his trial for the assault.

4. A judgment of conviction in a criminal case in which the defendant was a witness in his own behalf will not be reversed because of an instruction that, in weighing his testimony, the jury may properly consider his interest in the case, and whether it might not affect his credibility or color his testimony.

5. While the burden of proving insanity as a defense in a criminal case rests on the defendant, a preponderance of the evidence is all that is required, and an instruction that the defense must be "clearly established by satisfactory proof" is erroneous.

In Bank. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

W. H. Wells appeals from a judgment of conviction for an assault with a deadly weapon, and from an order denying his motion for a new trial. Reversed.

R. E. Rhodes and Leonard B. Fowler, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

VAN DYKE, J. The defendant was charged with assault with a deadly weapon with intent to murder, was tried, convicted of assault with a deadly weapon, and sentenced to imprisonment in the county jail for one year. An appeal is taken from the judgment and from the order denying defendant's motion for a new trial.

The first point made on behalf of the appellant is that the evidence is insufficient to justify the verdict. The alleged assault was made on one McCartney near the town of Madera, in Madera county, at or near the house of Mrs. Northfield, where the said McCartney was boarding, and McCartney in giving his testimony says: "I was standing at the northwest corner of the porch, and we were talking, and all of a sudden Mr. Wells appeared at the front gate. Don't know where he came from. He passed through the gate, but never said a word, and he came right around and walked right in front of me. He laid his left hand on my right shoulder, and at the same time he pulled a gun out of his pocket and throws it right up in my face—just within six or eight inches of my face; and he says: 'I want my money.' He says: 'I have lost thirty-five dollars,' as well as I could understand him, and, as he did, I reached with my left hand, and jerked his gun down by his side. I said: 'I ain't got your money. I don't know anything about it.' The pistol was not more than six or eight inches from my face. It was pointed directly at my face. He says: 'Excuse me, I have got the wrong man.' Miss Northfield, where she was milking, when she seen the gun fly, she jumped up and run around the back way of the house, and he quit me and started in the direction that she went, and he turned when he got a little from me, probably a couple of steps, and he says: 'Keep your hands down.' I says: 'I ain't got nothing but my jackknife.' When he says, 'Keep your hands down,' I says, 'Here is Hutson now.' I says: 'Maybe he knows something about your money.' Hutson was just driving up to the gate." It appears, also, that he then proceeded to make an assault with his pistol upon Hutson.

It is contended on behalf of the appellant that the mere act of pointing the weapon at McCartney did not, of itself, amount to the offense of an assault. The Code defines an assault as follows: "An assault is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another." Pen. Code, § 240. This is substantially the old or common-law definition of an assault. The evidence in this case showed that the pistol, or, as the witness calls it, a gun, was loaded, and, as McCartney testified, was pointed directly at his face, and within a short distance of it, when he jerked it down. But it is contended, also, by appellant that the evidence shows that he had made a mistake in assaulting McCartney, instead of Hutson, and therefore there was no intention on his part to make an assault upon McCartney. But where one intends to assault or kill a certain person, and by mistake or inadvertence assaults or kills another in his stead, it is nevertheless a crime, and the intent is transferred from the party who was intended to the other. In People v. Suesser, 142 Cal. 365, 367, 75 Pac. 1093, this question was fully considered and a number of cases cited in support of this rule. The pointing of a loaded pistol under the circumstances here shown was such an act as would raise a presumption that the unlawful act was done with an unlawful intent. Code Civ. Proc. § 1962; Pen. Code § 21. There being evidence to support the jury's finding that the weapon was pointed with guilty intent, this court will not disturb such finding; for in such case no question of law is presented and the jurisdiction of this court in criminal cases is limited to questions of law alone. People v. Fitzgerald, 138 Cal. 40, 70 Pac. 1014; People v. Gonzales (Cal.) 77 Pac. 448; People v. Donnolly (Cal.) 77 Pac. 177; People v. Smith (Cal.) 77 Pac. 449.

It is further contended that it was prejudicial error on the part of the court to permit the witness McCartney to be interrogated with reference to the discharge of the pistol by the defendant after the alleged commission of the assault upon him. But it was material to ascertain whether the pistol was loaded, and it was proper to admit evidence tending to show that fact; for, unless it had been loaded, it would not have been an assault. People v. Silva (Cal.) 76 Pac. 814; People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165. Similar objection is made by appellant to the admission of the testimony of Mrs. Northfield as to the discharge of the pistol after the alleged assault upon McCartney. But this evidence was also admitted for the purpose of showing that when this alleged assault was made on McCartney the pistol was loaded, and, for the reasons already stated, it was material for that purpose, and a part of the res gestæ.

It appears that the arresting officer, immediately after the commission of the offense charged, found upon the person of the defendant the revolver in question, and also brass knuckles, and it is contended upon the part of the appellant that the court erred in allowing the officer to give testimony with reference thereto. Though we do not deem this irregularity of such importance as to justify a reversal, still it would have been much better, as well as safer in practice, not to have allowed the officer to be examined in reference to the brass knuckles or any other articles found upon the defendant at the time of his arrest excepting the pistol in question.

The defendant testified as a witness in his own behalf, and on the subject of his testimony the court gave three instructions, which should perhaps be considered together as a single instruction. They are as follows: "(22) The defendant has been examined as a witness in his own behalf. This it is his right to be, and the jury will consider his testimony as they would that of any other witness examined before you. (23) It is proper for the jury, however, to bear in mind the situation of the defendant, the manner in which he may be affected by the verdict, and the very grave interest he must feel in it; and it is proper for the jury to consider whether this position and interest may not affect his credibility or color his testimony. (24) But it is your duty to consider it fairly, and give it such credit and weight as you think it is entitled to receive." Appellant's counsel objects to the above instruction No. 23 on the ground that it is unfair to the defendant and that it invades the province of the jury. He admits that it is substantially the same as the one approved in People v. Cronin, 34 Cal. 204, but he thinks that case is not good law and should be modified. In the recent case of People v. Tibbs, 76 Pac. 904, however, this court said of a similar instruction: "This instruction was in effect the same as an instruction given in the case of People v. Cronin, * * * and there held to be correct. It has since been frequently held that where this instruction, though it may be regarded as erroneous, is kept well within the language considered in the Cronin Case, the judgment will not be reversed on account of it. People v. Van Ewan, 111 Cal. 144, 43 Pac. 520. It only undertakes to lay down for the guidance of the jury a matter that they would be apt to know about and act upon without any such instruction."

One of the defenses was insanity, caused by excessive intoxication, and the court gave the following instruction, No. 9, bearing upon such defense: "As has been said, in criminal cases the guilt of the accused must always be established to a moral certainty and beyond a reasonable doubt, and while the burden of proof is upon the defendant to establish the fact of his insanity at the time of the commission of the alleged act, when that plea is interposed, yet he does not have to make proof of it to a moral certainty and beyond a reasonable doubt, but only to your entire and perfect satisfaction." We do not agree with the criticism of the defendant that the language used in this instruction is equivalent to saying that the defense should be established beyond all reasonable doubt, but the last clause of the instruction should have been omitted. Another instruction, No. 26, also bearing on this subject, reads as follows: "Where insanity is relied upon as a defense, the burden of proof is on the defendant. The proof must be such in amount that, if the single issue of the insanity or sanity of the defendant should be submitted to the jury in a civil case, it must find that he was insane. In other words, insanity must be clearly established by satisfactory proof." This last instruction is almost in the exact language of the one condemned in People v. Wreden, 59 Cal. 393. The instruction there was as follows: "I charge you that, where insanity is relied upon as a defense, the burden of proof is on the defendant, and the proof must be such in amount that, if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane, or, in other words, that insanity must be clearly established by satisfactory proof. It is not sufficient that you should entertain a reasonable doubt as to his sanity, but the proof must be satisfactory, and the fact of insanity clearly established." This court, in commenting upon that instruction, after stating the rule that such a defense was required to be established by a mere preponderance of evidence, says: "Is not the expression 'clearly established by satisfactory proof' the full equivalent of 'established by satisfactory proof beyond a reasonable doubt'? How can a fact be said to be clearly established, so long as there is a reasonable doubt whether it has been established at all? There can be no 'reasonable doubt' of a fact after it has been clearly established by satisfactory proof." After citing the definitions in Webster with reference to "clearly" and "in a clear manner," and also the charge of Chief Justice Shaw in Commonwealth v. Webster, 5 Cush. 320, 52 Am. Dec. 711, bearing upon this point, this court concludes: "Under the instruction given it was the duty of the jury to require that the defense of insanity should at least be proven beyond a reasonable doubt. This was error." And the court reversed the case for that reason. We have not been referred to a case, nor do we know of one in this court, overruling or modifying the decision in People v. Wreden, supra. On the contrary, in People v. Allender, 117 Cal. 81, 48 Pac. 1014, the court instructed the jury that the burden rested upon the defendant of proving his insanity by a preponderance of evidence merely. "The principle of law thus declared is in full accord with the law of this state. For a period of 30 years this court has repeatedly and uniformly so declared the law to be. The cases to that effect are numbered by the score"—referring to a large number of cases.

For the error in giving the instruction in question on the plea of insanity, the judgment and order must be reversed, and the cause remanded; and it is so ordered.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

145 Cal. 110

PEOPLE v. STROMBECK. (Cr. 1,170.)

(Supreme Court of California. Oct. 8, 1904.)

ANIMALS—MARKING TO PREVENT IDENTIFICATION—ELEMENTS OF OFFENSE—INTENT—EVIDENCE.

1. Under Pen. Code, § 357, making any one guilty of a criminal offense who marks or brands, or alters or defaces the mark or brand of, horses or cattle, with intent thereby to steal the same "or to prevent identification thereof by the true owner," slitting the ears of a colt owned by another, if done with intent to prevent its identification by the owner, constitutes the offense, although the mark so placed upon the animal may not be a conventional one, indicative of ownership.

2. Where it was admitted by defendant that he took from the range a colt of which he was not the owner, and branded it and slit its ears, and that he afterward obliterated the brand and turned the colt loose, and there was evidence tending to show that he knew who was the owner of the colt, a finding by the jury that the marking of the colt was with intent to prevent its identification by the owner is sufficiently supported by the evidence and the surrounding circumstances, and will not be disturbed on appeal.

3. Under a statute making it an offense to mark an animal with intent to prevent its identification by the true owner, it is immaterial whether or not the mark placed on an animal with such intent is one calculated to accomplish the purpose intended.

Department 1. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Defendant, Johnny Strombeck, appeals from a judgment convicting him of a criminal offense, and from an order denying his motion for a new trial. Affirmed.

W. H. Larew and G. G. Goucher, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

ANGELLOTTI, J. An information was presented against defendant, wherein it was charged that he "did willfully, unlawfully, and feloniously mark a certain domestic animal, to wit, a stud colt, belonging to one Thomas Beasore, by then and there slitting the ears of said animal, with intent thereby to prevent identification thereof by the true owner, to wit, the said Thomas Beasore." Having been found guilty by a jury, and adjudged to suffer imprisonment in the state prison for two years, he has appealed from the judgment, and from an order denying his motion for a new trial.

1. The information states a public offense under the provisions of section 357 of the Penal Code. That section is as follows: "Every person who marks or brands, alters, or defaces the mark or brand of any horse, mare, colt, jack, jennet, mule, bull, ox, steer, cow, or calf belonging to another, with intent thereby to steal the same, or to prevent identification thereof by the true owner, is punishable by imprisonment in the state's prison for not less than one nor more than five years." Under its terms, one who in any way marks any animal therein named, belonging to another, with intent thereby to prevent identification thereof by the true owner, is guilty of a felony. It can make no difference that the mark placed on the animal is not of a character usually adopted for the purpose of indicating ownership, or that it may not accomplish the purpose of preventing identification. These are matters that may properly weigh with the jury in determining as to the intent with which the marking was done. It is the placing of any mark on such an animal, with the intent thereby to prevent identification by the true owner, that constitutes the crime. That one who slits the ears of a horse or colt thereby "marks" the same, within the ordinary meaning of that word, is clear. He thereby places some visible sign or impression on the animal, which to some extent changes its natural appearance, attracts the attention, and conveys some information or intimation. That such a mark might tend to impede the owner of the animal in the identification thereof is likewise clear. The statutes recognize that such a mark might be legally adopted as a mark to indicate ownership, for they expressly provide that no person must use a mark "by cutting off the ear or by cutting the ear on both sides to a point." Section 3171, Pol. Code. But it is immaterial, in this connection, whether the mark in fact used is such that it might be legally adopted as a mark under the provisions of the Political Code. It is sufficient that it is a mark, placed on the animal with the unlawful intent.

Counsel for defendant seeks to limit the meaning of the word "marks," as used in this section, to the placing on the animal of some "conventional artificial indication of ownership"; but we find no warrant for such limitation in the plain language of the statutory provision. The portion of the section here involved was designed to protect the owners of animals, by making it a crime for one to in any way mark the animal of another with the intent thereby to prevent identification by the owner, and we do not see how any mark made with such unlawful intent can be excluded from the operation of the section.

We have considered the other points made in support of the demurrer to the information, and are satisfied that the demurrer was properly overruled.

2. It is contended that the verdict was contrary to the evidence; the particular contention being that there was no evidence to show the specific criminal intent necessary to complete the crime. The defendant testified substantially as follows: Having gone out "upon the range" to find one of his three colts, he found his colt and also the stud colt mentioned in the information, with several others, and, never having seen this animal before, he concluded that it was an estray, and that he would claim it. He told his companion, Wagner, that it was his colt, and, having driven the horses into Wagner's corral, lassoed this animal, threw it down, branded it with "F. N.," a brand of Wagner, and split its ears. After this had been done and the animal was released, it followed the defendant around the corral, and he saw that it had been theretofore handled. The defendant then concluded that it was not an estray, and that he should not have branded him, and the next morning took the colt about two miles from the place, burned out the brand, and turned the animal loose upon the range. He testified that he split the ears simply because he intended to use the horse

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¶ 3. See Animals, vol. 2, Cent. Dig. § 18.

as a saddle horse, and liked the looks of a saddle horse with split ears; that, although he had been the owner of horses before, this was the first time that he had ever slit the ears of a horse; that he had always understood that when a horse's ears were split it was to signify that the animal was mean or vicious; and that he had never heard of such a thing being done for the purpose of identifying an animal, or as a mark of ownership. There was evidence that the defendant had admitted that at the time he slit the ears of the animal he knew that it belonged to Thomas Beasore. It was admitted that the defendant branded the colt and slit its ears, and afterwards burned out the brand and turned the colt loose. The testimony was without conflict to the effect that it has been a custom for many years to split the ears of vicious or unmanageable horses, that a split in a horse's ear was intended to signify that the horse was vicious, and that such splits are never used as marks of ownership.

The foregoing is substantially all the evidence shown by the record. The defendant acknowledging that he slit the ears of the colt, and there being evidence sufficient to sustain a finding by the jury that at the time he so did he knew that the animal belonged to and was the property of Thomas Beasore, the question remained as to whether the slitting was done for the purpose of preventing identification of the animal by Beasore. Upon this question we cannot say that the finding of the jury is not sustained by the evidence. Where some particular intent is a necessary element to constitute an act a crime, such intent may be sufficiently shown by the circumstances surrounding the commission of the act. Here, in support of the verdict, it must be assumed that the defendant knew that the colt was the property of Beasore, and that he did not think it was an estray. Under these circumstances he, having taken the animal from the range where it was grazing, placed a brand upon it and slit its ears. The evidence as to the placing of the brand on the animal was, of course, material and competent upon the question as to what the intention of the defendant was in the slitting of the ears. Both things were done by the defendant at the same time, and apparently, despite defendant's statement to the contrary, for the same purpose. The nature of the act, the thus double marking of the animal by brand and mark, and the circumstances attending the doing thereof, including statements made by defendant which the jury found to be untrue, were sufficient to sustain the finding that the slitting was done for the purpose of preventing identification of the animal. That it might reasonably assist in accomplishing that purpose is very clear, even if such slits are not ordinarily used as marks of ownership, and are generally used simply to indicate a vicious animal. The statement of the defendant as to his reason for thus marking the animal was, of course, not conclusive upon the jury. The most that can be said for defendant is that there was a conflict in the evidence as to the intent with which the act was done, and the well-settled rule that the appellate court will not, under such circumstances, disturb the finding of the jury, prohibits us from interfering therewith.

The case of Fossett v. State, 11 Tex. App. 40, 45, relied on by defendant, fully recognizes the rule that "the surrounding facts—the facts and circumstances which hover around and give character to the act"—are to be taken into consideration in determining as to the intent with which such an act as is here involved is done.

3. Complaint is made that the court refused to give certain instructions requested by the defendant. We have examined these requested instructions, and find no error in the action of the court. The court did instruct the jury that, before they could convict the defendant, they must be convinced by the evidence, beyond a reasonable doubt, that the slitting of the horse's ears was such a marking of an animal as might prevent the identification thereof by the true owner; and this was certainly as liberal an instruction in regard to the character of the mark as the defendant was entitled to. As has been said before, it is the placing of any mark upon the animal, with the intent thereby to prevent identification by the owner, that is denounced by the statute here involved. Whether the mark adopted by the offender for that purpose is such that it will accomplish the result desired is not material. What the statute really makes an offense is an attempt to prevent the identification of the animal by the true owner, by the placing of a mark thereon. As in the case of an attempt to commit a crime, it is not essential that the means used should in fact be capable of accomplishing the result designed. The jury were very fully instructed that they could not convict the defendant unless they were satisfied beyond a reasonable doubt that the defendant slit the animal's ears for the purpose of preventing its identification by the true owner.

The judgment and order are affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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7 Cal. Unrep. 184

MAZOR v. SPRINGER et al. (S. F. 3,054.)

(Supreme Court of California. Oct. 8, 1904.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—TIME OF DISCOVERY.

1. In an action against two defendants for work and labor, one defendant admitted that the work was performed at his request, and plaintiff and another witness testified that the other defendant also requested the performance of the work. On motion for a new trial on the ground of newly discovered evidence it was claimed that the defendant last mentioned was not at the place where this request was claimed to have been made on the date at which it was

claimed to have been made; but no witnesses other than those present at the trial were mentioned as able to testify to this effect. No excuse for not calling these witnesses was produced, except the statement in the affidavit of the defendant who requested the services that the fact of the other defendant's absence at the time of the alleged interview had not occurred to defendants until after the trial. *Held*, that as the new evidence would not affect the liability of affiant and as he was not qualified to speak for the other defendant, a new trial was properly refused.

Department 1. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Stanislaus Mazor against Mary Springer and another. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

J. H. Campbell, for appellants. B. A. Herrington, for respondent.

SHAW, J. This is an action to recover wages for labor performed. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

There was sufficient evidence to prove the allegation that the plaintiff performed the work in question at the request of the defendant Mary Springer. The plaintiff testifies positively to that effect, and he was corroborated by the witness Gilman. The answer does not deny the request so far as the defendant Sage is concerned. The plaintiff also testified, in effect, that the agreement was that he was to receive $15 for the first month and $25 per month thereafter, and that he worked the entire time for which he claims, except 17 days. This was sufficient to support the verdict. We cannot say, from the evidence, that the jury did not deduct the wages for the time he was absent, nor can we disturb the verdict, where the evidence is conflicting, although the preponderance may now seem to be for the defendants.

The court did not err in denying the motion for a new trial on the ground of surprise at the testimony of Gilman concerning the contract made in his presence between the plaintiff and the defendant Springer, and of the discovery of new evidence relating thereto. The new evidence was to the effect that on the afternoon on which Gilman said the conversation took place at the house of Mary Springer she was "many miles distant" from the house. It is not alleged that there was any witness, other than those present at the trial, by whom her absence at that time could have been proven; nor is her whereabouts at that time stated. The only excuse for not calling the witnesses present at the trial to testify to her absence was that contained in the affidavit of the defendant Sage, that the "fact of the absence of Mary Springer from the said Springer farm did not occur to their (defendants') minds until several days after the trial was concluded." Her absence, if proven, would not affect the liability of Sage, who admits making the request. He was not qualified to speak concerning the mind and memory of Mrs. Springer, and she made no affidavit. Under these circumstances the court did not abuse its discretion in refusing a new trial upon these grounds.

The judgment and the order denying the defendants' motion for a new trial are affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

(145 Cal. 173)

HARRISON v. ROBERTS et al. (S. F. 4,090.)*

(Supreme Court of California. Oct. 27, 1904.)

MUNICIPAL CORPORATIONS — CHARTER AMENDMENTS—APPROVAL BY MAYOR—SUBMISSION TO POPULAR VOTE.

1. Const. art. 11, § 8, providing that a freeholders' charter may be amended "at intervals of not less than two years" by proposals therefor submitted to the qualified electors of the city at a general or special election, and ratified by a majority of such electors and approved by the Legislature, refers, in so far as it prohibits amendments at intervals of less than two years, solely to the time of the general or special election at which a proposed amendment is submitted for ratification, so that proposals for amendments may be submitted at elections only at intervals of two years.

2. Const. art. 11, § 8, provides for the amendment of freeholders' charters by proposals submitted to the qualified electors by the "legislative authority of the city." San Francisco Charter (St. 1899, p. 244, art. 2, c. 1, § 1) provides that the legislative power of the city shall be vested in a legislative body, which shall be designated as the board of supervisors. Article 4, c. 1, § 1 (page 268), of the same chapter, declares the mayor to be the chief executive officer of the city; but article 2, c. 1, § 16 (page 246), requires certain bills and resolutions (which do not, however, include proposals for amendments to the charter) to be presented to the mayor for his approval. *Held*, that the mayor of the city is not a part of its legislative authority, nor does chapter 1, art. 2, § 5, of the charter (page 244), making him the presiding officer of the board of supervisors, render him such, and proposals for charter amendments need not be concurred in by him, or presented to him for approval, as prerequisites to their submission to the electors.

In Bank. Application for a writ of mandate by Joseph N. Harrison against Robert W. Roberts and others. Denied.

Lane, Ledeman & Lane and Cameron H. King, for petitioner. Percy V. Long and Devoto & Richardson, for respondent.

ANGELLOTTI, J. An application was made to this court for a writ of mandate requiring defendants, who are the board of election commissioners and the registrar of voters of the city and county of San Francisco, to prepare and cause to be printed upon the ballots to be used at the general election to be held on November 8, 1904, a column, with voting squares, whereby the electors may indicate their votes upon certain proposals to amend the charter of said city and county, which, it is claimed, should be voted on at such election. As it was necessary to immediately act upon the application, the matter was decided by this court on October 21, 1904, without the filing of any written opinion. By that decision the application for a writ of mandate was denied. This opinion is now filed to indicate the views of the court upon the questions presented by the application.

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*Petition for modification of decision denied November 19, 1904.

The main question presented by the application is as to the proper construction of the provisions of the Constitution relative to the time when proposed amendments of a municipal freeholders' charter may be ratified by the electors of the municipality. The provision of the constitution under which a Freeholders' charter may be amended is as follows: "The charter, so ratified, may be amended at intervals of not less than two yeads by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by a majority of the electors voting thereon, and approved by the Legislature as herein provided for the approval of the charter." Article 11, § 8. It will thus be seen that it is essential to any amendment that a proposal therefor be submitted to the qualified electors of the municipality at a general or special election, and that such proposal be ratified by a majority of the electors voting thereon. This proposal must emanate from the legislative authority of the municipality, and, by reason of another provision of the Constitution, such legislative authority must submit to the electors any proposed amendments petitioned for by 15 per cent. "of the qualified voters of the city." Amendments ratified by the electors, like the original charter, may be approved or rejected, as a whole, by the Legislature of the state, which body, however, has no power of alteration or amendment thereof. Such approval may be made by concurrent resolution, and the amendments take effect only upon such approval being given. The Constitution explicitly provides, as appears from the portion hereinbefore quoted, that the charter may be amended only at intervals of not less than two years.

It appears that on December 4, 1902, a special election was held in the city and county of San Francisco, at which election there were submitted to the electors thereof, for ratification, certain proposed amendments to the charter. These amendments had been proposed by the legislative authority by resolutions adopted at different dates between July 12 and August 10, 1902. At this election certain of the amendments so proposed were ratified by the necessary majority of the electors, and said amendments were on February 5, 1903, approved by the Legislature, by concurrent resolution. St. 1903, p. 583, c. 11. It thus appears that two years will not have expired on November 8, 1904, since certain proposed charter amendments subsequently approved by the Legislature were ratified by the electors of the city and county of San Francisco. If the constitutional provision quoted above, in so far as it declares that the charter "may be amended" only "at intervals of not less than two years," has reference solely to the time of the general or special election at which a proposed amendment is submitted for ratification, it must be admitted that any ratification by the electors of the amendments here proposed, had within two years of December 4, 1902, would be in violation of such constitutional provision, and therefore invalid. That such is the proper construction of that provision, we entertain no doubt. The correctness thereof is more clearly perceived on a consideration of the only other constructions possible. If the provision does not have reference solely to the date of election by the people, it must mean either that none of the steps essential to the taking effect of an amendment, viz., proposal, ratification by the people, and approval by the Legislature, can be taken within two years after the approval by the Legislature of a prior amendment, or simply that no charter amendment must be approved by the Legislature within two years after a prior approval by the Legislature of an amendment of the same charter.

It will be observed that the first of these constructions could not assist plaintiff in this proceeding, it being sought by him to have the proposals for certain amendments submitted to the electors within less than two years from the approval by the Legislature of prior amendments; but we deem it proper to indicate our views thereon, as the question is one of importance to all municipal corporations existing under freeholders' charters. The effect of this construction would be that while the Constitution, in terms, declares, that "the charter * * * may be amended" at intervals of two years, amendments could, in fact, in the absence of a special session of the Legislature, be fully accomplished and put into effect only at intervals of nearly four years. Two years would be required to elapse after the approval of the amendment by the Legislature before another proposal could be made by the legislative authority of a municipality, which, with the time required for notice of the election, would carry the matter beyond reach of the Legislature at the succeeding regular session, and defer proceedings for practically another two years. It seems very clear that it was the intention that whatever is here authorized by the constitutional provision, might be fully accomplished at intervals of two years.

The second construction suggested, viz., that the provision simply means that no charter amendment may be approved by the Legislature within two years after a prior approval by the Legislature of an amendment of the same charter, is the only one that could avail plaintiff in this proceeding. This construction would make the provision as to time referable solely to the approval by the state of an amendment theretofore ratified by the people of a municipality, and render it a prohibition on the Legislature of the state, rather than a prohibition on the municipality. Although the electors of the city had ratified the amendment, and the municipality had completed every act within its power to perform in a matter relating solely to its municipal affairs, the approval of the state could not be given until the lapse of precisely two years from a prior approval by the state of any amendment to the same charter. The effect of this construction would be that proposed amendments might be submitted to the people of the municipality for ratification as often as the legislative authority of the city, or 15 per cent. of the electors thereof, expressed, in proper form, their desire for such submission. Special elections on amendments, with all the attendant disturbances and cost, could be as frequent as a few officers or a small minority of the electors might determine; and the prohibition as to time, undoubtedly inserted for some good purpose, would simply defer the ordinarily formal action by the state Legislature, and the consequent taking effect of an amendment. It is impossible to conceive of any good object to be attained by thus expressly deferring for a specified time simply the action of the Legislature upon an amendment which has been ratified by the people of a municipality. Such a provision would not, in any substantial degree, tend to permanency of charter provisions. Under our system of biennial sessions of the Legislature, the approval of amendments can, in the nature of things, be had only at intervals of approximately two years, in the absence of the very exceptional case of a special session, and therefore no provision as to the time of approval was necessary to insure practically all that could have been contemplated in the way of permanency by the provision under consideration. A mere delay for a few days by the Legislature in the matter of the approval of amendments ratified by the electors, could not have been the object sought to be attained. The real essential to an amendment is, after all, the ratification by the people at an election. The submission of the proposal to amend is, of course, essential as a preliminary, for in no other way could an opportunity for the electors to formally express their desires be had; but, as already noted, a small minority of the electors may compel such submission. The approval by the Legislature subsequent to the ratification has also been made essential to the taking effect of the amendment, but, under our well-settled policy of municipal self-government in municipal affairs, this approval is practically only a formal matter, where the subject-matter of the amendment is within the proper scope of the municipal charter. No instance of the rejection by the Legislature of a proposed municipal charter or any amendment thereto has yet been recorded, so far as we have been able to find. When amendments to a charter have once been ratified by the necessary number of electors, it is practically settled that they will, in due course, be approved and take effect. The Legislature, it is true, has the power to reject them; but it could never have been contemplated that this power would be exercised, except so far as might be necessary in the protection of the interests of the state and the citizens of the state, as contradistinguished from the interests of the municipalities. Practically, it is the ratification of the proposal for amendment by the electors of the municipality that determines the change in charter provisions, and any provision of law designed to obtain more or less permanency in the terms of the charter, to be effectual, would naturally be addressed to the time of such ratification, i. e., to the general or special election at which the amendment is voted upon. That this was one of the objects of the provision under discussion is very clear. This court has already said thereof in Blanchard v. Hartwell, 131 Cal. 263, 265, 63 Pac. 349, 350, "Here is a clear and positive constitutional policy, calculated to insure some degree of permanency and to prevent frequent changes."

Another apparent object of the limitation as to time was to protect the municipality against the expense and disturbance of frequent elections. Economy and a certain degree of permanency in charter provisions are the only objects of such a limitation that can reasonably be suggested, and these objects can be substantially subserved by no other reasonable construction of the constitutional provision before us than the one to the effect that the limitation as to time has reference solely to the general or special election at which proposed amendments are submitted for ratification by the electors of the municipality. Our conclusion upon this question is that the only effect of the limitation as to time is to prohibit a submission for ratification by the electors of any proposed amendment within two years from the submission for ratification of any prior amendment; in other words, that proposals for amendments may be submitted at elections only at intervals of two years.

It is suggested that the practical effect of this decision will be, in this instance, to put the city and county of San Francisco to the expense of a special election on the proposed amendments, if such amendments are to be acted upon at the next session of the Legislature. This is, of course, true, but we are unable to see how it affects the question as to the proper construction of the constitutional provision. The practical effect of our construction of the constitutional provision will also be that a municipality can be put to such expense only once in every two years, while the construction contended for would give the municipality as many special elections on such questions as the legislative authority of the city, or 15 per cent. of the electors thereof, desired.

It was contended by respondents that said proposals were not legally adopted by the board of supervisors, in that the resolutions therefor were not signed by the mayor of the city, or presented to him for his signature or approval. The Constitution declares that the proposals are to be submitted by the "legislative authority of the city." The charter of San Francisco declares (section 1, c. 1, art. 2, St. 1899, p. 244): "The legislative power of the city and county of San Francisco shall be vested in a legislative body, which shall be designated the board of supervisors." And section 1 of chapter 1, art. 4 (page 268), declares that the mayor is the chief executive officer of the city and county. The "legislative authority" of the city and county is therefore vested in the board of supervisors. The requirement in section 16, c. 1, art. 2 (page 246), that certain bills and resolutions which shall have been passed by the board of supervisors shall be presented to the mayor for his approval, gives him a qualified veto upon the action of the board, but does not make him a constituent part of the legislative authority of the city and county. The provision in this section is, moreover, limited to the bills and resolutions "hereinbefore provided," and does not include proposals for amendments to the charter. The provision in section 5 of chapter 1, art. 2, that he shall be presiding officer of the board of supervisors, confers upon him no more legislative authority than is given to the Lieutenant Governor by being president of the Senate. Under the provision of section 34 of the street improvement act (St. 1883, p. 45, c. 24) that the term "city council" includes a body or board which under the law is the legislative department of the government of any city, it was held in McDonald v. Dodge, 97 Cal. 112, 31 Pac. 909, that the board of supervisors of San Francisco is the body which forms the legislative department of the government of the city; the court saying: "It is true that the mayor, by virtue of his right of veto in certain cases, has some of the lawmaking power of the municipality; but the charter of the city does not make him a part of the legislative department, in the sense that no independent power is or can be given to the latter." In Jacobs v. Board of Supervisors, 100 Cal. 121, 34 Pac. 630, it was held that the constitutional provision for the fixing of water rates by the board of supervisors, or other governing body of the city and county, did not require the ordinance fixing such rates to be presented to the mayor of San Francisco for his approval. See, also, Brooks v. Fischer, 79 Cal. 173, 42 Pac. 570; Truman v. Supervisors, 110 Cal. 128, 42 Pac. 421.

It must be held, therefore, that it was not necessary that the proposals for amendment should be concurred in by the mayor, or presented to him for approval.

The application for the writ of mandate having been already denied, no further order is necessary.

We concur: McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.

SHAW, J., who is now temporarily absent, concurred in the order heretofore made.

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GAY v. TORRANCE, Judge. (S. F. 3,980.)

(Supreme Court of California. Oct. 18, 1904.)

MOTION FOR NEW TRIAL—IRREGULARITY IN TRIAL COURT—STRIKING OUT AFFIDAVITS—BILL OF EXCEPTIONS—MANDAMUS.

1. A motion for a new trial under Code Civ. Proc. § 657, subd. 1, for irregularities "in the proceedings of the court" must be made on affidavits.

2. Under Code Civ. Proc. § 939, subd. 3, an appeal lies from a special order striking from the files affidavits on a motion for a new trial.

3. On appeal from an order striking from the files affidavits on motion for a new trial appellant is entitled to a bill of exceptions.

4. Personal misconduct of the judge having a case under advisement may be an "irregularity in the proceedings of the court" for which a new trial may be granted under Code Civ. Proc. § 657, subd. 1.

5. On a petition for a mandate requiring a trial judge to settle and certify his bill of exceptions on appeal from an order striking from the files affidavits on motion for a new trial because of irregularities of the trial judge, the court will not determine any conflict in the evidence as to such irregularities.

6. An affidavit on a motion for a new trial for irregularities in the proceedings of the court cannot be considered when made merely on information and belief.

7. A writ of mandate does not lie to require a trial judge to include in a bill of exceptions to review an order on a motion for a new trial an affidavit made on information and belief.

In Bank. Petition by Lucile D. Gay for mandate to the superior court of San Diego county. Denied.

See 76 Pac. 717, 973.

Victor E. Shaw and Valentine & Newby, for petitioner. Oscar A. Trippet and L. L. Boone (W. C. Van Fleet, of counsel), for respondent.

ANGELLOTTI, J. The petitioner, Lucile D. Gay, is the plaintiff in an action for divorce pending in the superior court of the county of San Diego. The defendant therein, John H. Gay, having filed an answer and cross-complaint, the action was tried, and an interlocutory judgment was rendered declaring that the defendant, John H. Gay, was entitled to a divorce on his cross-complaint.

Subsequently petitioner served and filed her notice of intention to move for a new trial upon various grounds, including "irregularities in the proceedings of the court which prevented plaintiff from having a fair trial." The notice stated that the motion would be made upon affidavits and upon a bill of exceptions. Subsequently petitioner served her proposed bill of exceptions and affidavits, and filed the affidavits with the clerk of the court. Among the affidavits so served and filed were two devoted to the attempt to show irregularities in the proceedings of the court, viz., those of Willia Hosmon and Nathan Newby. The defendant in the action in due time served and filed counter affidavits upon the question as to irregularities of the court, and subsequently petitioner served and left with the clerk for filing certain reply affidavits. Subsequently the trial court, upon the motion of defendant in said action, upon the grounds, among others, that one of the affidavits was made solely on information and belief, and that the matters contained in all said affidavits were useless, immaterial, impertinent, and scandalous, consisting of offensive personalities and scandalous charges against the judge who tried the cause, made an order striking from the files the affidavits of Nathan Newby and Willia Hosmon and the reply affidavits of Sallie Jones and Willia Hosmon. On motion of defendant a further order was made striking from the files the counter affidavits upon the ground that it would be improper to permit the same to remain on file after the affidavits to which they relate had been stricken out.

The petitioner proposed a bill of exceptions to be used on appeals from the orders striking out the affidavits, and amendments were proposed thereto, and thereafter an engrossed bill was presented to respondent for authentication, whereupon respondent refused to allow or to certify said bill of exceptions. Subsequently petitioner perfected her appeal to this court from the orders striking out the affidavits.

The foregoing facts appear from the petition, which, for the purposes of the demurrer thereto, must be taken as true. Petitioner asks for a writ of mandate commanding respondent to forthwith settle and certify the bill of exceptions containing the affidavits stricken out, to be used upon the appeals from the orders striking out said affidavits, and for a writ of prohibition restraining respondent from hearing her motion for a new trial pending the hearing in this court of such appeals. An alternative writ was issued requiring respondent to settle and certify said bill of exceptions containing said affidavits, or show cause why he had not so done.

The sufficiency of the petition to justify the relief sought is challenged by a motion to strike out the petition and by a demurrer. The alleged irregularities in the proceedings of the court to which the affidavits in question referred were alleged acts and conduct of the judge between the time of the submission of the case for decision on October 7, 1903, and the time of the rendition of the decision, October 29, 1903, constituting, it is claimed, misconduct of such a nature and to such an extent as to render the granting of a new trial necessary or proper, under subdivision 1 of section 657, Code Civ. Proc. That section provides that a new trial may be granted "for any of the following causes, materially affecting the substantial rights of such party: (1) Irregularity in the proceedings of the court, jury, or adverse party. * * *" So far as a motion for a new trial is based upon such a ground, it must be made upon affidavits (section 658, Code. Civ. Proc.), and the moving party is, of course, entitled to have such competent affidavits as are material to the motion, and are seasonably served and filed, considered upon the hearing of the motion for a new trial. A trial court would not be justified in striking any such affidavits from the files of the court, and an order purporting to so do, being a special order made after final judgment, would be appealable under subdivision 3, § 939, Code Civ. Proc. Gay v. Torrance (Cal.) 76 Pac. 973. Upon an appeal from such an order the aggrieved party is entitled to a bill of exceptions presenting the proceedings and rulings of the lower court in such shape that the action of such court may be reviewed by the appellate tribunal. Ordinarily, upon such an appeal, the affidavits stricken out would necessarily constitute the most material part of such a bill of exceptions. So far as the strict letter of the law is concerned, there can be no doubt that the petitioner is entitled, upon her appeal from the orders striking out certain affidavits, to a bill of exceptions containing such affidavits.

It is true, as contended by learned counsel for respondent, that the granting of the writ of mandamus is not a matter of right, but is a matter largely within the discretion of the court. By this, however, it is not meant that the court may arbitrarily grant or refuse the writ. The discretion is to be exercised in accordance with the established rules of law, in order to prevent a failure of justice. As a court will not do a vain or fruitless thing, or, as was said by Chancellor Kent in Trustees, etc., v. Nicoll, 3 Johns. 598, "a court will not undertake to exercise power but when they exercise it to some purpose" (see Boyne v. Ryan, 100 Cal. 265, 267, 34 Pac. 707), it is laid down as a rule of law that the writ of mandate will not issue where it would be of no benefit to the applicant (Merrill on Mandamus, § 75; High on Extraordinary Legal Remedies, §§ 9, 10); that a mere abstract right, unattended by any substantial benefit to the relator, will not be enforced by mandamus (19 Am. & Eng. Ency. of Law [2d Ed.] p. 758); and that, where the relator has no right to the relief which it is his ultimate object to obtain, the writ should not be issued (Id. p. 754). This rule has been applied by this court on several occasions. See People v. Kahl, 18 Cal. 432; People v. Dickson, 46 Cal. 53; Clarke v. Crane, 57 Cal. 629. But where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy, and adequate remedy in the ordinary course of law, he is entitled, as a matter of right, to the writ; or, in other words, it would be an abuse of discretion to refuse it.

A party aggrieved is entitled to move for a new trial upon the ground of irregularity in the proceedings of the court materially affecting his substantial rights; he is entitled to present and file affidavits in support of such ground; he is entitled to have such affidavits, so far as they may be competent and material, considered upon the hearing of the motion by the trial court; and he is entitled to the judgment of such trial court as to the truth of the material allegations contained in the affidavits, and the effect thereof upon his rights. His right to have his affidavits, so far as they are competent and material, considered by the trial court, and his right to have the judgment of the trial court upon all material questions of fact concerning which there is any conflict in the affidavits, cannot be said to be mere abstract rights, unattended by any substantial benefit. They are rights guarantied by the law to every party prosecuting a motion for a new trial, and no court can say in advance of the action of the trial court on such motion that the ultimate decision thereon will not be in favor of the moving party. So far, therefore, as the affidavits presented by petitioner on the motion for a new trial were competent and material upon the question as to whether a new trial should be granted for irregularities in the proceedings of the court, it could not properly be said, in response to an application for a writ of mandate having for its ultimate object the consideration by the trial court of such affidavits upon the motion for a new trial, that the writ could be refused upon the ground that the granting of such a writ is a matter largely within the discretion of the court to which the application is made.

We are not prepared to assent to the contention of learned counsel for respondent to the effect that personal misconduct on the part of the judge of a court having under advisement a case tried in his court cannot be an "irregularity in the proceedings of the court" for which a new trial may be granted under subdivision 1 of section 657, Code Civ. Proc. It must be acknowledged that the misconduct of a judge under such circumstances may be of such a nature as to make it apparent that the substantial rights of a party have been materially affected thereby, as, for instance, where it is made to appear that he has received a bribe from one of the parties to the cause, or has so conducted himself with reference to a party to the cause as to show that he cannot well act toward such party without favoritism, or has so impaired his mental powers by the use of intoxicants that, while engaged in the actual disposition of the cause, he was incapable of properly exercising his judgment thereon. As has been said, it would shock the judicial instinct and be a reproach to our system, if a decision rendered under such circumstances could not, for that reason, be set aside, and yet, if the contention of respondent in this behalf be well founded, there would be no substantial remedy for the aggrieved party. There is no other ground for a new trial which could, by the utmost liberality of construction, be held to cover such a case. But we are of the opinion that it would be an exceedingly narrow and technical construction that would exclude such a case from the operation of subdivision 1 of section 657, Code Civ. Proc. It was said by Mr. Hayne in his work on New Trial and Appeal that it is impossible to answer with precision the question, "What is an irregularity of the court?" except that by that term is meant some conduct of the court other than orders and rulings; and that no accurate classification of things which are irregular is possible. Mr. Spelling, in his recent work on New Trial and Appeal, regards any overt act of the trial court violative of the right of a party to a fair and impartial trial, amounting to misconduct, as an irregularity, and says, "Courts of review treat misconduct of trial courts as irregularity." Section 32. In Woods v. Jensen, 130 Cal. 200, 205, 62 Pac. 473, it was said by this court that this ground for a new trial is intended to refer to matters which appellant cannot fully present by exceptions taken during the progress of the trial, and which must, therefore, appear by affidavits. The language of the statute is sufficiently broad to include any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected, where such departure is not evidenced by a ruling or order that may be made the subject of an exception. It may, of course, be freely conceded that the "personal habits, conduct, deportment, or statements of the judge" having no relation to or effect on the disposition of the cause are not the proper subject of complaint upon a motion for a new trial. The question always is as to whether the acts were of such a nature and done under such circumstances as to afford reasonable grounds for the conclusion that by reason thereof the defeated party has not had a fair and impartial trial. Where they are of this kind, we are satisfied that they afford the basis for a motion for new trial under subdivision 1 of section 657, Code Civ. Proc. The opinion of the Supreme Court of Montana in the case of Finlen v. Heinze, 28 Mont. 548, 571, 73 Pac. 123, is instructive upon this subject, and is in full accord with our views. Most of the cases cited by counsel for respondent upon the definition of an irregularity are cases in which the term "irregularity" was used in contradistinction to jurisdictional defects.

It would serve no useful purpose to here enter into an analysis of the affidavit made by Willia Hosmon, presented on behalf of petitioner. It is sufficient to say that after a careful consideration thereof we are not prepared to say that if the trial court, after a full consideration thereof and of the counter affidavits presented in reply thereto, and the subsequent reply affidavits presented on behalf of petitioner, should grant a new trial on the ground of irregularities in the proceedings of the court, we should feel warranted in disturbing the order. (In saying this we do not wish to be understood as intimating that the trial court should grant a new trial on this ground upon the showing made.) We cannot, however, upon this application, determine any conflict in the evidence upon the question of irregularities in the proceedings of the court. That is a matter upon which petitioner is entitled to a determination by the trial court.

As to the affidavit of Mr. Newby, one of petitioner's attorneys, presented in support of the motion, a different question is presented. So far as it can possibly be claimed to be material, it was entirely made on "information and belief," nothing material to the question of irregularities being therein stated as a fact within the knowledge of the deponent. Unless this affidavit constituted competent evidence upon the question of irregularities, it was purely scandalous matter assailing the judge of the court, and serving no useful purpose; and it was not only the right, but the duty, of the court to strike the same from its records. If, therefore, it is clear to us upon this proceeding that the affidavit cannot be considered upon the motion for a new trial, and consequently that petitioner cannot ultimately have any substantial benefit therefrom, we undoubtedly would be justified in refusing to compel the respondent to make such purely scandalous and immaterial matter a permanent record of his court by incorporating the same in a bill of exceptions. Such a situation would not only present a case for the application of the rule already alluded to as to the discretion of the court in the matter of an application for a writ of mandate, but would imperatively require the application of such rule, for it certainly is not consistent with the efficient administration of the law by the courts that scandalous charges against a judge of a court, not materially affecting an issue before such court, should be allowed to be made a permanent record thereof. Such a practice should be tolerated, as was said in effect in People v. Albany & S. R. R. Co., 39 How. Prac. 60, only where absolutely necessary for the proper protection of a party to a cause.

If it should be assumed that the matters set forth on information and belief in the affidavit of Mr. Newby constituted irregularities in the proceedings of the court which would warrant the granting of a new trial by the trial court (which we do not concede), we are satisfied that such affidavit cannot be considered competent evidence as to these matters. Ordinarily, an affidavit made solely on information and belief is unavailing for any purpose. The statutes allow such affidavits for certain prescribed purposes (as, for instance, in the verification of pleadings), but there is no statutory provision authorizing such an affidavit in a case like the one at bar. The subject-matter of certain applications (as, for instance, an application for a continuance upon the ground of the absence of witnesses) is of such a nature that from the necessities of the case the showing as to what the absent witness will testify to must ordinarily be made by the moving party upon information and belief, and the statute upon the subject so recognizes. Section 595, Code Civ. Proc. But where one is testifying as to something that has transpired he can ordinarily testify only as to those facts which he knows of his own knowledge (section 1845, Code Civ. Proc.), and it is immaterial in this connection whether his testimony is taken by affidavit, deposition, or oral examination. Where a statute provides that the evidence upon a certain question must be presented by affidavit, it simply means that the competent and material testimony must be presented by the affidavits of the witnesses. If the statute authorized the taking of the testimony on a motion for new trial by oral examination, we apprehend that it would not be contended that Mr. Newby could have given purely hearsay testimony. Information and belief affidavits in cases where misconduct of the jury has been urged as ground for a new trial have been held by this court to be insufficient. In People v. Findley, 132 Cal. 301, 303, 64 Pac. 472, it was said: "It is equally clear that defendant's affidavit as to the misconduct of the jury, based as it is solely on information and belief, is entitled to no weight. There was no competent or proper evidence of misconduct of the jury laid before the court." See, also, People v. Tarm Poi, 86 Cal. 225, 231, 24 Pac. 998; People v. Williams, 24 Cal. 31, 40. We cannot see that the reasons stated in the affidavit for the making of the same on information and belief, viz., that the persons who knew the facts had refused to make affidavit, can alter the situation. It still remains that there is "no competent or proper evidence" contained therein, and, if petitioner is unable to procure competent evidence as to the alleged irregularities, she cannot establish the same. It follows that this court will not require the respondent to make such affidavit a permanent record of his court.

So far as the counter affidavits are applicable to the issues raised by the affidavit of Willia Hosmon, they are undoubtedly competent and material evidence to which both parties are entitled on the motion for new trial, and we are satisfied that a party moving for a new trial upon affidavits is entitled to present reply affidavits as to new matters set up in the counter affidavits. The petitioner not being entitled to a bill of exceptions containing the affidavit of Mr. Newby, she must necessarily fail upon this application.

The demand made upon respondent by petitioner was that he should allow and certify a certain proposed bill of exceptions containing all of the affidavits stricken out, the application to this court is for a writ requiring respondent to forthwith settle and certify "the bill of exceptions containing said affidavits," and the alternative writ required him to "settle and certify said bill of exceptions containing said affidavits," or show cause why he has not so done. It is well settled that a petitioner for a writ of mandate is concluded by the terms of the alternative writ, and that, where the alternative writ is awarded for a purpose partly proper and partly improper, the court will not enforce it by a peremptory mandamus as to that which is proper, but will give judgment for the respondent. It is incumbent upon the petitioner in such a proceeding to establish his right to the performance of the very act or acts commanded by the alternative writ, and, unless he so does, he must fail entirely. High, Extraordinary Legal Rem. §§ 539, 548.

Petitioner is entitled to a bill of exceptions to be used upon her appeal from the orders striking out the affidavits, containing such affidavits as may be competent and material upon the question as to whether a new trial should be granted on the ground of irregularities in the proceedings of the court.

We have herein given our views as to what affidavits should receive the consideration of the trial court upon the motion for a new trial. Such affidavits should, of course, remain on the files of the court, and an order striking them from the files would necessarily, upon an appeal duly taken and regularly prosecuted, be reversed. The restoration of such affidavits to the files of the court would make unnecessary the further prosecution of the appeals taken by the petitioner. If such restoration be not so made, doubtless the trial court will, upon demand, settle and certify a bill of exceptions containing such material and competent affidavits as may be necessary for the proper disposition of such appeals. Those suggestions herein made which are not necessary to a disposition of the present application for a writ of mandate are made with a view to facilitate the disposition of the motion for a new trial in the court below, and to obviate the necessity of applications and appeals to this court, having for their object the making of a proper record for the consideration of the trial court upon the motion for a new trial.

The alternative writ of mandate heretofore issued is discharged, and the application for a peremptory writ of mandate is denied.

We concur: BEATTY, C. J.; SHAW, J.; VAN DYKE, J.; HENSHAW, J.; LORIGAN, J.

McFARLAND, J. (concurring). I concur in the judgment, and in what is said in the opinion of Mr. Justice ANGELLOTTI, to the point that a court will not grant a writ of mandate where it would be doing a vain thing of no benefit to the applicant, and also in what is said about the affidavit of Newby. But in my opinion there is nothing in the affidavits of Willia Hosmon and other affidavits filed by petitioner that by any proper construction can be considered as constituting, or tending in any way to show, an "irregularity in the proceedings of the court," within the meaning of subdivision 1 of section 657 of the Code of Civil Procedure.

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145 Cal. 157

GARDINER v. CORD et al. (L. A. 1,585.)*

(Supreme Court of California. Oct. 24, 1904.)

PARTITION—WHEN ACTION LIES.

1. The several owners in common of real estate conveyed the property to trustees, to place a mortgage thereon to secure debts due from each of such owners, and it was agreed that the trust should terminate on the extinguishment of the mortgage. *Held*, that under Code Civ. Proc. § 752, giving a right of action for partition to co-tenants in real property, partition could be had on the termination of the trust by the payment of the mortgage, though all the debts mentioned had not been paid, and another mortgage had been placed on the property.

2. Where a trust deed provided that the trustees shall at all times keep the premises free from any and all incumbrances other than a mortgage referred to in the deed, the execution by the trustees of another mortgage was in contravention of the trust and void, under Civ. Code, § 870.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by William Gardiner against Adeline Cord and others for partition. Defendants had judgment, and plaintiff appeals. Reversed.

Dunnigan & Dunnigan, for appellant. O. P. Widaman, for respondent L. Ada James. Max Lowenthal and A. B. McCutchen, for respondents Johnston. Graves, O'Melveny & Shankland, for respondent James Allen. Camp & Lissner, for respondent Annie Allen. J. L. Murphy, for respondents Adeline Cord et al.

HARRISON, C. Action for the partition of a parcel of land in the city of Los Angeles known as the "Allen Block," at the corner of Spring and Temple streets. The superior court rendered judgment against the plaintiff, and he has appealed therefrom upon the judgment roll, without any bill of exceptions.

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*Rehearing denied November 23, 1904.

May 23, 1889, William Gardiner (the plaintiff herein), Adeline Jonson (now Adeline Cord), Annie Allen, James Allen (defendants herein), Benjamin Allen, and Catherine Allen were the owners in fee, as tenants in common, of the said real property, each being the owner of an undivided sixth thereof, and on that day entered into and executed an agreement with each other, wherein, as a means of facilitating the accomplishment of the purpose of said agreement, the said William Gardiner, Annie Allen, Catherine Allen, and Benjamin Allen, as the parties of the first part thereto, conveyed the said property to James Allen and Adeline Jonson, as the parties of the second part thereto, in trust for certain purposes therein declared and hereinafter mentioned. After reciting in the agreement their respective ownership of the property, they recite that they are severally and individually indebted in certain amounts, aggregating about $24,000 (giving the amount of the indebtedness of each and the name of the respective creditors), and that said indebtedness is secured by mortgage and other liens upon the above property, and that they had agreed to consolidate the said indebtedness in a single loan, and were about to execute a joint and several mortgage of said property to secure the same, irrespective of their proportionate individual indebtedness, and that for the purpose of liquidating said mortgage indebtedness they had leased the said property for a term expiring January 1, 1892, and had agreed that the monthly rent therein provided, or a portion thereof, should be applied each month in payment of said mortgage indebtedness, and that "inasmuch as it would greatly facilitate the management and control of the said property, and the transaction of business in connection with the same, to vest the same in trust," they had mutually agreed to appoint the parties of the second part thereto as trustees for the uses and purposes thereinafter declared. The agreement thereupon declares that "for and in consideration of the premises the parties of the first part do hereby grant the said real property unto the parties of the second part, to the survivor of them and their successors, upon trust to enter into and upon the same and take possession thereof. * * * And the said real property shall be managed and controlled by the said trustees until the full payment of the said mortgage so executed as aforesaid, and they are at all times to keep the same free from any and all incumbrances other than the mortgage hereinbefore referred to; and to at all times keep the premises fully insured. Thirty days before the expiration of the term of said lease they are to advertise said premises to let in two daily papers for four weeks and to let the same to the highest and best bidder for a term not to exceed the term of this trust. At the expiration of this trust the said trustees shall reconvey the said premises to the said parties of the first part in the proportion of one-sixth each, and during the continuance of said trust they are to render them monthly accounts of the moneys received and disbursed by them."

In addition to this transfer of the real property, the said parties of the first part authorized the parties of the second part to receive the moneys to be procured under the joint mortgage, whose execution had been agreed upon, and to dispose of the same by paying the said specified indebtedness and liabilities of the several parties to the agreement. They also provided in said agreement for the liquidation of the said mortgage indebtedness by applying in payment thereon from time to time a portion of the rents that might accrue upon the aforesaid lease of the property; and for this purpose the parties of the first part assigned and set over the said lease to the parties of the second part, and directed that they should collect the rents reserved in said lease as they should fall due from time to time, and out of the money so collected should pay the quarterly installments of interest upon said mortgage, and, after paying in each month a portion thereof to the several parties to the agreement, should apply the balance then remaining in their hands toward the payment of the principal of said mortgage debt. The agreement also provided that, as between the parties thereto, the amounts paid in discharge of their respective liabilities and indebtedness should be severally charged to their respective accounts, and, to the extent of the payments made for the benefit or account of each, within the limits specified in the instrument, should constitute a lien upon his share or interest in the aforesaid real property, and that the said accounts of the several parties should each be credited with an aliquot part of the rents paid in liquidation of the mortgage debt, until the credits so given to any of the several parties should have paid his proportionate liability for said mortgage debt, and that thereafter his share of the rents, when collected, should be paid directly to him. By the same instrument the parties of the second part granted to the parties of the first part all their interest in the aforesaid real property as security for the faithful performance by them of the duties imposed upon them by virtue of said instrument, and agreed that after such performance they would reconvey to each of said first parties an equal undivided sixth of the fee of said premises.

Adeline Jonson, one of the parties to said agreement, subsequently married William S. Cord, and before the commencement of this action succeeded to the interest of Catherine

Allen in said real estate. Subsequent to the execution of the agreement, Griffin Johnston succeeded to the interest of Benjamin Allen in said real property, and died intestate in 1895, leaving as heirs at law, his widow, the defendant Maud W. Johnston, who afterwards was appointed and qualified as the administratrix of his estate, and an infant daughter, the defendant Grace Margaret Johnston. In June, 1899, James Allen assumed to resign the duties and powers conferred upon him by virtue of said agreement, and since that date the defendant Adeline Cord has had possession and control of said real property.

Immediately upon the execution of the instrument the parties thereto executed their joint note to the German Savings & Loan Society for the sum of $24,000, and a mortgage upon the aforesaid real property to secure its payment; and the said parties of the second part received the said $24,000 from the said mortgagee, and out of the same paid and discharged the indebtedness and obligations which they were authorized by the said agreement to pay, and entered into possession of said real property, and thereafter collected the rents thereof and made payments out of the same upon the said mortgage debt until May 17, 1898, at which time there remained due and unpaid thereon the sum of $8,000. At that time, also, the proportionate shares of said mortgage indebtedness of Annie Allen and of Maud W. Johnston and Grace Margaret Johnston, who had succeeded to the interest of Benjamin Allen in said real property, had been fully paid, and, as between the parties to the agreement of May, 1889, they were not indebted in any sum whatever to said mortgagee. On that day the plaintiff herein, together with Annie Allen, James Allen, Adeline Jonson, and Maud W. Johnston (defendants herein), and Catherine Stare (formerly Catherine Allen), borrowed from W. H. Purcell the sum of $8,000, and executed to him their promissory note therefor, and also a mortgage upon the aforesaid real property as security for its payment. The said James Allen and Adeline Jonson also joined in the execution of the said mortgage as trustees. The court finds that the mortgage was made under an agreement between them for the purpose of paying off the aforesaid mortgage debt, and more effectually carrying out the provisions of the agreement of May 23, 1889. The moneys received upon the said note and mortgage were obtained for, and were paid to, the German Savings & Loan Society, the mortgagee in the former mortgage, on said 17th day of May, 1898, and the said mortgage debt was on said date fully released and satisfied of record. This mortgage to Purcell is still unsatisfied and outstanding. Prior to its execution the plaintiff herein executed to the defendant Annie Allen an instrument of indemnity by which he agreed to hold her harmless from any liability by virtue thereof, and agreed that, as between them, in case of any foreclosure his interest in the properterty should be applied in satisfaction of the mortgage prior to any sale of her interest therein. Other mortgages upon certain of the individual interests in said real property have since said date been executed by the owners thereof, and are still unsatisfied and outstanding.

In February, 1899, in an action brought by the plaintiff herein for that purpose, the superior court rendered a judgment settling the accounts of the defendants Adeline Cord and James Allen for their receipts and disbursements as trustees under the aforesaid agreement of May, 1889, from the time of its execution until September 1, 1898; and in December, 1900, in another action between said trustees, a judgment was rendered settling their accounts as between themselves. By the judgment of February, 1899, it was determined that of the mortgage indebtedness existing against said real property on September 1, 1898, there was due from the plaintiff herein the sum of $5,920.08, and from the defendant Adeline Cord $1,394.50, and from James Allen $933.61; and by the judgment of December, 1900, it was determined that, as between the said Adeline Cord and James Allen, the amount due by the latter on account of the mortgage of May, 1898, was on the 21st of October, 1899, the sum of $274.70. The defendant Adeline Cord has in her hands, of said James Allen's share of the revenues of said property, enough to pay his portion of said mortgage indebtedness, and also of her own share of said revenues enough to pay her portion of said indebtedness as determined by the aforesaid judgment. The plaintiff herein has not paid or offered to pay his share of the said mortgage indebtedness, and, after applying thereon all moneys in the hands of said Adeline Cord applicable thereto, his share of said indebtedness exceeds $4,600.

The superior court held that the agreement of May, 1889, is a valid, subsisting agreement, and that, inasmuch as the indebtedness for whose payment it was entered into has not been fully paid, and as the trustees therein named have not in their hands sufficient moneys with which to pay the same, the agreement has not been fully performed, and that for this reason the plaintiff is not entitled to have a partition of the property or a sale thereof for the purpose of a division of the interests of the several co-tenants therein; that before he can have such relief he must first discharge his portion of the mortgage indebtedness thereon for which the said agreement was entered into.

It is not necessary for the disposition of the present appeal to determine whether a valid trust in the aforesaid real property was created by the instrument of May 23, 1889, as was held by the superior court, or whether, as contended on behalf of the appellant, the provisions therefor in the instrument were in contravention of provisions of the Civil Code, and therefore ineffective to create a trust in said property, as, in our opinion, the rights of the parties which are involved in this action do not depend upon the validity of such trust. By the terms of the instrument, the trust in reference to the real property was to continue only during the life of the mortgage to the German Savings & Loan Society therein provided for, and therefore terminated with its satisfaction, and the payment and extinguishment of the indebtedness secured thereby. The power given to the trustees to manage and control the property was to continue only "until the full payment of the said mortgage debt," and their authority to lease the property upon the expiration of the term then outstanding was only "for a term not to exceed the term of this trust." The mortgage debt to the German Savings & Loan Society was fully paid, and the mortgage itself satisfied, May 17, 1898; and at that date the purpose of the said trust ceased, and the trust itself thereby terminated. For the purpose of the present action it is therefore immaterial whether the said trust, as is contended by the appellant, is to be regarded as having been invalid from the beginning, by reason of an attempted suspension of the power of alienation, or whether the provision therein for a reconveyance upon its termination to the creators of the trust is within the principles declared in Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813, or is to receive the same construction as would a direction to convey the property to a beneficiary (Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70), or whether it be held that by the termination of the trust the estate of the trustees has ceased (Civ. Code, § 871). If the trust was invalid from the beginning, the title and estate of the owners of the land was not affected thereby; and, if it was valid, it has terminated, and the estate of the trustees has ceased, and the rights of the owners of the land can be adjudicated in a court of equity, or in a proceeding like the present one, without the necessity of an actual reconveyance thereof from the trustees. The finding of the court that the moneys received upon the mortgage of May 17, 1898, were obtained for the purpose of paying off the mortgage indebtedness to the German Savings & Loan Society and that said mortgage was made "pursuant to the agreement of May 23, 1889," and for the purpose of a more effectual carrying out of the provisions of said agreement, is not to be construed as a finding that the mortgage to Purcell was impressed with any of the trusts declared in the instrument of 1889, and that by uniting in the execution of the mortgage the trustees were acting under the said trust, or that their act was attended with any validity. The instrument of 1889 declared that the trustees therein named should "at all times keep the premises free from any and all incumbrances other than the mortgage hereinbefore referred to"—the mortgage to the German Savings & Loan Society. The execution of the mortgage to Purcell in 1898 by them "as trustees" was in contravention of the terms of this trust, and therefore void. Civ. Code, § 870. The finding that the mortgage was made pursuant to the agreement of May, 1889, receives full effect by construing it in connection with the provision in the agreement by which the amount of the indebtedness of each of the parties to the instrument was to constitute a lien upon his share of the real property, and be secured by the mortgage to that extent. The mortgage to Purcell is to be regarded, as between the mortgagors therein, merely as creating a lien upon land to the extent of their respective liability for the debt secured thereby. By the instrument of 1889 they had agreed, as between themselves, that the portion of the $24,000 received upon the mortgage then contemplated, which should be paid in satisfaction of their respective liabilities, should to that extent be a lien upon their respective interests in the land, and at the time of the execution of the mortgage to Purcell this lien had been extinguished as to some of the co-tenants, and by the judgments thereafter rendered in the superior court the amount of the indebtedness of the plaintiff, for which his interest in the real estate was secured by the mortgage to Purcell, was ascertained and determined.

The right of the plaintiff to the relief sought by him is therefore not affected by the provision in the agreement of May, 1889, but is to be determined upon the consideration of other principles. Section 752, Code Civ. Proc., gives to any one or more of several co-tenants of real property a right of action for its partition according to the respective rights of the persons interested therein, and for a sale of said property if partition cannot be had, and in the succeeding sections provision is made for ascertaining the respective rights of the parties to the action, and for the satisfaction or other disposition of any liens thereon; and, although a party may by some act or agreement on his part estop himself from enforcing his right to a partition, the mere fact that his interest in the land is subject to a lien or incumbrance will not of itself operate as such estoppel. The fact that the interest of the plaintiff in the land in question is subject to a lien for certain indebtedness, which can be at any time discharged by the payment of said debt, and for whose payment the court is authorized to provide in its judgment of partition or sale, does not deprive him of the right to maintain the action.

The superior court therefore erred in holding that the plaintiff is not entitled to maintain the present action. It should have determined the respective interests of the owners of the land, and the amount of the liens and incumbrances upon the same, or upon the interest of any of them; and if, as between the said owners, any portion of said incumbrances ought, under the rules of equity, or by virtue of any contract, to be borne by one or more of the owners, it should make proper provision for satisfying the same out of the share or shares against which it is chargeable.

The judgment ought therefore to be reversed.

We concur: COOPER, C.; GRAY, C.

For the reasons stated in the foregoing opinion, the judgment is reversed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

145 Cal. 154

GAYLORD v. CURRY, Secretary of State.
(L. A. 1,694.)

(Supreme Court of California. Oct. 19, 1904.)

ELECTIONS—PARTIES—RIGHT TO PLACE ON BALLOT.

1. Pol. Code, § 1186, provides that a party represented by a convention in a political division in which sections 1357 to 1375, relative to primary elections, are not mandatory, must have polled, at the last election before the holding of the convention, at least 3 per cent. of the entire vote of the state or other political division for which nominations are to be made. Section 1361 provides that political parties which shall have polled at the last election at least 3 per cent. of the entire vote of the state or other political division for which a primary election is to be held shall be entitled to a place on the official ballot to be used in all primary elections for delegates. *Held*, that a party which at the last state election polled over 3 per cent. of the total vote of the state is entitled to a place on the congressional ballot in a district where sections 1357 to 1375 are not mandatory, although it failed to cast 3 per cent. of the votes within such district.

In Bank. Application for a peremptory writ of mandate by A. J. Gaylord against Charles F. Curry, Secretary of State. Writ awarded.

Cameron H. King and James Taylor Rogers (Emil Liess, of counsel), for petitioner. Atty. Gen. U. S. Webb, for respondent.

PER CURIAM. This is an application by petitioner for a peremptory writ of mandate directed against the Secretary of State to compel that officer to certify petitioner's name as a candidate of the Socialist Party for member of the House of Representatives in Congress of the United States for the First Congressional District of California to each county clerk within the said First Congressional District. It is made to appear that the Socialist Party of California cast 3 per cent. of the votes at the next preceding state election, but did not cast 3 per cent. of the votes in the congressional district above mentioned. It is further made to appear that in no portion of this congressional district are the provisions of sections 1357 to 1375 of the Political Code relative to mandatory primary elections in force or effect. Under this state of facts the Secretary of State justifies his refusal under the provisions of section 1361 of the Political Code, to the following effect: "All political parties which, at the last election prior to any ensuing primary election herein provided for, polled at least three per cent. of the entire vote of the state, county, district, city and county, city or town, or other political division for which a primary election is to be held under the provisions of this chapter, or which, in the case of any county, city and county, township, city or district wherein no general election shall have been held after its organization, shall have polled at least three per cent. of the votes cast in the precincts composing such county, city and county, township, city or district, shall be entitled to a designation and place upon the official ballot to be used in all elections for delegates under this chapter, upon complying with the provisions of this section." Under this it is contended that, as the Socialist Party failed to cast 3 per cent. of the votes in this particular district, it is not entitled to designation and place upon the congressional ballot. The Supreme Court of the state of Illinois was called upon to construe a section of the Revised Statutes of that state similar in language and identical in effect to our own, and it held that, if a political party had cast the requisite number of votes in a general state election, it was entitled by virtue of that fact to have its nominees for local and district officers placed upon the ballot, even if it had not cast the requisite percentage of votes in the particular county or district for which the nomination was made. People ex rel. Dickerson v. Williamson (Ill.) 56 N. E. 1127. The conclusion that such is the correct interpretation of the statute is, so far as our law is concerned, strengthened by the language of section 1186 of the Political Code, where it is provided: "If such convention be assembled to present candidates for public office to be elected within territory or a political division in no portion of which said sections of this Code are mandatory or in force and effect, then and in such event the political party which such organized assemblage of delegates represents, must have at the last election before the holding of such convention polled at least three per cent. of the entire vote of the state, or of the county, city and county, district or other political division for which nominations are to be made." Here is an unmistakable declaration that in a congressional district such as this, where the provisions of the primary law are not mandatory, if a political party shall have cast 3 per cent. of the entire vote of the state, it shall be entitled to nominate officers from such district, and to have their names placed upon the official ballot.

Let a peremptory writ of mandate issue commanding the respondent, Charles F. Curry, Secretary of State of the state of California, to certify the name of petitioner, A. J. Gaylord, as a candidate of the Socialist Party for member of the House of Representatives in Congress of the United States for the First Congressional District of California to each county clerk within the said First Congressional District, as required by the provisions of section 1193 of the Political Code of California.

(145 Cal. 169).

PEOPLE v. MILTON. (Cr. 1,151.)*

(Supreme Court of California. Oct. 26, 1904.)

DEGREES OF HOMICIDE—INSTRUCTIONS.

1. Pen. Code, § 189, provides that murder committed in the perpetration or attempt to perpetrate arson, robbery, rape, burglary, or mayhem is murder in the first degree. *Held*, that it is immaterial on a trial for such a murder whether the killing was willful, deliberate, and premeditated, or absolutely accidental.

In Bank. Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Henry Milton, having been convicted of murder, appeals. Affirmed.

Henry C. Dibble, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

HENSHAW, J. The defendant was convicted of the crime of murder of the first degree, and sentenced to death. Upon his appeal he presents but one alleged error of the trial court upon which he seeks a reversal of the judgment. This alleged error lay in the court's refusal to give the following instruction: "The court instructs you that before you can convict the defendant of murder in the first degree you must find to a moral certainty and beyond all reasonable doubt that the defendant as a fact intended to take the life of the deceased. Accidental killing, even in an attempt to commit one of the felonies mentioned in section 189 of the Penal Code, is not murder in the first degree." While none of the evidence is presented to us with this appeal, it will be assumed from the general tenor of the instructions actually given by the court that the charge against the defendant was for a murder committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem. Pen. Code, § 189. The court properly refused to give the proposed instruction. Defendant insists that in every crime of murder in the first degree there must be shown to be present the elements of willfulness, deliberation, and premeditation bearing upon the actual intent to take human life. But such is not our law of murder. The only indispensable elements of murder under our Code are, first, the unlawful killing of a human being, and, second, that this killing be done with malice aforethought. Pen. Code, § 187. This malice is present and express when a deliberate intention unlawfully to take away the life of a fellow creature is shown, and it is also present (though implied) when the circumstances attending the killing disclose an abandoned and malignant heart. Pen. Code, § 188. In section 189 of the Penal Code three kinds or classes of murder in the first degree are specifically enumerated: (1) All murder which is perpetrated by means of poison, or lying in wait, or torture is murder in the first degree. (2) All murder which is perpetrated by any other kind of willful, deliberate, and premeditated killing is murder in the first degree. (3) All murder which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem is murder of the first degree.

Of the first of these classes it is sufficient to note that the means adopted for the unlawful killing furnish evidence of willfulness, deliberation, and premeditation, and this is made perfectly plain by the context of the section, which declares to be murder in the first degree all murder which is perpetrated by these means, or by any other kind of willful, deliberate, and premeditated killing. As to such a killing when perpetrated by means of poison, it has been held under the language of a statute similar to ours (and held in consonance with common sense and natural justice) that it was necesasry to establish the unlawful intent or purpose in the administration of the poison. Bechtelheimer v. The State, 54 Ind. 128. The decision was based more upon the nature of the case than the language of the statute, as is said by the same court in reviewing that case in the later one of Moynihan v. The State, 70 Ind. 126, 36 Am. Rep. 178, where it is pointed out that, unless the unlawful intent in administering the poison is made to appear, the most innocent act of one's life might turn out to be a murder, and that, too, a murder subjecting him to the gallows; so that one who innocently administered what he supposed to be a proper dose of medicine, would be compelled to endure this ultimate indignity and disgrace, notwithstanding the fact that in such administration of the poison no penal law was violated and no moral turpitude shown. In such an exceptional case, however, it is to be noted that neither element of our crime of murder is present. The killing being the result of inevitable casualty is not violative of the law, and in that sense, therefore, is not unlawful, and, of course, there is a complete absence of malice, express or implied.

The second class of cases which are designated murder in the first degree embrace all other nonspecified instances where the unlawful killing is shown to have been committed with willfulness, deliberation, and premeditation. The extreme penalty of the law is imposed for such offenses by reason of the manner in which they are committed. There is no occasion to mitigate the punishment because of the known weaknesses, frailties, and passions of mankind, since proof of the deliberation and premeditation precludes the idea that the slayer was dominated by such passions.

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*Rehearing denied November 23, 1904.

¶ 1. See Homicide, vol. 26, Cent. Dig. §§ 39, 40.

But when we come to the third kind of murder in the first degree it will be seen that in its nature it is wholly distinct from the two preceding classes. In this the law has said to the malefactor, "If in your perpetration of or attempt to perpetrate, arson, rape, robbery, burglary, or mayhem you shall take the life of a fellow being, intentionally or unintentionally, your crime is murder of the first degree. The killing may be willful, deliberate, and premeditated, or it may be absolutely accidental. In either case you are equally guilty. The elements of willfulness, deliberation, and premeditation are not indispensable to your crime. The murder, under section 187 of the Penal Code, is established, in that the killing is unlawful, it having been perpetrated in the performance or attempt to perform one of these felonies, and the malice of the abandoned and malignant heart is shown from the very nature of the crime you are attempting to commit. Therefore, if in perpetrating arson, although in the belief that the building is unoccupied, some person within the building, unknown to you, shall lose his life, you are guilty of murder in the first degree. Or if, in burglariously entering premises which you believe to be unoccupied, you shall accidentally take the life of one whose presence is unsuspected by you, still your crime is murder in the first degree." That such is the true meaning and construction of our statute there can be no doubt. Commonwealth v. Green, 1 Ashm. 289, and Keenan v. Commonwealth, 44 Pa. 55, 84 Am. Dec. 414—the only cases which the appellant presents for consideration—both have to do with deliberate and premeditated homicide, and the discussion of the court was in reference to this form of murder. In the first a soldier, with his musket, shot his drill sergeant, after having threatened to do so. In the second the conductor of a street car, after admonishing a noisy and boisterous passenger to be quiet, attempted to eject him, and was stabbed to death. Neither of these, it will be observed, has any bearing upon the crime here under consideration.

It will be noted that at common law murder was carried into the unlawful killing of a human being in the perpetration of any misdemeanor, and death was the penalty which followed. The rigor of the common law has been modified by our Code section, which is drawn from the laws of New York as they stood in 1860. In Buel v. The People, 78 N. Y. 492, 34 Am. Rep. 555, will be found an exposition and consideration of the changes made in the New York statutes relative to the crime of murder. The court there quotes the first statute, which was to the effect that the killing shall constitute murder "when perpetrated without any design to effect death, by a person engaged in the commission of a felony." 2 Rev. St. (1st Ed.) part 4, c. 1, tit. 1, § 5. "The killing," says the court, "while engaged in the perpetration of any felony which caused death, even if unintentionally, is here expressly declared to be murder." The court proceeds: "The statute of 1873 [Laws 1873, p. 1014, c. 644] was then passed, which is precisely like the statute of 1876 [Laws 1876, p. 317, c. 333], already cited, except that the words 'without any design to effect death' are omitted in the latter statute. The evident purpose of omitting these words was to make any killing, while engaged in the perpetration of a felony, murder in the first degree, no matter what the design was, or whether it was intentional or casual. So that a person engaged in the commission of the crime of arson, burglary, rape, or any other felony, who killed another, was chargeable with murder in the first degree. Under all of these various provisions where the killing was perpetrated it was of no consequence what the intention was. The statute was aimed against any killing by a criminal while committing any of the felonies enumerated, and the last amendment while engaged in the commission of any of the numerous felonies known to the law. The striking out of the words 'without any design to effect death' was no doubt designed to avoid any necessity of showing that there was no such intention, and to make the law more explicit and clear."

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN DYKE, J.; ANGELLOTTI, J.; LORIGAN, J.

145 Cal. 352

SMITH v. PACIFIC VINEGAR & PICKLE WORKS. (S. F. 2,674.)

(Supreme Court of California. Feb. 11, 1904.)

CORPORATIONS — POWERS OF OFFICERS — CONTRACTS WITH THEMSELVES INDIVIDUALLY— VALIDITY — RATIFICATION — EXPRESS — IMPLIED.

1. Under Civ. Code, § 2230, providing that no trustee or his agent may take part in any transaction concerning the trust in which he or his agent has an interest adverse to the beneficiary; section 2234, providing that a violation of this provision is a fraud against the beneficiary; and section 2322, declaring that no general authority shall authorize an agent to do any act which a trustee is forbidden from doing—the president of a corporation is prohibited from purchasing notes payable to the corporation and indorsing them to himself individually.

2. The court will not permit any inquiry into the question of the honesty or fairness of a transaction whereby the president of a corporation purchases notes payable to the corporation and indorses them to himself.

3. The by-laws of a corporation providing that the president thereof "shall sign, as president, all certificates of stocks, checks, notes, * * * and other instruments in writing, and

shall have full power to act in all respects as the general agent and manager of the company, subject to the advice of the board of directors," does not authorize the president to purchase notes payable to the corporation and indorse them to himself individually.

On Rehearing.

4. A maker executed notes to a corporation. The president indorsed the notes to himself individually, making the corporation liable as indorser. Renewal notes were given, indorsed in the same manner. The directors of the corporation had no knowledge of the transaction, and did not know of the existence of the renewal notes. At directors' meetings they asked the president if the notes were being paid at maturity, and they received an affirmative answer. The vice president testified that while he acted as president he indorsed some of these notes to raise money, but knew nothing of the renewal notes. *Held* not to show an express ratification on the part of the corporation of the unauthorized acts of the president.

5. On the issue whether a corporation impliedly ratified the unauthorized act of its president in indorsing to himself individually notes belonging to the corporation, it was shown that the secretary joined with the president in indorsing the name of the corporation on the notes. Knowledge of the transaction was concealed from the directors by the president and secretary, who made false statements on being asked whether the notes were being paid at maturity. *Held* not to show an implied ratification by the corporation.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Consolidated actions by the Pacific Vinegar & Pickle Works against Sidney M. Smith, by Sidney M. Smith against the Pacific Vinegar & Pickle Works, and by Elizabeth E. Smith and another against the same defendant. From adverse judgments in each action, the Pacific Vinegar & Pickle Works appeals. Reversed.

J. C. Campbell (W. H. Metson, Campbell, Metson & Campbell, J. J. Kennedy, W. H. Metson, and John Garber, of counsel), for appellant. Carter P. Pomeroy, for respondents.

LORIGAN, J. These cases are both presented on a consolidated transcript on appeal, and, as the same general principles of law are applicable to both, they will be considered together.

The first action is brought by the Pacific Vinegar & Pickle Works (which for brevity will hereafter be referred to as the "Pickle Works" or corporation) to enjoin the said Sidney M. Smith from selling or transferring certain promissory notes not yet due, given by a corporation known as the California Packing Company to said pickle works, and indorsed by said Smith, as president of the latter, to himself; also for the cancellation of such indorsements. The second action is brought by said Sidney M. Smith against the pickle works to obtain judgment on notes executed by the same packing company to the pickle works, and similarly indorsed and held by him. The pleadings in both cases fully raise the legal question to be disposed of, and the facts under which it is presented are as follows:

Said Sidney M. Smith was, at all the times herein mentioned, a director and president of the pickle works, and the by-laws thereof provided that "he shall sign as president all certificates of stock, checks, notes, bills payable, acceptances, bills of exchange, contracts, and other instruments in writing, and shall have full power to act in all respects as the general agent and manager of the company, subject to the advice of the board of directors"; that said pickle works was doing business with a corporation known as the California Packing Company, under a contract which provided that the pickle works should supply the packing company with material, and binding the latter not to contract with any other parties for such material; that the pickle works sold goods to the packing company under such contract, and, upon monthly statements rendered, notes were given by the latter in favor of the former, indorsed by one A. B. Patrick; that some of said notes so delivered were retained by the pickle works, some respondent Smith had discounted by the Bank of British Columbia for the benefit of the pickle works, and others were purchased by said Smith, in which latter case, as when discounting them to the bank, he transferred the same by an indorsement of the name of the Pacific Vinegar & Pickle Works thereon, by himself as president; that when he purchased said notes from the pickle works he paid over for its benefit the face of the principal and accrued interest thereon, and that no better terms could have been obtained at a bank. On December 13, 1899, said Smith held notes of said packing company so indorsed, and maturing on that date, amounting to the sum of $16,992.28, which on that day he surrendered, and took from said packing company a series of notes, each for about $1,500, maturing monthly. These renewal notes were also indorsed by A. B. Patrick, and when delivered to said Smith by the packing company he indorsed them to himself as before, with the name of the Pacific Vinegar & Pickle Works, by himself as president; that said renewal notes were so taken at the request of the packing company, and were drawn in such series of small amounts so that said company could meet them monthly, and were renewed so that the time of payment might be extended. Aside from the renewal notes, Smith held other notes of the packing company, purchased by him from the pickle works, and similarly indorsed. Of these, three, for upwards of $1,500 each, were paid by the packing company to respondent Smith in September, October, and December, 1899, and of the renewal notes of December 16, 1899, three, for $1,500 each, were likewise paid him in January, February, and March, 1900. No payments were paid during these periods of any of the notes executed by the packing company to the pickle works and retained by it, although at these times the secretary of the latter had in its safe unpaid notes of said packing company, which in March, 1900, amounted to from twelve to fifteen thousand dollars, besides which there were outstanding, on that date, notes of said company, indorsed by the pickle works, by said Smith as president, and held by the Bank of British Columbia, amounting to about $20,000. That none of the other four members of the board of directors of the pickle works had any knowledge of these transactions. It further appears that the pickle works is solvent. As to the actual condition, in that respect, of the packing company, or A. B. Patrick, the prior indorser of its paper, the record is silent, although it appears from the evidence that the packing company had stated to Smith that it could not pay its bills monthly and pay the full amount of the notes, and it was for that reason that he had put them in such a shape as to mature in the neighborhood of $1,500 per month. These are some of the principal facts in the case, and are all that are necessary here to be stated in order to fully present and consider the main proposition of law involved.

Judgments were rendered in favor of Sidney M. Smith in both actions; in the first for his costs; in the second for the amount of the notes therein sued on—$7,654.96; and from both judgments the pickle works appeals.

Several points are made by appellant for a reversal, but we will consider only the main one, which we deem controlling and decisive of the case. The others are merely subsidiary and unimportant. Broadly stated, the legal proposition insisted on by appellant is that one occupying a fiduciary or trust relation to a corporation cannot, while such relation exists, enter into any express contract with himself individually relative to the trust property which will be binding on the corporation; that such a contract is a breach of trust, and voidable at the mere election of the corporation, if not absolutely void; and that, when such a contract is sought to be enforced, the court will not permit any investigation as to the fairness or unfairness of the transaction, nor will it permit the trustee to show that it was not detrimental, or that it was even advantageous to the beneficiary. Such an inquiry cannot be entered into. And, specially applying the rule to the facts in the case at bar, it it claimed that as the respondent Smith, at the time he acquired ownership of said notes, occupied a fiduciary and trust relation to appellant corporation, both as president and director, and that as the contracts of indorsement guarantying the payment of said notes by said corporation were made by himself as president to himself individually, without the authority, knowledge, or approval of the corporation, they cannot be enforced by him against it. We are satisfied that this contention of appellant is sound, and sustained, not only by the Code provisions of this state, but by an unbroken line of authorities.

It will be observed that no question is involved in this action of the right of a director, who has advanced or loaned money to a corporation, to recover it back on a quantum meruit, and decisions which sustain such a right have no application. The action at bar is one brought by a director who, as president of the corporation, purchased its notes outright, and caused the corporation, by himself as president, to become indorser of the notes to himself individually, as indorsee, and is now seeking to enforce such contract of indorsement against his corporation. His suit is brought upon an express contract, the making of which and its enforcement are equally prohibited by law. In this regard the general principle is clearly stated in Bensiek v. Thomas, 66 Fed. 104, 13 C. C. A. 457: "It is an elementary law that an agent authorized to act for a principal in a given negotiation cannot deal with himself. He cannot, when authorized to buy property or borrow money, sell his own property or loan his own funds, without communicating the fact to his principal. An agent cannot unite his personal and representative characters in the same transaction. The doctrine applies to all persons who occupy a fiduciary relation, and it is especially applicable to the officers of a corporation when acting for and in behalf of the company. They cannot use their official position to benefit themselves individually. In short, an officer of a corporation is not qualified to act for his company in any transaction wherein the corporation is dealing with the officer." Wardell v. R. R. Co., 103 U. S. 651, 26 L. Ed. 509; Mallory v. Mallory-Wheeler Co. (Conn.) 23 Atl. 708; Bigelow on Fraud, 217; Perry on Trusts, § 207. And in Morawetz Priv. Corp. § 517, it is said: "The directors of a corporation have no authority to bind the company to any contract made with themselves personally. * * * Thus a president, cashier, or managing agent, having authority to sign the name of a corporation to negotiable instruments, cannot execute or indorse a note to himself, or certify a check for his own benefit." This rule is based on sound public policy, and there also enters into it the legal principle that, in order to make an express contract, there must be the assent of two separate independent minds; that no man can effectually make a contract with himself. In the case at bar, the respondent Smith assumed to constitute himself both the contracting parties. There is no pretense that he was dealing with the corporation represented by other members of the board of directors, or with other agents thereof. He was dealing with himself, contracting as president with himself as an individual, and was the contracting party on both sides. The corporation made no sale of these notes to, or contract of indorsement thereof, with him. He adjusted the whole matter, dictated the terms of the transfer by himself with himself, completed the transaction in this unilateral capacity, and it was the result solely of his own discretion and volition. To this situation the language of the court in Mercantile Mut. Ins. Co. v. Hope Ins. Co., 8 Mo. App. 411, may pertinently be applied: "A contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards, and with knowledge of all the circumstances that affect his possession, to ratify the act of his agent." In Clark & Marshall's Private Cor. vol. 3, § 759, the rule is concisely summed up in this language: "A person cannot, as director or other officer of a corporation, enter into a valid contract on behalf of the corporation with himself in his individual capacity, or be both vendor and purchaser, for two persons are necessary elements to the formation of a contract. The fact that he acts as an officer of the corporation on one side, and for himself on the other, can make no difference."

Recurring now to the main legal proposition under discussion, it is provided by section 2230 of the Civil Code that "neither a trustee, nor any of his agents, may take part in any transaction concerning the trust in which he, or any one for whom he acts as agent, has an interest, present or contingent, adverse to that of his beneficiary, except when the beneficiary, having capacity to contract with the full knowledge of the motive of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so." And by section 2234 of the same Code it is provided that "every violation of the previous preceding sections of this article is a fraud against the beneficiary of a trust." These Code provisions apply to directors of a corporation in their relation to it as trustees, and by section 2322 of that Code they are made to apply to the respondent, as the agent of such corporation, in the case at bar. This last section declares that "an authority [of an agent] expressed in general terms, however broad, does not authorize an agent * * * (3) to do any act which a trustee is forbidden to do by article 2, chapter 1, of the last title," which chapter includes the sections above quoted. As it does not appear in this case that the respondent had any special authority from the corporation to enter into the transaction in question here, he necessarily must claim to have been empowered to make it under an authority expressed in general terms, and hence the sections—2230, 2234, Civ. Code—in regard to trustees must apply to him, as a mere agent of the corporation. So applied, the law is inflexible that one acting in such fiduciary capacity will not be permitted to deal with himself in his individual capacity relative to the trust property.

Upon this point, as we have said, the current of authority in this state is unbroken, and it will only be necessary to refer at length to a few of the cases which clearly and uncompromisingly announce the rule, with general citations to such others from our own court as affirm the doctrine. In the case of Davis v. Rock Creek Co., 55 Cal. 364, 36 Am. Rep. 40; where the facts are stated, as well as the law declared, it is said: "But apart from this consideration, the transaction in question cannot be upheld. The law, for wise reasons, will not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity. The position of A. Wolff as a member of the firm of A. Wolff & Co., and his position as trustee and president of the corporation defendant, were inconsistent and conflicting. In purchasing the debts of the corporation in his individual capacity, it was to his interest to buy them at as great a discount as possible. The greater the discount the greater his gain. If he succeeded in purchasing the debts at any discount, to that extent he assumed to himself an advantage not common to all of the stockholders. To permit this to be done would be to permit the violation of one of the plainest principles of equity applicable to trustees. In this particular case it does not appear that Wolff assumed the demands against the corporation at any discount. Neither does it appear that he did not. Nor does the policy of the law permit an inquiry into that question. Occupying, as he did, the position of trustee, he should not have put himself in a position adverse to his cestui que trust. One cannot faithfully serve two masters whose interests are diverse." In the still later case of Sims v. Petaluma Gaslight Co., 131 Cal. 659, 63 Pac. 1012, it is said: "The court was clearly correct in holding that, for the reasons stated, the contract introduced in evidence on the part of the plaintiff was invalid. Being president of the defendant corporation, Van Syckel necessarily was one of the directors thereof (Civ. Code, § 308); and, as such, he occupied a fiduciary relation to the corporation and its stockholders. 'A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.' Civ. Code, § 2229. He cannot take part in any transaction in which he, or any one for whom he acts, has an interest, present or contingent, adverse to that of his beneficiary. Civ. Code, § 2230. In fact, this rule did not have its origin with the Codes, but it is much older. It is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee. 'Hence the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings with the trust property, with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary.' Wickersham v. Crittenden, 93 Cal. 29, 28 Pac. 788. In Aberdeen Ry. Co. v. Blaikie, 1 M. A. C. Q. 461, it is said: 'So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into. It obviously is or may be impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the interests of the cestui que trust which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could be obtained from any other person; they may even at the time have been better; but still, so inflexible is the rule, that no inquiry on that subject is permitted.'"

These authorities lay down two propositions: First, that an expressed contract cannot be entered into by a director with himself relative to the trust property; and, second, that the court will not permit any inquiry into the question of the honesty or fairness of the transaction. The philosophy of this rule is quite apparent, and its inflexibility is the strongest safeguard which the law can offer for the protection of the interests of the beneficiary. The great purpose of the law is to secure fidelity in the agent. When one undertakes to deal with himself in different capacities—individual and representative—there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal. His self-interest prompts him to make the best bargain for himself. Humanity is so constituted that, when these conflicting interests arise, the temptation is usually too great to be overcome, and duty is sacrificed to interest. In order that this temptation may be avoided, or, if indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of the trust, nor will the court enter into any examination of the honesty of the transaction. As said by the Supreme Court of New York in Munson et al. v. S. G. & C. R. Co. et al., 103 N. Y. 74, 8 N. E. 358: "The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction, or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry; and it leaves neither to judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. * * * The value of the rule of equity to which we have adverted lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempted discrimination, all transactions in which they assume the dual character of principal and representative."

So harmonious is the law on this subject that authorities might be cited indefinitely, but reference is made only to those in this state where the principles have been discussed, reiterated, and approved: San Diego v. S. D. & L. A. R. Co., 44 Cal. 112; Andrews v. Pratt, Id. 317; Wilbur v. Lynde, 49 Cal. 292, 19 Am. Rep. 645; Chamberlain v. Wool Growing Company, 54 Cal. 106; Shakespear v. Smith, 77 Cal. 638, 20 Pac. 294, 11 Am. St. Rep. 327; Smith v. Immigration Association, 78 Cal. 292, 20 Pac. 677, 12 Am. St. Rep. 53; Graves v. Mining Co., 81 Cal. 319, 22 Pac. 665; San Francisco Water Co. v. Pattee, 86 Cal. 629, 25 Pac. 135; Wickersham v. Crittenden, 93 Cal. 31, 28 Pac. 788; Gas Co. v. Young, 109 Cal. 143, 41 Pac. 869, 29 L. R. A. 463; Curtin v. Salmon River, etc., 130 Cal. 345, 62 Pac. 552, 80 Am. St. Rep. 132.

We have examined the cases cited by counsel for respondent to support the validity of this contract and the right of respondent to recover upon it, but they have no relevancy to the real point involved. We will not discuss at all the authorities cited from other jurisdictions, and, as to the cases in this state, will mention them briefly, and then only to point out their special inapplicability. All the cases cited by counsel are cases where either the director of the corporation whose dealings were questioned dealt directly, but illegally, with the board of directors of a solvent corporation, assuming to act for it, or dealt with such board with the knowledge or approval of the stockholders, or they are cases where the illegal action of the director was subsequently ratified and approved by the corporate authorities. In none of these cases is it held that he could deal with himself, or that a contract made with himself without the knowledge of the other directors or the stockholders, or without the subsequent ratification or approval of the corporation, could be sustained or enforced against the corporation. This marked distinction is plainly declared in a line from one of the cases cited by respondent (Lick Oil Co. v. Marbury, 91 U. S. 590, 23 L. Ed. 328) where the court says, "The defendant was not here both seller and buyer." In the case at bar he was both seller and buyer, with the additional relation created by himself, with himself, of indorser and indorsee.

Referring now briefly to the authorities cited by respondent from this court: In the case of Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802, no question of a director dealing with himself was involved. The plain point decided there was that, the corporation having borrowed money from the director Hihn, the latter was entitled to be repaid. But this is practically declared to be the rule in Davis v. Rock Creek, Graves v. Mining Co., and Sims v. Petaluma Gaslight Co.—that, where the corporation has dealt with the director, he can recover upon a quantum meruit; not, however, that a director can recover upon an express contract made with himself without the knowledge or sanction of the corporation. In the cases of Sutter St. Ry. Co. v. Baum, 66 Cal. 44, 4 Pac. 916, and Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439, the note and mortgage involved there were given by the corporation to a director. In Seeley v. San Jose, etc., 59 Cal. 25, the plaintiff paid off a note of the corporation at the request of its president and superintendent, and thereupon the corporation gave a note to plaintiff to secure repayment. At an annual meeting of the board of directors and stockholders, this note was recognized, sanctioned, and approved by them. There was nothing in the case calling for the application of the rule declared in Davis v. Rock Creek, or cases affirming a similar principle. In fact, the court in Seeley v. San Jose, etc., recognized the distinction, and particularly stated in its opinion that the case then in hand was not "at all like unto Davis v. Rock Creek, or like the cases of San Diego v. S. D. & L. A. R. Co. and Wilbur v. Lynde," previously referred to by us in this opinion. Neither is Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749, applicable. The only point decided there was that the corporation had ratified the contract claimed to be illegal, and was bound by the ratification. These are all the cases from this court cited by counsel, and none of them run counter to, but clearly recognize the distinction between, cases where the director deals with the corporation, or his act, while illegal, is subsequently ratified by it, and cases where he deals with himself without the knowledge and approval of the corporation, and where there is no ratification. While some claim is made that the corporation in this case ratified the respondent's acts, it is only a claim. There is not only no evidence to support it, but the evidence is that none of the other officers of the corporation were informed by respondent of the matter, or knew of the transaction. It is hardly necessary to say that the general power conferred upon Smith under the by-laws did not give him authority to contract with himself. In every case where the validity of a contract made by a trustee with himself is in question, general authority to act for the corporation must necessarily have existed, in order to apply the principle invoked here. The law assumes that the trustee is invested with general power to contract, but limits its exercise to matters strictly in the interest of the beneficiary, and disqualifies him from exercising it in his own behalf. This disability directly results from the existence of the general authority.

In disposing of this matter, it may be said that, if a director wishes to take security for advances made to the corporation, it is not requiring too much of him to ask for such security, or for whatever contract he would equitably be entitled to, in order to protect his advances. If he fails to do so, and has any equitable claim arising from such advances against the corporation, he may bring an action on a quantum meruit to recover. He cannot, however, make an express contract with himself which can be enforced against the corporation against its will; nor can the fairness of such a contract be inquired into, or affect the rule.

The principles here announced apply to both cases considered on this appeal, and, for the reasons given, the judgments therein appealed from are reversed, and the causes remanded.

We concur: BEATTY, C. J.; HENSHAW, J.

McFARLAND, J. (concurring). I concur in the judgment of reversal, and in nearly all that is said in the opinion of Mr. Justice LORIGAN; but I think that some of the quotations to be found in the opinion state the principle of law under discussion rather too broadly. It may be well to say, also, that it is quite likely that the respondent Smith did not intend to do any unlawful act, and that what he did probably inured to the benefit, rather than the injury, of the pickle company; but well-established and just general principles of law can occasionally be invoked so as to work hardship in particular cases.

On Rehearing.

(Nov. 12, 1904.)

HENSHAW, J. From the decision of this court in bank, rendered in the above-entitled cause, a rehearing was granted, to the end that a finding made by the trial court, to the effect that the Pacific Vinegar & Pickle Works ratified and approved each and every indorsement placed upon the notes of the California Packing Company by Smith as president and King as secretary, should receive further consideration. It was urged in the petition for rehearing that, although the principle of ratification was fully recognized in the opinion, through some oversight the finding declaring a ratification, which finding fully supported the judgment of the trial court, had been overlooked. Our attention, therefore, upon this hearing, is limited to the single question whether or not the finding of ratification is supported by the evidence. Respondent contends that the finding is supported, first, under evidence showing express ratification, and, second, under evidence showing implied ratification.

1. The express ratification, it is contended, finds support in the evidence of Mr. Koster, the vice president of the Pickle Works, who, during a three months' absence of the president, Mr. Smith, performed the latter's duties. During Koster's incumbency as president he indorsed three of the California Packing Company's notes. Respondent in his brief asserts that "Mr. Koster himself testifies that at the time he made this indorsement he knew that at least one of those notes belonged to Mr. Smith, although he denies any personal knowledge of the fact that he was effecting a renewal." The evidence of Mr. Koster, with the inferences and deductions which may legitimately be drawn from it, is the only evidence touching express ratification. Mr. Koster's testimony, however, is at variance with respondent's statement of it. It is brief, and may be set forth in full: "I never knew until March, 1900, that Mr. Smith had assigned or indorsed any of those notes to himself. I never knew that there was any notes of the California Packing Company in existence outside of those which we held in the safe, amounting to $12,000 or $15,000. By reason of what had been told me at the directors' meetings, I believed it was all paid up. I acted as vice president of the company during Mr. Smith's absence. During that time I indorsed three notes, one of which may have belonged to Mr. Smith, but I did not know that any of them were renewal notes. I never knew anything about renewals. I was told that some money was needed from the bank, and I indorsed some California Packing Company paper, which the Pacific Vinegar & Pickle Works had, for the purpose of getting money to run the business. I knew that the company had paper of the California Packing Company, but did not know any of it was renewed until after Mr. King's defalcation. I did not see any renewal notes brought to me. If there had been any renewal notes brought to me, that would have stopped right there. No notes were brought to me which had already been renewed by the Pacific Vinegar & Pickle Works. In every instance I asked Mr. King if the notes of the California Packing Company were being paid, and he told me 'yes.'" It is to be remembered that the directors, one and all, testified that they had no knowledge of any of these transactions; that they knew nothing of the existence of the California Packing Company notes held by Smith, upon which their company (the Pickle Works) was liable as indorser; and that at every directors' meeting, in the presence and hearing of Mr. Smith, the president, they asked if the California Packing Company's notes were being paid at maturity, and always received an affirmative answer from the secretary. Bearing in mind that an express ratification can only be found against a party when it is shown that he is in possession of all the facts, and has acted after such knowledge, it is at once apparent, without further discussion, that the testimony of Mr. Koster falls far short of establishing such a ratification.

2. The doctrine of implied ratification is invoked to support the finding. The doctrine of implied ratification is thus expressed: "An implied ratification may also arise if the corporation accepts the benefit of the unauthorized act; but a corporation will not be held to have ratified an act impliedly by accepting the benefit of it, unless knowledge of the act was actually possessed by some corporate agent who had authority to act for the corporation in the matter, or whose function it was to report it to the proper authorities, or unless knowledge of the act would have been possessed by some such agent, had there not been neglect of duty on his part, the consequences of which are to be borne by the corporation, rather than by the party from whose performance it has been benefited. Consequently, in order to constitute an implied ratification on the part of the corporation, arising from acquiescence, or from accepting the benefit of an act, it may not be necessary that the circumstances should be such as to warrant a jury in finding actual knowledge on the part of the corporation, or corporate agents competent to ratify; for the knowledge of one agent may, at least in the absence of proof to the contrary, be imputed to other agents, who have authority to do the acts in question, or even to the corporation." Taylor on Private Corp. (2d Ed.) §§ 214, 215.

It is urged that the facts in this case show that the corporation received the benefit of the money paid by its president, Smith, in discounting the notes of the packing company, and that as the secretary King joined with Smith in indorsing the name of the pickle company upon the notes, and as it was King's duty to inform the corporation of these facts, the negligence upon his part in not doing so is not negligence of which the corporation can avail itself while retaining the proceeds of the notes, and that, therefore, by conclusive implication the corporation had knowledge of the transaction and thus ratified it. This whole structure, it is to be observed, is built upon the somewhat flimsy foundation of a mere disputable presumption—a presumption which, while in strictness evidence, has been characterized as evidence "the weakest and least satisfactory." The case here presented is not at all parallel with those where the directors themselves are in fault for not knowing the things with knowledge of which they are sought to be charged. Here it affirmatively appears that knowledge of these transactions was concealed from the board of directors, not by the secretary, King, alone, but by the president of the company, who was drawing a salary for his services, who attended the directors' meetings, and who never—such is the record—informed his board as to any of these matters, but sat silent when his directors asked as to the payment of the notes of the California Packing Company, and when the secretary answered with the false statement that they were being promptly met. It appears, therefore, that the directors did what in reason they might have been expected to do—made inquiries in open board, and were deceived, not alone by the answers of the secretary, but by the silence of their president, whose duty, equally with the secretary, it was to tell them the truth. So telling them, the directors would have known that their corporation stood liable upon the paper of the California Packing Company as indorser for thousands of dollars which they knew not of; that their liabilities were to this extent increased; and they would have been in a position to take steps to reduce that liability and enforce the obligations of the California Packing Company. By the method which Smith adopted, however, they were kept in ignorance of these things, their corporate name was affixed to renewal notes, thus continuing their liability, and not that alone, but continuing a corporate liability which they did not know existed. Under these circumstances it cannot be successfully argued that the president of the corporation is entitled to invoke the doctrine of implied ratification, and thus reap the fruits of his own concealment.

For the foregoing reasons, in addition to those given in the opinion above cited, which opinion is hereby adopted and affirmed, the judgment appealed from is reversed, and the cause remanded.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.; VAN DYKE, J.

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145 Cal. 165

DUNHAM v. ANGUS et al. (S. F. 3,044.)*

(Supreme Court of California. Oct. 25, 1904.)

MUNICIPAL CORPORATIONS—SALES OF PROPERTY—RIGHTS OF EXECUTION PURCHASER—APPEAL—HARMLESS ERROR.

1. In 1850 the city of San Francisco passed an ordinance conveying certain property to the commissioners of the sinking fund, who were given power to sell, etc. St. 1851, p. 387, c. 88, created the commissioners of the funded debt, and directed the commissioners of the sinking fund to convey the property held by them to the commissioners of the funded debt, which was done. Prior to the passage of this act, a creditor of the city had recovered a judgment against it, and the property in question, which was held by the city as a private proprietor, was sold under execution. *Held*, that the ordinance transferring the property to the commissioners of the sinking fund was invalid for want of authority in the common council, so that a deed from such commissioners to the commissioners of the funded debt was inoperative, but the title passed under the execution sale, and could not be affected by the act of 1851.

2. The admission in evidence of the record of a case which is controlling on the case at bar as an authority, although not as an estoppel, is harmless.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by John H. Dunham against James S. Angus and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

E. G. Knapp, for appellant. Wm. M. Pierson, Geo. E. Crothers, Garret W. McEnerney, and W. S. Goodfellow, for respondents.

McFARLAND, J. Plaintiff appeals from a judgment in favor of defendants, and from an order denying his motion for a new trial.

The action is to quiet title to a lot of land which is a part of what is known as the "beach and water lots" of the city of San Francisco. The appellant claims title through a sale of the property in contest by the commissioners of the funded debt created by an act of the Legislature approved May 1, 1851. St. 1851, p. 387, c. 88. Respondents claim under what is known as the "Peter Smith title," which, as against the alleged title of the said commissioners of the funded debt, was a prominent subject of litigation during the first years of the history of California as an American state. The various statutes, ordinances, and other facts touching the controversy are fully set forth in the report of the case of Smith v. Morse, 2 Cal. 524, and need not be here stated in detail. For the purpose of this decision, the following brief statement is sufficient: In 1850 the city of San Francisco passed an ordinance under which certain of its property, including the lot involved in this action, was conveyed to certain trustees, styled the "Commissioners of the Sinking Fund," who were given power to sell, etc. On May 1, 1851, the act of the Legislature above referred to, creating the commissioners of the funded debt, was passed, and by that act the said commissioners of the sinking fund were directed to convey all of the property held by them under said ordinance to the commissioners of the funded debt, which was done. The commissioners of the funded debt were authorized to sell the property, and they did, on September 20, 1852, sell and convey the lot here in question to Joseph Hetherington, from whom the appellant has a clear deraignment of title. But in 1850 and 1851 Peter Smith was a creditor of the city in large amounts, and on January 14, 1851—which was before the passage of said act of May 1, 1851—he commenced an action on a part of the indebtedness of the city to him, and on September 6, 1851, he recovered a judgment against the city for the sum of about $14,000, and execution was regularly issued on said judgment, under which the property here in contest was sold on January 30, 1852, to David S. Douglass, who afterwards received the sheriff's deed to the same; and whatever interest in the property Douglass thus obtained passed by mesne conveyances, and vested in the defendants in this present action. Peter Smith had also, in 1851, commenced two other actions for other parts of this indebtedness, in which judgments had been rendered prior to May 1, 1851. The question in the case at bar, therefore, is which is the better title—the one claimed by appellant under the sale from the commissioners of the funded debt, or the other claimed by respondents under the execution sale on the Peter Smith judgment of September 6, 1851? And we think that this question was definitely settled against the contentions of the appellant by the case of Smith v. Morse, above noticed—2 Cal. 524.

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*Rehearing denied November 23, 1904.

Smith v. Morse was an action brought by Peter Smith against Morse and others, constituting the said commissioners of the funded debt, in which plaintiff sought to have it adjudged that, as against him as a creditor of the city, the commissioners had no title to the water property which had been levied upon and sold under his judgments, and to enjoin them from asserting any such title and thus injuriously affecting the value of his interest therein. The judgment was in favor of Smith in the trial court, and upon appeal it was affirmed. It is contended by appellant in the case at bar that the case of Smith v. Morse reached and determined only the rights of Smith under his first two judgments, which had been rendered prior to May 1, 1851, when the act creating the commissioners of the funded debt was passed. But in his amended and supplementary complaint he expressly set up his rights under the third judgment, of September 6, 1851, and asked a similar remedy as to those rights. The court clearly dealt with all three of the judgments, and, indeed, Smith's rights under the last judgment seemed to be those principally involved, for it seems from the statement of the case in the record that the two prior judgments had been satisfied, and the trial court stated in its finding that "a part of the judgment aforesaid rendered on the 6th day of September, 1851, remains unsatisfied." The preliminary injunction restraining the commissioners from selling, etc., was by the final judgment made perpetual. The judgment was affirmed on appeal, and in an elaborate opinion the Appellate Court held, first, that the ordinance above mentioned, by which it was attempted to transfer the property to the commissioners of the sinking fund, was invalid for want of authority in the common council to do so, and consequently the deed from the said commissioners to the commissioners of the funded debt conveyed nothing. But as it was contended that the act of May 1, 1851, itself, had the effect of a conveyance to the commissioners of the funded debt, the court took up that branch of the subject, and held that, assuming such to be the effect of that act, the act, as against Smith, was unconstitutional and void, because impairing the obligation of a contract. It was declared that the city held that water lot property as a private proprietor, and it was therefore liable for the city's debt, and that "such property as was subject to execution at the time the debt was contracted must remain subject to execution until the debt is paid." The facts as stipulated in the case at bar seem to bring it entirely within the decision in Smith v. Morse, and as, during the long time since the rendition of that decision, many titles have no doubt been taken upon the faith of it, we have no disposition to now question it. The respondents, over the objection of appellant, were allowed to introduce the record in the case of Smith v. Morse as it appears in the report of the case in 2 Cal., and appellant contends that this ruling of the court was erroneous; but that ruling was immaterial, for the case is controlling as an authority, even if appellant is not technically estopped by it.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

145 Cal. 217

HOME SECURITY BLDG. & LOAN ASS'N OF ALAMEDA COUNTY v. WESTERN LAND & TITLE CO. et al. (S. F. 2,029.)

(Supreme Court of California. Nov. 2, 1904.)

PARTITION—DESCRIPTION OF LAND.

1. The description in the complaint of land sought to be partitioned as the "westerly one-half of" a specified lot and block, according to a certain recorded plat, giving the township, county, and state, is sufficient.

Commissioners' Decision. Department 2. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action for partition by the Home Security Building & Loan Association of Alameda County, a corporation, against the Western Land & Title Company, B. Kelsey, and others. Plaintiff had judgment, and defendant Kelsey appeals. Affirmed.

J. H. Smith, for appellant. J. B. Richardson, for respondent.

COOPER, C. Defendants filed a demurrer to the complaint, which was for partition, upon the ground, among others, that it "is uncertain, in this: that it cannot be determined from the complaint where the property sought to be described in the complaint is situate." The demurrer was overruled, and an interlocutory judgment entered. Defendant Kelsey prosecutes this appeal from the judgment, and claims that the court erred in overruling the demurrer; his sole point being that the complaint does not contain a sufficient description of the property sought to be partitioned.

The description is as follows: "Situate in Oakland Township, County of Alameda, State of California, and described as follows, to wit: The westerly one-half of lot nine (9) in Block D as the same is delineated and so designated on a certain plat entitled 'Map of Klinkerville Tract,' filed March 21, 1899, in the office of the County Recorder of Alameda County, California." The description is sufficient under the rule in all jurisdictions, and long settled in this state.

The judgment should be affirmed, with $100 damages against appellant for a frivolous appeal.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed, with $100 damages against appellant for a frivolous appeal: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

145 Cal. 320

HUSTON v. ANDERSON. (Sac. 1,206.)

(Supreme Court of California. May 12, 1904.)

ELECTIONS—VALIDITY OF BALLOTS—IDENTIFYING MARK—QUALIFICATION OF ELECTORS—RESIDENCE—REGISTRATION—DE FACTO OFFICER—CUSTODY OF BALLOTS—PREPARATION OF BALLOTS.

1. On an election contest, an objection to certain ballots on the ground that the returns were not properly and safely kept by their legal custodian, the county clerk, was of no avail, where it appeared that, while the clerk might have kept the ballots in a more secure manner, the envelopes containing the ballots were in the same condition as when received by the clerk, and unopened, and there was no evidence tending to show that they were disturbed or tampered with.

2. Under Pol. Code, § 1205, which provides that at elections a cross should be stamped after the name of a candidate on the ballot, and against the answer that the voter desired to give as to a constitutional amendment, the fact that voters had stamped a cross on the parallelogram containing the candidate's name, after the name, but not in the square, and had stamped a cross under or on the word "Yes" or "No," in voting on constitutional amendments, and not in the square, did not render the ballots illegal.

3. On an election contest, the finding of the trial court as to the intention of a party relative to the place of his residence will not be disturbed on appeal unless it appears that there is no evidence whatever to support the finding.

4. After certain voters had registered, it was ascertained that the affidavits of registration contained incorrect designations of their voting precincts, and the county clerk corrected them by inserting the proper precinct names. All

the voters in fact actually resided, when they registered, in the precincts represented by the correction. *Held*, that the correction did not affect the validity of the registration.

5. Where, on an election contest, it appeared that the formal affidavit for registration signed by an elector was in the precinct register, but there was no jurat of the county clerk showing that he had been sworn, but it appeared that he went to the clerk's office, and that the clerk prepared his affidavit, and that he understood he was making an affidavit, and the clerk testified that it was usual to swear the voters when they were registered, it being the duty of the clerk to administer such an oath, it was proper to presume that the clerk discharged his duty and administered the necessary oath.

On Rehearing.

6. Pol. Code, § 1083, as amended in 1899, provides that only those who have "conformed to the law governing the registration of voters are qualified electors"; but the section, as it originally stood, made those qualified whose names were "enrolled on the great register." By the act amending section 1083, and providing for the use of affidavits as a register in the various precincts (St. 1899, p. 59, c. 53), sections 1094, 1095, 1096, 1097, 1103, and 1105 were also amended (pages 60–62) so as to require the one charged with the registration of voters to keep in his office a register giving the names of qualified electors, the entries in which register shall be made on affidavit showing the facts required to be stated in the entry; and such person is required to preserve all affidavits used before him or his deputies in procuring registration, and to arrange the same in a book, which shall be delivered to the boards of election, and "constitute the register to be used at such election." During the absence of a deputy registration clerk, electors visited his store to be registered, and their registrations were made out by a person employed in the store, who was not a deputy, but what purported to be the affidavits of such persons were contained in the book of affidavits delivered to the board of election. *Held*, that such persons were qualified electors; the affidavits merely constituting an official list of voters who have been enrolled by the registration officer on the great register, and the phrase in section 1083, "conformed to the law governing registration," merely meaning those who have caused themselves to be enrolled on the authentic list.

7. Where, on an election contest, it appeared from the affidavits of certain voters that each of them had sworn to a statement that he could read the Constitution in English, write his name, and mark his ballot, and, apart from the undisputed fact that they were not able to mark their ballot, and that some of the affidavits were signed by mark, and some by another person at the request of the deponent, there was nothing to indicate that the registration officer did not fully question them or correctly enter their statements, such facts were not sufficient to support a conclusion that the registration officer did not fully perform his duty.

8. Pol. Code, § 1208, provides that when it appears from the register that any elector has declared under oath, when he registered, that he cannot read, or that by reason of physical disability he is unable to mark his ballot, he shall, on request, receive assistance in preparing his ballot; and section 1096, subd. 11, provides that the entry on the great register must show the fact whether or not the elector desiring to be registered is able to read the Constitution and to write his name, and whether or not the elector has any physical disability by reason of which he cannot mark his ballot, and, if he cannot mark his ballot by reason of physical disability, the nature of the disability must be entered. *Held*, that the question whether an elector cannot read, or cannot mark his ballot because of physical disability, is to be ascertained from the entry on the great register.

9. Under Pol. Code, § 1096, subd. 11, and section 1208, and section 1097, providing that the affidavit for registration of the voter must show all the facts required to be stated in the entry on the register, except the date of entry, the fact that the register showed that an elector had declared on oath that he could not write his name did not entitle him to assistance.

10. Where the blank form of affidavit used by a voter was so filled in as to show that he declared under oath at the time of registration, as required by Pol. Code, § 1208, that he could not read the Constitution in English, he was entitled to assistance, irrespective of whether he also stated he could not mark his ballot.

11. Where election officers assisted the voter in preparing his ballot, the fact that they did not take the oath prescribed, to the effect that they would not give any information regarding the manner in which it was marked, until after they had assisted him, did not invalidate his vote.

12. Pol. Code, § 52, subd. 3, provides that every person has, in law, a residence, which cannot be lost until another is gained. By section 1239, subd. 4, it is declared that a person must not be considered to have gained a residence in any precinct into which he comes for temporary purposes merely; and subdivision 9 provides that the mere intention to acquire a new residence, without the fact of removal, avails nothing, "neither does the fact of removal without the intention." *Held*, that where a voter had no intention of making the precinct into which he moved his home, but went there for temporary purposes, he did not lose his legal residence in the precinct from which he moved, although he did not have a place in such precinct that he could call his home.

13. Where there was a plain and distinct impression of a cross in the blank space on a ballot under the column of Socialist candidates, the ballot was invalid.

14. Where a ballot bore on the back thereof the initials "W. H." and "R. L. O.," in different handwriting, in the upper left-hand corner, and on an election contest there was no pretense that the initials were not those of some of the election officers, placed on the ballot by them at some time during the canvass by the board of election, a finding that they were not placed thereon by the voter was warranted.

McFarland, Henshaw, and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Yolo County; J. W. Hughes, Judge.

Election contest by H. L. Huston against W. A. Anderson for the office of district attorney of Yolo county. From a judgment in favor of plaintiff, defendant appeals. Affirmed on rehearing.

Clark & Clark, G. Clark, and E. R. Bush, for appellant. A. C. Huston, C. W. Thomas, and B. A. Martin (William S. Wall, of counsel), for respondent.

LORIGAN, J. This is an election contest, the parties thereto having been rival candidates for the office of district attorney of Yolo county at the last general election. The defendant, upon the official canvass, was declared elected, and in due time plaintiff inaugurated this contest, based upon various grounds, which, upon the trial and upon this appeal, narrowed down to three points—the admission of the ballots in evidence, and rulings upon alleged illegal ballots and as to illegal voters. Upon the face of the returns, defendant had received 1,575 and the plaintiff 1,567 votes; the plurality of defendant being 8 votes. After counting the ballots in this contest, and rejecting the ballots of several illegal voters, the court below found that plaintiff had received 1,468 and defendant 1,457 votes, giving to plaintiff a plurality of 11 votes; hence this appeal. Disposing now of the questions as they are presented:

1. Appellant insists that the court erred in admitting the ballots in evidence. This applies to the returns of every precinct in the county; the claim being that these returns were not properly and safely kept by their legal custodian, the county clerk. It is unnecessary to comment at length on the evidence introduced upon this point. While it is true that the county clerk might have kept the ballots in a more secure manner than he did, yet it cannot be said that the evidence shows anything more than that fact, or that it raises any stronger inference than that, by reason of this lesser measure of security, the ballots might have been more easily tampered with than if greater precautions for their safety had been taken. It appears from the evidence that the envelopes containing the ballots were in the same condition as received by the clerk—intact and unopened—and there is no evidence even raising a suspicion that they were disturbed or tampered with. The lower court found that they were kept in substantial compliance with the law, and admitted them. As said in Tebbe v. Smith, 108 Cal. 107, 41 Pac. 455, 29 L. R. A. 673, 49 Am. St. Rep. 68: "So, too, when a substantial compliance with the provisions of the statute has been shown, the burden of proof shifts to the contestee of establishing that, notwithstanding this compliance, the ballots have in fact been tampered with, or that they have been exposed under such circumstances that a violation of them might have taken place. But this proof is not made by a naked showing that it was possible for one to have molested them. The law cannot guard against a mere possibility, and no judgment of any of its courts is ever rendered upon one. When all this has been said, it remains to be added that the question is one of fact to be determined in the first instance by the jury or trial judge; and, while the ballots should be admitted only after clear and satisfactory evidence of their integrity, yet, when they have been admitted, this court will not disturb the ruling, unless we, in turn, are as well satisfied that the evidence does not warrant it. In this case we do not think the ruling was erroneous." We think, too, that within this rule the evidence sufficiently warranted the court in admitting the vote of Woodland precinct, No. 1, specially objected to by defendant.

2. As to illegal ballots: Upon the contest the plaintiff objected to 495 ballots, and the defendant to 328, and the validity of the rulings of the court upon these objections is next presented for consideration. The original ballots (excepting some few instances where counsel apparently abandoned their objections and omitted them) by stipulation were transmitted to this court for examination under the objections. The number so transmitted exceeds 700, and the objections urged embrace, on one side or the other, every conceivable objection which could be raised. We have examined the ballots thoroughly, and considered the objections carefully, and, stating the result of such consideration generally, we find that the court erred in sustaining objections made by plaintiff to 19 ballots voted for defendant, Anderson, and in overruling 31 objections of plaintiff to ballots likewise voted for defendant; and it erred likewise in sustaining objections of defendant to 28 ballots cast for plaintiff, Huston, and in overruling 30 objections of defendant to ballots likewise voted for plaintiff. As a result of these errors in sustaining or overruling objections, the plaintiff loses 30 votes and gains 28; the defendant loses 31 votes and gains 19 votes; giving the plaintiff a gain upon this appeal of 10 votes, which, with the 11 majority found in his favor by the lower court, makes his present majority 21. It can be of no benefit to the legal profession to set forth the particular objections urged to the ballots on either side. They involve no novel questions, and, under the amendment to the election law by the last Legislature, may never arise again. It may be mentioned, however, that the court sustained objections upon both sides against counting ballots where the voter had stamped a cross on the parallelogram containing the candidate's name after the name, but not in the square, and had stamped a cross either under or on the word "Yes" or "No," in voting on constitutional amendments, and not in the square. As the law stood (Pol. Code, § 1205) when this election took place, the law did not require the cross to be stamped in the square, but only after the name of the candidate (Tebbe v. Smith, 108 Cal. 109, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68), and, as to constitutional amendments, against the answer he desired to give. So in neither case was the stamp a distinguishing mark. The ballots were therefore valid, and should have been counted. While we do not consider that any practical purpose can be subserved by calling further particular attention to any of the objections urged, yet, for the benefit of counsel in the case, we will mention those objections, by number, which the court should have sustained or overruled on account of the sufficiency or insufficiency of the objections. The court should have sustained plaintiff's objections Nos. 3, 59, 64, 74, 75, 77, 104, 117, 120, 121, 123, 124, 157, 158, 167, 176, 184, 185, 194, 215, 225, 237, 241, 251, 252, 258, 275, 278, 281, 290. It should have also sustained those of defendant numbered 33, 63, 125, 142, 144,

153, 160, 172, 207, 214, 216, 235, 247, 259, 271, 282, 287, 293, 298, 312, 345, 360, 372, 409, 415, 434, 453, 468, 471, 475. The following objections of plaintiff should have been overruled: Nos. 21, 92, 115, 119, 160, 161, 179, 198, 203, 207, 208, 214, 234, 248, 249, 268, 269, 272, 289. Likewise those of defendant numbered 10, 19, 20, 29, 50, 80, 89, 92, 159, 163, 165, 174, 185, 186, 213, 266, 290, 291, 303, 316, 317, 321, 368, 381, 435, 447, 467, 485. The ballot numbered "Deft. 6," which is sent up here to point defendant's objection of the same number, is obviously not the ballot to which he objected, or which should have been marked as his exhibit. It contains a vote in his own favor, and has nothing upon it rendering it in the slightest degree open to the objection he made to it, or to any other objection. It is so apparent that the wrong exhibit was marked and sent up that we pay no attention to the objection. Defendant's objection No. 399, made in the lower court, was against a ballot containing a vote in his own favor. It was overruled below, and he has urged on this appeal that the ruling was erroneous. The original objection was doubtless through an oversight of counsel; but as he has not abandoned this assignment of error, and presents it on this appeal, and as it is apparent that the ballot is open to the objection he urged against it—a double cross—we are compelled to pass on it, and find that his objection should have been sustained, and the ballot rejected, though the effect is to lose him a vote.

Although upon this appeal the majority of the plaintiff has been increased, it cannot avail him for the purpose of an affirmance of the judgment, because, in our opinion, the court committed errors which, if not committed, might have had the effect of overcoming this majority in favor of defendant, and for these errors a new trial will have to be ordered. These errors are as follows, and were committed by the court in ruling as to illegal voters:

3. In that regard it is insisted by appellant that the court erred in refusing to permit him to show, by an inquiry of them, how 20 certain persons who had voted at the election cast their votes for the office of district attorney. All these persons had on election day been, at their request, assisted in marking their ballots by members of the election board at various precincts, and none of them had made oath on registering that he was unable to read or was under any physical disability. On the contrary, in addition to the absence of any statement of the existence of physical disability, it appeared from their affidavits of registration that they could all read and mark their ballots, except a voter—Pulze—who in his affidavit swore that he could not read the Constitution in the English language, but could mark his ballot. The law provides (Pol. Code, § 1208) the conditions under which voters who are unable to read, or are suffering from physical disability, may have assistance in marking their ballots. It declares that "when it appears from the register that any elector has declared under oath, when he registered, that he cannot read, or that by reason of physical disability he is unable to mark his ballot, he shall, upon request, receive the assistance of two officers of election of different political parties, in the marking thereof, to be chosen as follows," etc. It will be observed from the reading of this section that it is only when it appears "from the register that the elector declared under oath when he registered that he could not read, or was physically disabled from marking his ballot," that he shall receive assistance. The evidence of those matters which shall entitle a voter to assistance are required to appear in his affidavit of registration (Pol. Code, § 1096), and these affidavits constitute the precinct register to be used by the election board upon election day. It will be found that the test provided for in section 1208 is the only one contained in the election law for determining whether a voter shall be given assistance or not, and it provides the only condition upon which assistance can be extended. No other test is provided for, and no other test is permissible. When the law has designated a condition under which a right may be exercised, it is necessary to a valid exercise of that right that such condition should exist. This conclusion is strengthened when we take into consideration previous legislation upon this subject. When section 1208 of the Political Code was first adopted, it provided that "any elector who declares under oath to the presiding election officer that he cannot read, and that by reason thereof, or by reason of physical disability, he is unable to mark his ballot, shall, upon request, receive the assistance of any one of the election officers he may choose in the marking thereof," etc. St. 1891, p. 175, c. 130. This section was amended in 1893 (St. 1893, p. 307, c. 220), but was not disturbed as to the oral oath. In 1895 (St. 1895, p. 306, c. 216) the section was amended into the present form, which abolished the right theretofore accorded to the voter of making, when he presented himself to vote, an oral oath of his inability to read, or of physical disability which prevented his marking his ballot, and requiring these facts warranting his assistance to appear in his affidavit of registration, which would be in the precinct register, in the hands of the election board, and an examination of which by them would conclusively determine his right, under the law, to assistance when he applied for it. If an examination of the voter's affidavit in the precinct register is not the exclusive method of ascertaining his right to assistance, then the only other way he would be entitled to it would be by a simple request for it, or upon an oral oath establishing his necessity for it, made when he appeared to vote.

Now, it cannot be claimed that either of these methods is provided for in the election law. No one would seriously contend that he would be entitled to it on a simple request, and, if his oral oath was to be accepted (which was not even administered to any of these persons whose votes are here in question), why did the Legislature adopt the idle ceremony of repealing the only provision of law which ever accorded it to him, and substituting his affidavit of registration as sole evidence of it? We are satisfied from the language of the section, and in view of the previous legislation, that the Legislature intended that the test of a voter's right to assistance should appear on, and be determined by, an examination of the register by the election officers (the affidavits of registration which constitute the precinct register), and that, by amending the law which previously extended the right to make oral oath so as to require the necessary facts to appear in the affidavit of registration, this latter method was intended by the Legislature to be exclusive, and that the provision is mandatory. We are mindful that cases may arise where the voter, between the day of final registration and the day of election, may become so physically incapacitated as to be unable to mark his ballot; and, as such fact could not appear on the register, under the view we hold of the section he could not be permitted to vote. What the rights of a voter under such circumstances would be—whether (the law having failed to make provision for such a contingency, and only contemplating that the disabilities existing at the time of registration should appear in the affidavit of registration) the voter would be entitled to assistance upon taking an oath before the board of election—is a matter not here involved, because it appears from the evidence that all the persons whose votes the appellant challenges as illegal suffered from the disabilities, which they claimed on the day of election entitled them to assistance, when they made their affidavits of registration. We think these votes were illegal, and that the court erred in refusing to allow appellant to inquire how the parties depositing them voted. Upon the general proposition of the illegality of these votes, attention is directed to the cases of Tebbe v. Smith, 108 Cal. 113, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68; Patterson v. Hanley, 136 Cal. 275, 68 Pac. 821; and Summerson v. Schilling (Md.) 51 Atl. 613.

Evidence was taken upon the trial, over appellant's objection, which showed that these persons whose votes were challenged as illegal were, in fact, on the date of their registration, either unable to read, or, by reason of physical disability, unable to mark their ballots. As the law, however, does not leave the question of the right of the voter to assistance to be determined by the court when the legality of such vote is challenged upon a contest, but requires the voter's right to assistance to appear from his affidavit as set forth in the precinct register, the court erred in refusing to permit appellant to question these parties as to how they voted. In order to avoid any question upon a new trial as to the identity of these illegal voters, we give their names as appearing from the record, omitting their initials. They are Austin, Nickell, Alexander, Jones, Wilger, Pulze, Washabaugh, Hill, Gibson, Brannigan, Olsen, Harrington, Valine, Rose, Peters, Sacramento, La Montagne, Angelo, Thomas Adams, and Hiller.

As to additional illegal voters, the court also erred in refusing to permit the defendant to show how they had voted for district attorney. The evidence concerning these voters was that the county clerk had appointed one F. B. Edson, who was engaged in a mercantile business with his brother, T. W. Edson, at Knight's Landing, as a deputy clerk to attend to the registration of voters in the election precinct of Knight's Landing. During the absence of F. B. Edson, the deputy registration clerk, in the mountains, certain electors came to the store to be registered for the purpose of a party primary. Their registrations were made out by T. W. Edson, who signed the name of his brother thereto as deputy clerk; writing under that signature, as evidence of his action, "per T. W. E." T. W. Edson was not a deputy clerk, and no other registration of these persons was had. These parties were never legally registered, and their votes were illegal. It is contended by plaintiff that their registrations were taken before a de facto officer and were valid. Conceding that, if so taken before a de facto officer, they would be valid, still T. W. Edson was not a de facto officer. A de facto officer is one who, though not authorized by law to act in the official capacity he assumes, yet claims to be so authorized, and in fact does act as an officer. T. W. Edson claimed no right to act as deputy clerk, nor did he pretend to be such; neither was he reputed to be a deputy clerk. In fact, he did not, in these registrations, assume to act as a deputy, but simply as a substitute for his brother, whose name he signed as the deputy, "per T. W. E.," as his representative. Any individual in possession of blank affidavits for registration could have prepared them in the same manner, and the same claim could as well be insisted on to sustain their validity. As section 1083 of the Political Code stood prior to its amendment in 1899, the law required, in order to entitle an elector to vote, only that his "name shall be enrolled upon the great register of the county." The law then, as now, required an affidavit of registration to be made by the voter; but, prior to the amendment, facts contained in the affidavit were enrolled upon the great register, and the entry of the elector's name in the great register was the evidence of his right to vote.

The affidavit was no part of the register. The amendment of this section in 1899 (St. 1899, p. 60, c. 53) changed this. It is no longer provided that the test of the right of an elector to vote shall be determined by his enrollment on the great register, but an entirely different test is provided, which now is that he "shall have conformed to the law governing the registration of voters." And as the law now requires that the affidavits of registration themselves shall constitute the precinct register upon which an elector is entitled to vote, it is essential, in order to so entitle him, that there should be a strict compliance with the law, to the extent, at least, that his affidavit for registration should be made before either a de jure or de facto officer. These illegal voters were Reddington, Faulk, Roberts, Jenkins, and William Adams.

It is insisted by defendant that certain other persons were illegal voters by reason of nonresidence in the precincts in which they voted, and that the court erred in not sustaining his inquiry as to how they voted. Residence is a question of fact, in which the intention of the party enters as an important element; and, when the court has found upon the matter, such finding will not be disturbed, unless it appears that there is an absence of evidence to support it. We find no such condition in the record. There was evidence, including the declared intention of all the parties upon the subject, from which the court was warranted in finding that they all resided in the precincts where they voted, and this finding concludes us from reviewing the matter. This applies to the finding by the court upon all claims of residence or nonresidence in precincts which are urged by either party upon this appeal.

There is nothing in defendant's contention that certain electors were illegally registered. This claim is based on the fact that, after certain voters had registered, it was ascertained that the affidavits of registration contained incorrect designations of their voting precincts, and at their request, or at the suggestion of the outside deputy registration clerks, who had registered them, but were in doubt at the time as to the lines of the various precincts, and in some instances from his own knowledge that the names of the precincts inserted were not correct, the county clerk corrected them by inserting the proper precinct names. All these voters in fact actually resided, when they registered, in the precincts represented by the correction. That the wrong precincts were originally designated was clearly a mistake on the part of the deputy registration officers, or of the voters themselves; and the correction was simply to conform to the fact, and made long before the time for registration expired. Under these circumstances the corrections were properly made, and did not affect the validity of the registration. Nor is there any merit in defendant's claim that one Marston was an illegal voter. His formal affidavit for registration signed by him was in the precinct register, but there was no jurat of the county clerk thereto showing that he had in fact been sworn. The evidence shows that Marston went to the county clerk's office to be registered, and that the county clerk himself prepared his affidavit; and, while Marston does not remember whether he took an oath before making it, or not, he understood that he was making an affidavit. The clerk did not remember whether the oath was administered, or not, but testified that it was usual for himself and deputies to swear the voters when they registered them. As it is made the duty of the clerk and deputies to administer the oath to parties applying for registration, and as the affidavit was inserted by the clerk in the precinct register as that of a person entitled to vote, the court was justified in presuming that the clerk discharged his duty and administered the necessary oath, but neglected certifying the fact. An elector is not required to see that the county clerk certifies his registration affidavit, and, when he has done all that the law requires of him to effect registration, he cannot be deprived of his vote by the failure of the clerk to perform his duty.

We have now disposed of all the points raised on this appeal by either party, and, from what we have said, the judgment of the lower court must be reversed, and a new trial granted. It only remains to determine to what extent the lower court should proceed upon such new trial. As all the exceptions of both parties to the action of the lower court in the reception or rejection of ballots are presented in the record, and this court has passed upon them, and determined upon review that, from the legal ballots cast, the plaintiff has a majority of 21 votes, this determination is final; and upon a new trial the lower court and the parties shall be confined to ascertaining how the persons whom we have determined were illegal voters voted for the office of district attorney, and, upon a basis of 21 majority in favor of plaintiff, ascertained by us from the legal votes cast, determine from the evidence of such illegal voters whether this majority is lessened, equaled, or overcome, and render a judgment accordingly.

The judgment is reversed and a new trial ordered, limited to the extent that we have above indicated.

We concur: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.

ANGELLOTTI, J. (dissenting). I am unable to concur in the judgment of reversal. I concur in the opinion, except as to the portions thereof relating to assisted voters, and to the voters whose purported affidavits were taken by T. W. Edson. The first class numbered 20, and the second class 5. I am not prepared to say that the 20 assisted voters were not illegal voters, but, in the view I take of the case, it is unnecessary to determine whether or not they were. By the recount, plaintiff has 21 majority. Assuming all of the assisted voters to have been illegal voters, and that they all voted for him, he would still have a majority of 1 after the deduction of their votes. To reverse the judgment, it is therefore essential to hold, as does the majority opinion, that the 5 voters whose so-called affidavits were taken by T. W. Edson were also illegal voters. I cannot concur in this conclusion. The evidence showed that each of these voters had resided in the precinct for over 20 years, and had voted in that precinct before. There is no claim that they did not possess all of the qualifications of electors as prescribed by the Constitution. Section 1, art. 2. They were electors of the precinct. Bergevin v. Curtz, 127 Cal. 86, 59 Pac. 312. The objection is not that these voters were not electors of the precinct in which they voted, but that they had not "conformed to the law governing the registration of voters," which is by section 1083 of the Political Code, as amended in 1899, made a condition precedent to the right of an elector to exercise the privilege of voting. It is well established that the Legislature may make reasonable regulations for the registration of voters, for the purpose of providing "a means whereby the elector who is entitled to vote may be known by having his name enrolled upon an authentic list," and that it may require electors to comply therewith as a condition precedent to voting. The validity of the provision of section 1083 of the Political Code relied on by defendant is not, therefore, to be doubted; but that provision means no more than that the elector shall have, in good faith, procured his registration as an elector, so that his name appears upon the authentic list provided by law. This had been done in the case at bar. It is not claimed that the names of these five voters were not entered upon the great register of the county kept in the office of the county clerk (sections 1094–1096, Pol. Code), and what purported to be the affidavits used for the purpose of procuring their registration (section 1103, Pol. Code) were contained in the book of affidavits delivered by the county clerk to the board of election of the precinct, to be used as the register at such election (section 1116, Pol. Code). The purported affidavits signed by the voters were on their face without fault, the "per T. W. E." referred to in the majority opinion having been stricken out in the office of the county clerk; and they had been received by that officer as sufficient affidavits for the purpose of registration. The real objection is that the statements of the voters, forwarded by their procurance to the office of the clerk for the purpose of obtaining registration, had not, in fact, been sworn to by them before the county clerk or any of his deputies. The provision that no name shall be entered upon the register of the clerk, except upon an affidavit made before the clerk or one of his deputies, is directed entirely to the county clerk (section 1097, Pol. Code; State v. Lattimore, 120 N. C. 426, 26 S. E. 638); and, while the clerk should not register an applicant without such an affidavit being made, and while, perhaps, a registration made without the prerequisite of a sufficient affidavit might be canceled at the suit of any person, as having been illegally made (section 1109, Pol. Code), the registration is not void. In Davis v. O'Berry, 93 Md. 708, 50 Atl. 273, it was held, in a proceeding to have a name erased from the registration book, that a complete answer to the showing that the voter had not been sworn as required by law would be made by a showing that the voter in fact possessed all of the qualifications which would entitle him to be registered. In State v. Lattimore, supra, it was held that, where an elector's name appeared on the registration book, he had a right to vote, whether he had been sworn prior to registration, as required by law, or not. In Tullos v. Lane, 45 La. Ann. 333, 12 South. 508, it was held that where the registration had been carried on, under verbal authority from the registrar, by persons not having legal authority so to do, voters actually entitled to vote could not, after an election, be deprived of their constitutional right to have participated therein, by the simple fact, of itself, that the person who registered them was not legally authorized so to do. See, also, McCrary on Elections (4th Ed.) § 140. No case has been cited, and I have been unable to find any, where a person who was in fact entitled to vote if registered, and whose name was enrolled on the register, and who was allowed to vote, has been held, after the election, to have been an illegal voter, simply for the reason that there was some irregularity or informality in the method by which he was registered. The majority opinion appears to concede that, under the law as it stood prior to the amendments of 1899, a vote cast by such a person would have been a legal vote. I cannot see that there has been any material change made in this regard by such amendments.

We concur: VAN DYKE, J.; SHAW, J.

On Rehearing.

(Nov. 12, 1904.)

ANGELLOTTI, J. This is an election contest, the office in question being that of district attorney of Yolo county. It has once been decided by this court in bank; but upon petition of both parties the decision was vacated, and a rehearing granted, for the purpose of reconsidering some of the questions involved. Most of the material facts are stated in the opinions—majority and dissenting—heretofore filed.

By the former decision it was held that upon the face of the legal ballots the respondent had a majority of 21 votes, but that the trial court had erred in its conclusion that 20 electors who had voted at the election, but who had the assistance of election officers in the marking of their ballots, although it did not appear from the register that they could not read, or by reason of physical disqualification could not mark their ballots, were legal voters. It was also held that there was a similar error in holding that five electors of Knight's Landing precinct, who had not made an affidavit for registration before a proper registration officer, were legal voters. The judgment was therefore reversed, and the cause remanded for a new trial; such new trial to be confined to the ascertainment of the fact as to how the 25 so-called illegal voters voted on the office of district attorney; and the trial court was directed, "upon a basis of twenty-one majority in favor of plaintiff, ascertained by us from the legal votes cast, to determine from the evidence of such illegal voters whether this majority is lessened, equaled, or overcome, and render a judgment accordingly."

1. Upon a further consideration of the question as to the legality of the five Knight's Landing voters, we are satisfied that they should be held to be legal voters. Our views upon the law applicable to the facts concerning these voters, as the same are set forth in the opinions in this case heretofore filed, are stated in the dissenting opinion filed on the former decision. In addition to the authorities therein cited in support of the proposition that where a person was in fact entitled to vote if registered, and he did in good faith attempt to comply with the law in regard to registration, and his name did in fact appear upon the register furnished by the proper officer to the election officers, and he was allowed to vote, he will not, after the election, be held to have been an illegal voter, simply for the reason that there was some irregularity or informality in the method by which he was registered, the following cases are cited, viz.: State v. Sadler, 25 Nev. 131, 174, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128, 83 Am. St. Rep. 573; Stinson v. Sweeny (Nev.) 30 Pac. 999; and Lane v. Bailey (Mont.) 75 Pac. 192. See, also, note to Patton v. Watkins (Ala.) 31 South. 93, 90 Am. St. Rep. 58.

In addition to what was said in such dissenting opinion, it may be said that it is apparent from an examination of the Code provisions applicable thereto that no material change was made in this regard by the amendment of section 1083, Pol. Code, in 1899 (St. 1899, p. 59, c. 53). Much reliance is placed upon the fact that, under the section as it originally stood, persons otherwise qualified, whose names were "enrolled upon the great register," were declared to be qualified electors, while, under the section as amended in 1899, only those who have "conformed to the law governing the registration of voters" are declared to be such qualified electors. Taken in connection with the other provisions of the Code, these expressions mean practically the same thing, viz., that those who have caused themselves to be enrolled by the proper officer upon the authentic list of electors of the county are qualified electors thereof. We are speaking, of course, of those who were in fact otherwise entitled to vote.

Learned counsel for appellant are mistaken in their contention that there is no such thing as a great register, other than the affidavits made by the electors. By the act amending section 1083, Pol. Code, and providing for the use of affidavits as a register in the various precincts (St. 1899, p. 59, c. 53), sections relative to the keeping of the great register, the entry of names therein, etc. (sections 1094, 1095, 1096, 1097, 1103, 1105, Pol. Code), were also amended (St. 1899, pp. 60–62, c. 53). Under these sections, as so amended, it is the duty of the person charged with the registration of voters to keep in his office "a register in which shall be entered the names of the qualified electors" (section 1094), and therein to enter the names of the qualified electors (section 1095); the entry to show certain facts (section 1096); such entry to be made on affidavit showing the facts required to be stated in the entry (section 1097); and to leave in such register a blank for cancellation, which is to be made by "writing in such blank the word 'Canceled,' and a statement of the reasons therefor, and by writing in red ink across the face of the affidavit used in procuring such registration the same words as are used in making the cancellation in the great register." Section 1105. By the same act the officer is required to "preserve all affidavits used before himself or his deputies for the purpose of procuring registration" (section 1103) within 15 days after the close of registration, arrange such affidavits for each precinct, and bind them into a book (section 1113), which, together with printed indices, shall be delivered by him to the respective boards of election, and this book of affidavits "shall constitute the register to be used at such election" in the precinct. Sections 1115, 1116.

The plain object of this legislation as to the use of the affidavits at the precincts, instead of a printed copy of the great register, which was formerly used by the election officers, was simply to dispense with the necessity of printing copies of the great register. Under it, what purport to be the affidavits used "for the purpose of procuring registration" simply take the place of the printed copy of the great register which was formerly used. They no more constitute the register itself than did such printed copy, and, when the law says that a book of precinct affidavits "shall constitute the register to be used at such election," it simply means that such book shall constitute the list of voters authenticated by the proper officer as qualified electors of the precinct, which is to be used by the election board. It is an official list of the electors who have in fact been enrolled by the registration officer upon the great register, as electors of the precinct. In the official list in use at Knight's Landing precinct appeared the names and purported affidavits of these five electors. It thus appeared that they had in fact been enrolled by the registration officer in the great register of the county. Having been so enrolled by the registration officer, and being in fact electors of the precinct, entitled to vote if registered, they were qualified electors thereof.

2. In regard to the 20 assisted voters, we adhere to the general views expressed in the opinion heretofore filed. There is no question presented by the record in this case as to the effect of the failure of the registration officer to obtain the necessary information from the elector for the entry to be made on the affidavit and register, or, such information having been obtained, to properly record the same. If it appeared that it was the fault of the registration officer that the register failed to show that the electors who were in fact unable to mark their ballots had declared under oath, when registered, that they could not read, or that by reason of physical disability they were unable to mark their ballots, a different question would be presented, which question it is unnecessary for us to consider on this appeal.

It appeared generally from the affidavits that each of these voters had sworn to a statement that he could read the Constitution in the English language, write his name, and mark his ballot. Apart from the undisputed fact that they were not able to mark their ballots, and the fact that some of the affidavits were signed by mark, and some by another person at the request of the deponent, there is nothing to indicate that the registration officer did not fully question them as to these matters at the time of registration, or that he did not correctly enter their statements in regard thereto. These facts are not sufficient to support a conclusion that the registration officer did not fully perform his duty in this matter. To so hold would be to practically abolish the statute as to assisted voters.

By the petition for rehearing presented by respondent, it was specially urged that, as to the assisted voters Hiller, Washabaugh, Hill, Gibson, Alexander, Brannigan, and Pulze, the register sufficiently showed them entitled to assistance. The affidavit of Hiller stated that he could read, write, and mark his ballot. The additional statement contained therein to the effect that he was an invalid did not show him to be entitled to assistance.

The affidavits of Alexander, Washabaugh, Hill, Gibson, and Brannigan stated that they were not able to write their names, but that they could read the Constitution in the English language and mark their ballots. The fact that the registration officer did ascertain and enter the statement that these electors could not write supports the theory that he questioned them as to all the matters required by subdivision 11 of section 1096, Pol. Code, to be shown in the entry in the great register, and correctly set forth their answers thereon. The fact that the register showed that these electors had declared on oath that they could not write their names did not entitle them to assistance. Section 1208, Pol. Code, alone prescribes the conditions upon which such assistance may be given, viz.: "When it appears from the register that any elector has declared under oath, when he registered, that he cannot read, or that by reason of physical disability he is unable to mark his ballot." These facts are to be ascertained, as contended by plaintiff, from the entry made on the great register under section 1096, Pol. Code, which provides that such entry must show (11) "the fact whether or not the elector desiring to be registered is able to read the Constitution in the English language and to write his name, and whether or not the elector has any physical disability by reason of which he cannot mark his ballot; and if he cannot mark his ballot by reason of physical disability, then the nature of such disability must be entered." Under section 1097, Pol. Code, the affidavit for registration of the voter must show all the facts required to be stated in the entry on the register, except the date of entry. But there is nothing in these provisions to detract from the force of the provisions of section 1208, Pol. Code, even though they were enacted subsequent to the enactment of said section 1208, which is not the case. The provisions referred to above constituted portions of sections 1096 and 1097 at the time of the enactment of section 1208 in its present form, and the subsequent amendments of sections 1096 and 1097 made no change in such provisions.

Upon further consideration of the case of the voter Pulze, we are satisfied that the register showed a case in which, under the provisions of section 1208, Pol. Code, the voter was entitled to assistance. The blank form of affidavit used in the case of this voter was so filled in as to show that he declared under oath at the time of registration that he could not read the Constitution in the English language. This presented a case where, under the express provision of the statute, the voter was entitled, on demand. to assistance, regardless of whether or not he had also stated that he could mark his ballot. It further appeared that he was in fact not able to read or write. There was evidence sufficient to justify the court in finding that the election officers assisting him did take the oath prescribed by law, to the effect that they would not give any information regarding the manner in which his ballot was marked, and the mere fact that such oath was not taken until immediately after they assisted him should not be held to invalidate his vote. It follows that Pulze must be taken from the list of illegally assisted voters.

3. It was contended on rehearing by the appellant, and the point was made in his petition for a rehearing, that the voter Walter Grim was an illegal voter, for the reason that he was not on the day of the election a resident of the precinct wherein he voted. He was held by the trial court to have been a legal voter, and the appellant was therefore not allowed to show how he voted. We cannot disturb the finding of the lower court as to this voter. The evidence was sufficient to sustain a conclusion that he had no intention of making the precinct into which he moved his residence. He said that he went there to undertake temporary employment only, intended to return to Woodland when he completed such employment, and did not intend to give up Woodland as his home when he left. When residence is spoken of in connection with the right of a person to vote, "legal residence" is meant. Every person has, in law, a residence, and a residence cannot be lost until another is gained. Pol. Code, § 52, subd. 3. By subdivision 4 of section 1239, Id., it is declared that a person must not be considered to have gained a residence in any precinct into which he comes for temporary purposes merely, without the intention of making such precinct his home; and by subdivision 9 of the same section it is provided that "the mere intention to acquire a new residence, without the fact of removal, avails nothing, neither does the fact of removal, without the intention." If the voter had no intention of making the precinct into which he moved his home, but went there for temporary purposes only, he did not gain a residence there, and consequently did not lose his legal residence in the precinct from which he moved, notwithstanding that he may not have had any certain house, room, or place therein that he could call his home. That precinct continued to be his legal residence until he gained a legal residence elsewhere. The evidence was such that it might have sustained a contrary finding, but not such as to warrant us in disturbing the finding of the court below. See, in this connection, Smith v. Thomas, 121 Cal. 533, 54 Pac. 71; Stewart v. Kyser, 105 Cal. 459, 39 Pac. 19.

4. Upon a further examination of defendant's ballot No. 189—a vote for respondent counted over appellant's objection—we are satisfied that the objection made thereto by appellant was good, and that the vote should not have been counted. There was a plain and distinct impression of a cross in the blank space under the column of Socialist candidates. This, under the authorities, must be held to have invalidated the ballot. This error, however, is more than offset by a mistake in the former opinion in regard to defendant's ballot or objection 153. In such opinion it was stated that the court erred in overruling 30 objections of defendant to ballots voted for plaintiff, including No. 153. This ballot was therefore by this court deducted from plaintiff.

It appears from the record of the case that the trial court did in fact sustain defendant's objection to this ballot, and it therefore was not counted for plaintiff in the lower court. It further appears that the only objection to the ballot was one that, as will appear hereinafter, we do not consider to have been a valid objection, viz., that the voter, in expressing his choice as to constitutional amendments, had placed the cross on the word "Yes" or "No," instead of in the voting square to the right thereof. The objection should not, therefore, have been sustained by the trial court. Plaintiff should have been credited by us with another vote, instead of being deprived of a vote.

5. As to the other points made by the parties on rehearing, we adhere to the views announced in the original opinion. We have carefully considered appellant's contention relative to "defendant's ballot No. 1." There was, it is true, a tear extending from the top down through a portion of the ballot, but there was no "piece torn out of the top of the ballot," as urged by the objection. The tear was not the kind of mark that a voter would ordinarily place upon a ballot to serve as a distinguishing mark, and there is nothing in the appearance of this tear to indicate that it was not made accidentally or unconsciously; and conceding, for the purposes of the case, that it was among the ballots that had been rejected by the election board, we cannot say that the evidence was such as to compel the conclusion that the tear had been made by the voter. As to another objection made to the ballot, viz., that the name of "R. L. Ogden" had been written on the back thereof, it appears that the name "R. L. Ogden" was not written thereon, but that the initials "W. H." and "R. L. O.," in different handwriting, had been written on the back in the upper left-hand corner. There was no pretense in the trial court that these were not, as they appeared to be, initials of some of the election officers, placed on the ballot by them at some time during the canvass by the board of election. The trial court was fully justified in concluding that they were not placed thereon by the voter, or prior to the deposit of the ballot in the ballot box.

We have also fully considered appellant's contention as to the ballots where the cross stamped by the elector to indicate his vote as to constitutional amendments was placed upon the word "Yes" or "No," instead of in the voting square immediately to the right thereof. This question affects five ballots cast for respondent and one cast for appellant. Upon this point we adhere to the views expressed in the original opinion, and in the cases of Tout v. Hawkins (Cal.) 76

Pac. 897, and Hannah v. Green (Cal.) 76 Pac. 708.

The rejection of ballot 189, and the rectifying of the error in regard to ballot 153, leaves respondent 22 majority. According to the views of this court, there were only 19 voters who may be held to have been illegal voters, and, if it be conceded that each of those voted for respondent, he would still have 3 majority, which is sufficient to support the judgment in his favor.

It follows that the judgment of the superior court must be affirmed, and it is so ordered.

We concur: SHAW, J.; VAN DYKE, J.

BEATTY, C. J. I concur in the judgment of affirmance, and in the opinion of Justice ANGELLOTTI, except as to the torn ballot (defendant's ballot No. 1). I think the evidence shows it was torn by the voter, and delivered to the officers in that condition. A deduction of this vote and of all the illegally assisted votes from respondent's score would not, however, change the result.

We dissent: McFARLAND, J.; HENSHAW, J.

LORIGAN, J. I dissent, and adhere to the opinion heretofore delivered.

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145 Cal. 190

PEOPLE v. SING LEE. (Cr. 1,178.)

(Supreme Court of California. Oct. 29, 1904.)

CRIMINAL LAW—CONDUCT OF TRIAL—MISCONDUCT OF DISTRICT ATTORNEY—NEW TRIAL.

1. In a prosecution for receiving stolen goods, the district attorney asked defendant, when a witness in his own behalf, whether he had been "offering for sale across the track a roll of silk." The question was ruled out, but, in arguing to the jury, the prosecuting attorney stated that defendant was a "fence keeper," and, after alluding to the "hole in the wall," told the jury, in effect, that defendant was keeping "just that sort of a joint," thereby implying that he was keeping a place for the habitual reception of stolen goods. *Held*, that the discretion of the court in granting defendant a new trial for misconduct of the district attorney would not be interfered with.

Commissioners' Decision. Department 2. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Sing Lee was convicted of receiving stolen goods, and from an order granting him a new trial the people appeal. Affirmed.

U. S. Webb, Atty. Gen., C. H. Hoar, Dist. Atty., and B. F. Fowler, Dep. Dist. Atty., for the People. E. R. Jones and B. Berry, for respondent.

SMITH, C. The defendant was found guilty by a jury of the crime of receiving stolen goods, as defined in the statute. The appeal is by the people from an order granting the defendant a new trial. The grounds of the ruling were: "That there was a misconduct on the part of the district attorney in asking the defendant, when a witness in his own behalf, upon cross-examination of said defendant, the following question: 'Q. During last November, were you offering for sale across the track a roll of silk?' And thereafter arguing to the jury that the defendant was a fence keeper, and that such misconduct was prejudicial to the substantial rights of the defendant, and by reason of such misconduct a fair and impartial trial was not had." Objection was made to the question on various grounds, and upon the statement of the district attorney that he had no evidence that the property referred to was stolen, unless it could be drawn out of the witness, the question was ruled out. In the passages in the argument of the district attorney referred to in the order, the defendant was alluded to as a "fence keeper," or "criminal fence keeper," and, following the use of the expressions "hole in the wall" and "fence," the jury were told that it was believed by the people "that the evidence shows that the defendant in this case is keeping just that sort of a joint." The case, we think, is similar in principle to that of People v. Valliere, 127 Cal. 66, 59 Pac. 295, where the judgment and order denying the defendant a new trial were reversed for language of the district attorney to the jury substantially similar to the language used here. In that case, the defendant being on trial for larceny, the district attorney told the jury, in effect, that there was another theft committed by the defendant, "that [he knew] of his own knowledge." Here the jury was told by the district attorney, in effect, that he believed the evidence showed that the defendant was keeping a place for the habitual reception of stolen goods. This, though the contrary is urged, was something quite different from the charge on which the defendant was tried; and it may be said of it, as was said in the former case, that the statement made "was in the nature of evidence. It was the assertion of a damaging fact not only not proven, but in regard to matters that had been expressly ruled out." We are of the opinion, therefore, that this is not a case in which the discretion of the lower court in granting a new trial should be interfered with. And also, we think, the eighth instruction asked by the defendant should have been given, and especially that that part of it instructing the jury not to consider "any proposed evidence which has been offered and disallowed by the court."

We advise that the order appealed from be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

145 Cal. 192

GERMAN SAVINGS & LOAN SOC. v. COLLINS et al. (S. F. 3,051.)

(Supreme Court of California. Oct. 29, 1904.)

APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

1. The erroneous admission in evidence of a deposition was harmless, where the testimony of the witness making the deposition related solely to a matter which, if eliminated, would leave the judgment amply supported by other evidence in the case.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the German Savings & Loan Society against Adeline F. Collins and others. From a judgment for plaintiff, defendants appeal. Affirmed.

John H. Durst, J. A. Stephens, and Curtis Hillyer, for appellants. W. S. Goodfellow and Goodfellow & Eells, for respondent.

GRAY, C. The defendants are copartners doing a draying business in San Francisco. H. F. Grinnell has been at all the times herein mentioned the general manager and superintendent of said defendants. William P. Bullard had been their bookkeeper, became a defaulter, and was discharged by them in December, 1896, and, after the deposition hereinafter mentioned was taken, committed suicide. During the year 1896 defendants had an account with plaintiff, standing in the name of H. F. Grinnell, superintendent; and during 1896 Bullard presented to the plaintiff three orders, for $1,500, $500, and $500, respectively, all purporting to be signed by "H. F. Grinnell, Supt." Upon these several orders plaintiff paid to Bullard amounts aggregating $2,500. The defendants subsequently notified the plaintiff that the said orders were forgeries, and repudiated the same. This action is brought, under the provisions of section 1050, Code Civ. Proc., by plaintiff, and is in the nature of an action of quia timet to determine the claim and liabilities of the parties as to the $2,500 drawn out by the bookkeeper. The court found, among other things, "that each of the said checks or written orders was valid and executed, made and signed by H. F. Grinnell, superintendent, and by and with the authority of defendants." The court further finds that $1,500 paid by plaintiffs on one of said checks was on the same day deposited to the credit of defendants with the Crocker-Woolworth Bank, and was received by defendants and retained to their own use. The court also finds that the amounts as paid were entered in defendants' passbook, and thereafter said passbook was returned to defendants and retained by them so as to constitute an account stated between the parties, etc. Upon these findings, judgment was entered in favor of plaintiff, and the defendants appeal from said judgment. No motion for a new trial was made, and the appeal is taken more than 60 days after the entry of judgment.

The appellants urge as their sole ground for reversal that the court erred in admitting in evidence the deposition of Bullard, for the reason that the taking of said deposition was not in all respects fair. The unfairness complained of consisted in the refusal of the witness, on advice of counsel, to answer certain questions on cross-examination. It is needless, however, to enter upon any inquiry as to this matter of unfairness. The testimony of the witness in the deposition related only to the disposition of the moneys obtained by him upon the three orders in question. It contained no evidence whatever upon the subject of the genuineness of the orders or checks. If the deposition, together with the findings in regard to what disposition Bullard made of the money that he obtained on the orders, were eliminated from the case altogether, the judgment would still find ample support in the finding that the checks were genuine. This finding is not, and cannot be, questioned on the record before us. It is plainly apparent, therefore, that the appellants were not injured by the alleged error.

We advise that the judgment be affirmed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 4161.

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145 Cal. 199

DE LEONIS v. WALSH. (L. A. 1,504.)

(Supreme Court of California. Oct. 29, 1904.)

DEEDS—DESCRIPTION—INTERESTS CONVEYED.

1. Plaintiff conveyed one-half of her interest in an estate, the deed reciting an intention to convey such interest in the portion of the estate as should finally be distributed and allotted to plaintiff. In an accompanying contract the grantee agreed to use his best endeavors to secure a proper monthly allowance to be made to plaintiff out of the estate for her support during the administration thereof. *Held*, that such allowance was not within the description of the deed.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by M. E. C. De Leonis against E. E. Walsh, administrator of Laurent Etchepare, deceased. From an order denying a new trial, plaintiff appeals. Reversed.

Dunnigan & Dunnigan, for appellant. H. H. Apel and Horace Bell, for respondent.

SMITH, C. This suit was brought to set aside a conveyance of lands from the plaintiff, Mrs. Leonis, to the deceased, Etchepare, of date January 31, 1894, and also for the recovery of money alleged to be due from him, as the general manager of her estate, under her power of attorney of date January 15, 1890. The court found, in effect, that the conveyance in question was made as a mortgage to secure indebtedness due and to become due from Mrs. Leonis to Etchepare, and that the latter had expended on her account the sum of $13,865.43 and received the sum of $11,421.34, leaving due to him a balance of $2,444.09. The judgment is that, on payment of that amount to the defendant, the land be reconveyed. The plaintiff moved for a new trial, which was denied, and she now appeals from the order. There is no brief on behalf of respondent.

The only questions in the case that need be considered relate to the findings of the court as to several items of the account, which it is claimed by appellant are not justified by the evidence; and, of these, there are at least two as to which, I think, her contention should be sustained. These relate to the credit of $1,000 allowed Etchepare for money paid to Bell and White, and the disallowance of a debit to Etchepare of the sum of $900, which Mrs. Leonis claims she paid to him. The item of $1,000 paid to Bell and White was half of $2,000 of the family allowance received by Etchepare, and was allowed by the referee on the ground that it was due to them under contracts between plaintiff and S. M. White, and White and Bell, by the former of which White was to receive one-half the plaintiff's estate, and, by the latter, Bell one-fourth of White's interest. The former contract, consisting of the deed of Mrs. Leonis and the executory contract of White, is set out in the findings, and it is clear that under its terms White was not entitled to any part of the family allowance, nor does it appear he ever claimed to be. The description in the deed is: "The undivided one-half of [her] interest * * * in the estate of Miguel Leonis, and of the property of which he died seized or possessed, the intention being to convey to the party of the second part said interest in that portion of said estate which shall be finally distributed and allotted to the said party of the first part whether such interest be set apart to [her] as community property or otherwise." And in the accompanying contract White agrees "to use [his] best endeavors to procure a proper monthly allowance to be made to [Mrs. Leonis] out of said estate for her support or maintenance during the administration thereof." The family allowance can hardly be regarded as coming within the description of the deed, and, were such construction otherwise admissible, it would be negatived by the terms of the contract. It is worthy of note that this was all of the family allowance ($6,595) that was paid to or claimed by Bell and White.

As to the remaining item of $900, it is expressly alleged in the complaint that this was paid by Mrs. Leonis to Etchepare for purposes specified; that is to say, in part to pay outstanding indebtedness against her, and the balance to be credited on her supposed indebtedness to him. But this allegation is not denied by the defendant in his amended answer, except as to the number of dollars received; and, indeed—except as to the precise amount—the allegation is in effect admitted in the defendant's allegation "that he did not use or receive for his own use any of said moneys," etc. It is also said by the appellant's counsel, and in the absence of contradiction from the respondent it must be taken as true, that Mrs. Leonis' testimony on this point is uncontradicted by that of the defendant or otherwise. Nor have I been able to discover any such contradictory evidence in the record.

Other objections urged by the appellant to the account may be well taken, but, as we cannot anticipate that on a new trial the evidence will be the same, it will be as well to leave them undetermined.

I advise that the order appealed from be reversed, and the cause remanded for a new trial.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the order appealed from is reversed, and the cause remanded for a new trial: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

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145 Cal. 181

RECLAMATION DIST. NO. 551 v. VAN LOBEN SELS et al. (Sac. 1,265.)

(Supreme Court of California. Oct. 28, 1904.)

DEEDS—CONSTRUCTION—FORFEITURES—CONVEYANCES ON CONDITION—REVERTER—PLEADINGS—WAIVER OF OBJECTIONS.

1. A deed to a reclamation district created to reclaim land in the district and construct and maintain works for the reclamation of such land, which provided that the district is to hold the premises, for reclamation only, and that, if the land shall cease to be so used, it shall revert to the grantor, gave the grantee no right to use the land for different purposes than that of reclamation, and on its use for such purposes it would revert to the grantor.

2. Under Civ. Code, § 1442, providing that a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created, every presumption, on conveyance of land for certain purposes and providing for a reverter to the grantor in case of its use for other purposes, is against such reverter, and the party claiming the same must clearly show that the land has ceased to be used for the purpose for which it was granted.

3. In an action by a reclamation district to quiet title to land conveyed to it for reclamation purposes only, and which was to revert to the grantor in case of its use for any other purposes, evidence *held* to support a finding that the land was used for reclamation purposes, and had never ceased to be so used.

4. A purchaser of land, who took her conveyance with full knowledge of a prior conveyance for the construction and maintenance of reclamation works to be used in the reclamation of lands, could not be heard to say that it was not necessary for the grantee in the prior deed to use the pumping house or ditch for reclamation purposes.

5. The conveyance of land by a reclamation district, in which the right is reserved to use a part of the building on the premises for tools, does not show that the premises have ceased to be used for the purposes of reclamation, in vio-

lation of a clause of the deed restricting the conveyance to one for reclamation purposes only.

6. A deed by a reclamation district purporting to convey lands granted to it for reclamation purposes only, if void because of want of power in the district to make the conveyance, still left the title to the property in the reclamation district, and did not operate to put it in the owner of the reversion, which was dependent on the cessation of the use of the land for reclamation purposes.

7. Under Code Civ. Proc. § 434, providing that an objection not taken by demurrer or answer is deemed to be waived, an objection that plaintiff was a married woman, and that her husband was not made a party to the action, when not taken by demurrer or answer, was waived.

Commissioners' Decision. Department 2. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Reclamation District No. 551, a corporation, against P. J. Van Loben Sels and Sophia McCullough. From a judgment for plaintiff and for defendant Van Loben Sels, defendant McCullough appeals. Affirmed.

White & Miller, for appellant. A. L. Shinn, for respondent Reclamation Dist. No. 551. Olney & Olney, for respondent P. J. Van Loben Sels.

COOPER, C. Action to quiet title. Judgment was entered in favor of plaintiff and defendant Van Loben Sels and against defendant McCullough, who has appealed therefrom on the judgment roll and a bill of exceptions.

The controversy is about a small lot of 2.6 acres, described in the complaint by metes and bounds. Plaintiff is a reclamation district, organized under the laws of California for the purpose of reclaiming swamp and overflowed lands. In September, 1895, one Olsen was the owner of the lot, and in consideration of $924.88 conveyed the same to plaintiff by grant, bargain, and sale deed. The deed contained the following concluding clause: "To have and to hold the same unto the said Reclamation District No. 551, its successors and assigns for the purpose of reclamation only; that is, for the purpose of constructing and maintaining thereon reclamation works consisting of levies, pump and pump-house, drains, ditches and other reclamation works used in and about the reclamation of the lands of said Reclamation District No. 551, and if said land shall cease to be used for such purposes, the same shall thereupon revert to the said party of the first part, and all right, title and interest of said party of the second part therein shall be terminated and ended." After the deed was delivered, the plaintiff entered into possession of the lot, and constructed reclamation works thereon, and said land has ever since been used for reclamation purposes, and has never ceased to be so used. In April, 1902, the plaintiff conveyed the land by deed to defendant Van Loben Sels, "reserving to plaintiff the right to use a convenient and necessary part of the building on said premises as a storehouse for its tools and appliances used for the purposes of reclamation." In October, 1898, Olsen conveyed to defendant McCullough all his title and interest in the land, and she is still the owner of whatever title remained in Olsen after the conveyance to plaintiff. Appellant, in her answer, alleged that she was the owner in fee of the land through her deed from Olsen; that she was in possession thereof; that plaintiff has ceased to use the same for reclamation purposes, and had abandoned and lost all its right in and to the premises; and, finally, prayed judgment that she was the owner of the premises free of any easement or right of any kind in plaintiff. The judgment, while against defendant, contained the clause "that, in case said real property shall cease to be used for reclamation purposes, the same shall thereupon revert to the defendant Sophia McCullough, and all the right, title, and interest of the said plaintiff and the defendant T. J. Van Loben Sels therein shall be terminated and ended."

While the discussion in the briefs has covered considerable ground and a variety of questions, we think the case on its merits involves only two propositions—the construction of the deed made by Olsen to plaintiff, and the sufficiency of the evidence to sustain the findings of the court that the land has never ceased to be used for reclamation purposes. Without discussing the many cases cited by counsel, we think the construction of the deed by its own language is easy of solution. The plaintiff is a reclamation district, created and organized for the purpose of reclaiming lands in the district, and constructing, maintaining, and keeping in repair all works necessary for the reclamation of the land embraced in the district. The deed was for the purpose of reclamation only. When the land should cease to be used for such purpose it was to revert to the grantor. The title passed out of the grantor for the purposes therein specified, and when it shall cease to be used for such purposes the estate of the grantee ceases. The grantee has no right to use the land principally for other or different purposes. If it or its assigns should cease to use the land for the purpose therein specified, and use it for farming or other different purposes, it would revert to the grantor or his assigns. In such case every presumption is against a forfeiture, and the party claiming that the land has reverted to the original grantor must clearly show that the land has ceased to be used for the purpose for which it was granted. If the grantee or his assigns continue to use the land for the prescribed purpose, the estate continues in such grantee. Conditions providing for the forfeiture of an estate are to be construed liberally in favor of the holder of the estate, and strictly against the enforcement of the forfeiture. Civ. Code, § 1442; Washburn on Real Property, 447; Behlow v. Southern Pacific R. R.

Co., 130 Cal. 19, 62 Pac. 295; French v. Inhabitants of Quincy, 3 Allen (Mass.) 9.

The finding of the court that the land is used for reclamation purposes, and has never ceased to be so used, is supported by the evidence. The evidence shows that immediately upon acquiring the property the plaintiff built a pumping plant upon it on the west end thereof near the river, and excavated a ditch along the southern portion of it. It is true that the plaintiff afterwards ceased to use the pumping plant, but the ditch has remained open, and drains the seepage water from the river to the main drainage canal in the center of the district. Plaintiff has continued to use the pumphouse for the purpose of storing its coal, sacks, and tools, and some of its employés have used the rooms in the upper story. It does not lie in the mouth of appellant to say that it is not necessary for plaintiff to use the pumping house or the ditch for reclamation purposes. When she took her conveyance it was with full knowledge of, and subject to, plaintiff's rights. Her grantor had previously conveyed the premises for a consideration, which he received.

It appears that the plaintiff conveyed the premises to defendant Van Loben Sels in April, 1903, reserving the right "to use a convenient and necessary part of the building on said premises for its tools and appliances used for the purposes of reclamation." This deed does not, of itself, show that the premises had ceased to be used for the purposes of reclamation. The deed made by Olsen was to hold to plaintiff "its successors and assigns." If the deed to defendant Van Loben Sels was beyond the power of plaintiff to make, and void, as argued by appellant at great length, the result would be that the plaintiff is still the owner of the property. The fact that the judgment defines the right of plaintiff and defendant Van Loben Sels as between themselves is no concern of appellant. Plaintiff was certainly entitled to judgment on the findings, and, if the premises are still being used for reclamation purposes, appellant is entitled to no relief. The judgment protects her rights. It expressly declares that when the "property shall cease to be used for reclamation purposes the same shall revert to the defendant Sophia McCullough." It is true that no cross-complaint or answer of Van Loben Sels appears to have been served on appellant, but in her answer she directly alleges "that neither the plaintiff nor the defendant P. J. Van Loben Sels has any right, title, interest, or claim of any kind in or upon the said real property, or any part thereof." She prayed for a decree adjudging her to be the owner in fee of the property. She does not appear to have served her answer upon defendant Van Loben Sels. She did not object to the evidence offered by defendant Van Loben Sels upon the ground that there was no issue made between her and Van Loben Sels by the pleadings, nor did she object upon any ground or at all. In fact, the record shows that all the parties agreed on certain facts, and no separate trial was had as between plaintiff and appellant.

Finally, appellant claims that she is a married woman, and her husband was not made a party to the action. As she did not raise the objection in the lower court by demurrer or answer, it was waived. Code Civ. Proc. § 434.

The judgment should be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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145 Cal. 205

W. W. MONTAGUE & CO. v. FURNESS et al. (S. F. 2,938.)

(Supreme Court of California. Oct. 31, 1904.)

BUILDING CONTRACTORS' BONDS—CONSTITUTIONAL LAW—RESTRICTING CONTRACTS —COMMON-LAW OBLIGATIONS.

1. Code Civ. Proc. § 1203, requiring those who contract about erecting buildings to secure their contracts by bonds, which shall inure to the benefit of all persons furnishing materials to be used in the building, is unconstitutional, as being an unreasonable restriction on the power to make contracts.

2. A bond given by a contractor pursuant to an unconstitutional statute cannot be upheld as a valid common-law obligation.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by W. W. Montague & Co., a corporation, against John Furness and others on a bond. Plaintiff had judgment, and defendants appeal. Reversed.

Alex. G. Eells, for appellants. W. H. Linforth, for respondent.

GRAY, C. This action is brought against a building contractor and his sureties upon a bond alleged in the complaint to have been "given under and in pursuance of the provisions of section 1203 of the Code of Civil Procedure of this state." Plainitff seeks to recover the amount due it from the contractor, Furness, for certain materials furnished by plaintiff for use in constructing the building to which the bond relates. The plaintiff had judgment against all the defendants, and the sureties on the bond appeal from said judgment.

The said section 1203, Code Civ. Proc., is unconstitutional, and the bond having been given in pursuance of it cannot be upheld even as a common-law obligation, and is void. Therefore the sureties on it were not liable. It was so held in the two recent cases of San Francisco Lumber Company v. Bibb et al., 139 Cal. 193, 72 Pac. 964, and a case of the same title, 139 Cal. 325, 73 Pac. 864. In both of these cases the action was upon the identical bond sued on here by parties furnishing material, just as in this case. The decisions in those cases dispose of the only question that need be decided on this appeal, to wit, the constitutionality or unconstitutionality of said section 1203, Code Civ. Proc. Nothing need be here added to what is said in those cases.

We advise that the judgment be reversed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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145 Cal. 210

RISDON v. YATES. (S. F. 3,049.)

(Supreme Court of California. Nov. 1, 1904.)

ASSAULT AND BATTERY—CIVIL ACTION—PLEA IN CRIMINAL CASE — ADMISSION — CROSS-EXAMINATION—RENEWING OFFER OF EVIDENCE —INSTRUCTIONS—HARMLESS ERROR.

1. Any error in striking an amended answer from the files on the ground that it had been filed without permission is harmless, it having thereafter been filed by permission, and the issue thereby raised having been tried; and this though defendant had to ask for such permission in the presence of the jury.

2. One's plea of guilty on a prosecution for assault and battery can be received in a civil action therefor only as an admission; and, the justice of the peace before whom the prosecution was had having testified thereto for plaintiff, though as he had written it down in his docket, defendant may cross-examine him to prove the entire statement made in connection therewith, to show that it was not an unqualified admission.

3. Where objection to a question on the ground that it is irrelevant, incompetent, and not admissible under the answer, is sustained, and defendant then, on leave, amends the answer to make the evidence admissible under the views of the judge, but does not renew his offer, the ruling will not be reviewed.

4. An instruction in an action for assault and battery as to what a party must do before he can use force to eject a trespasser is apt to mislead, and should not be given, where there is no evidence to which it is applicable; the defense being placed entirely on the theory of self-defense.

Commissioners' Decision. Department 2. Appeal from Superior Court, Napa County; S. R. Dougherty, Judge.

Action by Stephen H. Risdon against Enoch Yates. Judgment for plaintiff. Defendant appeals. Reversed.

F. E. Johnson, H. L. Johnson, and L. E. Johnson, for appellant. T. B. Hutchinson, for respondent.

COOPER, C. This action was brought to recover damages for an assault and battery committed upon plaintiff by defendant. The jury returned a verdict for plaintiff, upon which judgment was duly entered. Defendant prosecutes this appeal from the judgment on the judgment roll and a bill of exceptions. The bill of exceptions shows that the evidence was conflicting, and it is conceded that there is sufficient evidence to sustain the verdict. Several errors are claimed as to rulings of the court and in giving instructions. This discussion will be confined only to the matters deemed material.

More than 10 days after the defendant had served his original answer, and on the day set for trial, the defendant filed with the clerk and served upon plaintiff's attorney an amended answer, in which he set forth affirmatively an additional defense, that the alleged assault and battery was committed in self-defense. After the case was called for trial and the jury impaneled, the court, on motion of plaintiff's attorney, made an order striking the amended answer from the files upon the ground that it had been filed without permission of the court. Defendant contends that he had the right, under section 472, Code Civ. Proc., to amend his answer once, of course, without permission of the court. It is not necessary to decide the question as to the ruling in striking out the answer. If any error was committed, it was cured by the court, upon defendant's request, making an order permitting the amended answer to be filed. It was filed, the case was tried upon the issues raised by it, and it is now in the record. We cannot hold, as contended by defendant, that the fact of defendant having to ask the court, in the presence of the jury, for leave to file his amended answer, injured his case in the eyes of the jury. The jury is not supposed to know or interest itself with questions of law raised before the court during the trial. If every ruling made by the court in the presence and hearing of the jury could be investigated, as to whether or not it might possibly have injured the rights of one of the parties, and thus be made the ground for reversing a case, there would be few verdicts that would stand. We must presume that the jury did its duty, and decided the question of fact under the instructions of the court upon the pleadings as they are. Verdicts are not to be set aside for light, trivial, or imaginary errors.

The plaintiff called one Palmer, a justice of the peace, for the purpose of identifying the record in a criminal case of the People v. defendant herein, and introduced the complaint in the criminal action, and the docket of the justice showing that defendant had pleaded guilty and suffered a fine for the same assault and battery for which damages were recovered in this action. Defendant sought, by cross-examination of the justice and by his own testimony, to prove the entire statement made to the justice at the time defendant pleaded guilty concerning such plea, and the reasons why defendant made it. In other words, defendant sought by several questions to prove the entire statement in connection with the oral plea, as made to the justice at the time, and entered in his docket. The court sustained the objections of plaintiff to each of the questions by which it was sought to elicit the full statement. In this the court erred. The evidence was sharply conflicting, the defendant introducing evidence which, if true, shows that plaintiff was the aggressor and struck the first blow, while the plaintiff introduced evidence, which if true, shows that the defendant, without provocation, willfully assaulted and beat him. It was thus for the jury to determine where the truth lay, and they were to do this from seeing and hearing the witnesses, and from all the competent facts and circumstances in the case. Now, the record of the plea of guilty and judgment of conviction in the justice court was not conclusive, and did not estop the defendant in the civil case. If defendant had been acquitted in the justice court on a plea of not guilty, he would not have been permitted to introduce the record or prove such fact in this case as a bar—this for the reason that the criminal proceeding was by the state, and this plaintiff was not a party to it. Therefore the judgment in a criminal suit cannot be used in a civil action to establish the facts on which such judgment rests. But where a defendant has pleaded guilty in a criminal case, the plea and judgment are received in evidence as an admission, but not as conclusive. "It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs." 1 Greenleaf on Evid. (16th Ed.) § 527a. If an admission is testified to by a witness against a party, such party has the right, in cross-examination, to bring out the whole of what was said in direct connection with, and pertaining to, the admission. In this case the plaintiff was, in effect, allowed to prove that defendant said or admitted that he was guilty of an assault and battery upon plaintiff. This admission may have turned the scale, and caused the jury to disregard all the defendant's testimony. The plaintiff was allowed to put in evidence the part of the conversation or declaration to the justice which in law amounted to an admission. The defendant was not allowed to show that he stated other facts at the time which showed that it was not an unqualified admission. The statement of defendant in the form of an admission to the justice was allowed for the purpose of corroborating the evidence of plaintiff. The statement of defendant, if such statement was made, that plaintiff struck the first blow, was not allowed to get to the jury. It is certainly evident that this was receiving evidence only on one side of the controversy. The plaintiff was not bound to offer in evidence the admission made before the justice, but, having done so, the defendant was entitled to the whole of the declaration or admission. The fact that the justice wrote down part of it in his docket makes no difference. It was, after being written in the docket by the justice, but an oral admission of defendant. The entry by the justice was only the conclusion or opinion of the justice as to the effect of what defendant said. The question is, did the defendant, in words, admit his guilt before the justice? If he did, what were the words, and what did he say? When a part of a declaration or conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other. Code Civ. Proc. § 1854.

It is said in Greenleaf on Evidence (volume 1, § 201): "We are next to consider the effect of admissions when proved. And here it is to be first observed that the whole admission is to be taken together, for, though some part of it may contain matter favorable to the party, and the object is only to ascertain that which he has conceded against himself, for it is to this only that the reason for admitting his own declaration applies, namely, the great probability that they are true; yet, unless the whole is received and considered, the true meaning and import of the part which is good evidence against him cannot be ascertained. * * * But though the whole of what he said at the time and relating to the same subject may be given in evidence, yet it does not follow that all the parts of the statement are to be regarded as equally worthy of credit; but it is for the jury to consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor as those making against him." The importance of having all that was said with reference to the subject-matter is well illustrated in Erskine's celebrated argument in Stocksdale's Trial, 22 Howard St. Tr. 257, where he employs Algernon Sidney's famous illustration of what might be a criminal charge against the publisher of the Bible for printing, "(The fool hath said in his heart) there is no God." The words "there is no God," without the context, might be selected, and the publisher indicted for blasphemy. In the Queen's Case, 2 B. & B. 287, it was held by the House of Lords that, where a few lines of a letter were exhibited to a witness, the cross-examination might bring out the whole of the letter. It was there said that, if the whole letter could not be put in evidence "thus, the court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part." In Johnson v. Powers, 40 Vt. 612, it is said: "The object of the party using such declarations or admissions against the party who made them is only to ascertain that which he conceded against himself, yet, unless the whole is received and considered, the true meaning and import of the part which is in evidence against him cannot be ascertained. It is therefore a rule of evidence that the whole declaration or admission of the party made at one time shall be taken together, but the jury are at liberty to believe a portion and disbelieve the other, as they are of all evidence." It was said by Abbott, C. J., in 2 Dowl. & R. 361: "It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction and may have a very different tendency to what would be produced if the whole were heard, for one part of a conversation will frequently serve to qualify and explain the other." The same rule was applied by this court where one party read an extract from testimony of the witness given by him in a previous judicial proceeding, and the court held that the other party might introduce in evidence the whole of such testimony. Hobart v. Tyrrell, 68 Cal. 12, 8 Pac. 525. In the later case of Granite Gold Mine Co. v. Maginness, 118 Cal. 134, 50 Pac. 269, the rule is thus stated: "We think the general rule is well established that an entire admission must be taken together. This is essential to enable the court or jury to judge of the true extent of the admission, which, when taken entire, will often have a different import from that which a partial account may convey." Our attention is called to the cases of Root v. Sturdivant, 70 Iowa, 55, 29 N. W. 802, and Hauser v. Griffiths (Iowa) 71 N. W. 223, which hold the other way, but the reasoning of these cases does not commend them to us. We think they are not in accord with the best-considered cases. Nor can we say the rulings in this case were not prejudicial. It may have been that the admission as shown by the justice's docket was deemed by the jury to be of great weight, and of more force than all the testimony of defendant on the trial.

The defendant was a witness in his own behalf, and he claimed and testified that plaintiff was the aggressor and struck the first blow. He was asked in direct examination what had been the relations between himself and plaintiff up to the time of the alleged assault and battery. Counsel stated that the question was asked for the purpose of showing who was the aggressor. Counsel for plaintiff objected to the question upon the ground that it was irrelevant, incompetent, and not within the pleadings, as no justification had been pleaded. The court sustained the objection, and the ruling is claimed to be erroneous. The record shows that immediately after the ruling the defendant asked permission of the court "to amend his answer so as to permit the evidence offered to be introduced." Defendant was granted leave to amend his answer. He did amend it by setting up affirmatively that plaintiff was the aggressor, and first assaulted the defendant. He does not appear to have renewed his attempt to get the evidence before the court. The question was not again asked of the witness. Under such circumstances, we would not hold the ruling erroneous, conceding the evidence to be competent and material. If the defendant, after obtaining leave to amend his answer so as to make the evidence admissible under the views of the trial judge, did not take the trouble to renew his offer, he cannot be permitted to ask this court to review the case on the ruling. He took the trouble to place his pleadings in shape to obviate the objection, but does not appear to have deemed the matter of sufficient importance to renew his offer.

Objection is made to several instructions, the effect of which was to tell the jury that, before a party can use force to eject a trespasser from his lands, he must direct the trespasser to remove, give him sufficient time to do so, and then, if he does not remove, no more force can be used than is reasonably necessary to remove him. These instructions are not objected to as propositions of law, but defendant claims that there is no evidence tending to show that the injuries received by plaintiff were received by him by reason of any attempt on the part of defendant to eject him as a trespasser from the premises. We find no evidence in the record to which the instructions are applicable. The defendant placed his defense entirely upon the theory that the assault and battery upon plaintiff was done by defendant in self-defense. The instructions may have misled the jury, and should not have been given. While it is not necessary to hold that the instructions, of themselves, would be sufficient error to justify a reversal of the case, it would be safer not to give them upon a retrial, unless there should be evidence to which they would be applicable.

We advise that the judgment be reversed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment is reversed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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145 Cal. 236

In re FIRTH'S ESTATE. (S. F. 3,700.)

(Supreme Court of California. Nov. 5, 1904.)

HOMESTEAD—ALLOTMENT TO SURVIVING WIFE—WAIVER OF RIGHT—PROBATE JURISDICTION—DISCRETION.

1. Under Code Civ. Proc. § 1465, providing that if no homestead has been selected, designated, and recorded the court shall set apart a homestead for the surviving wife, the jurisdiction of the probate court to so set aside a homestead is excluded only when the wife has already a legal homestead, and it is immaterial that she has other property, though it be fit to live in.

2. A surviving wife, by qualifying as executrix of her deceased husband, does not waive her right to a homestead.

3. The probate court, in setting aside certain property to the surviving wife as a homestead, cannot be held to have abused its discretion, where the homestead awarded is much less in value than her interest would have been under the dower law.

¶ 2. See Homestead, vol. 25, Cent. Dig. § 268.

4. The probate court, in a proceeding merely to set aside a homestead to the surviving wife, has no jurisdiction to adjudicate the question in whom the remainder vests.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Joseph Bellamy Firth, deceased. From an order Joseph K. Firth and another appeal. Modified.

James G. Maguire, for appellants. Davis Louderback, for respondent.

McFARLAND, J. While the estate of Joseph Bellamy Firth was in course of administration the court made an order setting apart to the surviving widow, Evelina L. Firth, a certain part of the real property of the estate as a homestead, and also containing an adjudication about another matter, which will be noticed hereafter. From this order Joseph K. Firth and Fanny Firth, heirs at law of the deceased and devisees under his will, appeal. They are adult children by a former marriage; he left no minor children.

The facts necessary to the determination of this appeal are these: All the property of the deceased was his separate property, and it was of the appraised value of $23,584. He left a will by which he devised to the widow a lot with a house thereon situated on Guy street, in San Francisco, in which he had lived with her for several years immediately prior to his death. It was a suitable place for a residence, and was of the appraised value of $3,500. He also left her $1,000 in money, and directed that during the period of administration she should have $40 per month. The rest of his property he gave to others, the most of it going to the appellants herein. The property which the court set aside as a homestead was a lot 25 feet front, with a house thereon, situated on Tehama street, in said city, and it also was suitable for a residence, and was of the appraised value of $3,500. This lot is a part of the property devised in the will to the appellants. There never had been any recorded homestead by either the deceased or the respondent. The respondent and Joseph K. Firth, one of the appellants, were appointed executors and qualified. The homestead was set apart to respondent for and during her life.

The main contentions of appellants, as to the part of the order setting apart the homestead, are, first, that the court had no power or jurisdiction to make the order because the respondent had another residence at the time the order was made; and, second, that under the condition of the estate and the circumstances presented the making of the order was an abuse of discretion. Neither of these contentions is, in our opinion, maintainable.

The jurisdiction of a probate court to set aside a homestead to the surviving wife is not subject to the condition that she does not have any other property or any other property fit to live it. Such jurisdiction is excluded only when she has already a legal homestead, and a mere place fit to reside in is not a homestead unless it has been impressed with that character by certain acts required by the law to be done for that purpose. The Code provides that if no homestead "has been selected, designated, and recorded * * * the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife * * * out of the common property, or if there be no common property, then out of the real estate belonging to the decedent." Code Civ. Proc. § 1465. (There is also another provision that if the probate homestead be selected out of the separate property of the deceased it must be only for a limited period, which provision was followed in the case at bar.) This power and duty of the court to set apart the homestead is not, in any part of the statutory law, limited to a case where the widow has no other property; and if she has other property it matters not how she had obtained it—whether under her husband's will or otherwise. Her right to a probate homestead is an independent right, which she has in addition to any other right or property which she may have. A somewhat plausible argument might, perhaps, be made to the point that a very wealthy widow should not be allowed a probate homestead on her deceased husband's separate property (although it would not apply to the case at bar); but such an argument would be properly addressed only to the Legislature in support of an amendment to the law on that subject, for courts must take the law as they find it. And the power of the court to set aside a homestead on property which had been devised to others is well established. In Estate of Huelsman, 127 Cal. 275, 59 Pac. 776, the court say: "Despite the fact that the farm had been specifically devised, one half to the widow, the other half to the two children, it was competent for the probate court to set it aside as a homestead, for the right of a testator to devise is subordinate to the power in the probate court to sequester and set apart the property for the shelter, care, and support of the family." See, also, cases there cited. Nor did the respondent, by qualifying as executrix under the will, waive her right to a homestead. In Sulzberger v. Sulzberger, 50 Cal. 385, the court say: "The acceptance by the petitioner of letters testamentary, and the fact that she was, by the will, constituted one of the residuary legatees, does not tend to show that she waived her right to a homestead as prescribed by the statute."

Whether or not this court would be justified in any case in reversing an order setting apart a homestead merely on the ground that the order was an abuse of discretion need not be here considered, for there was certainly no such abuse in the case at bar.

It must be remembered that while our law is liberal to a wife with respect to community property—that is, property acquired after marriage by the assumed joint efforts of both spouses—yet with regard to the husband's separate property she has scarcely any right at all. He may devise it all to strangers and leave her penniless. The old estate of dower is taken away. The right to have a homestead for a limited period given her by the probate court is about the only interest which she can assert in a deceased husband's property. In the case at bar the homestead awarded her is much less in value than her interest would have been under the law of dower, and there is no warrant for holding that in awarding it the court abused its discretion.

But in the order and decree appealed from, the court, in addition to setting aside the homestead to the respondent for her lifetime, decreed that the fee in remainder vested in certain named persons as heirs at law of the deceased; and, in our opinion, this last part of the order was beyond the jurisdiction of the court to make. It is true that by section 1468, Code Civ. Proc., it is declared as a general rule of property that where a probate homestead is selected for a limited period from the separate property of the deceased "the title vests in the heirs of the deceased subject to such order," but the question as to whom the remainder goes is not before the court on a simple petition for a homestead. No such issue was presented by the petition or the answers thereto, nor could such issue have been legitimately presented. When there is a contest between different persons claiming in hostility to each other to be heirs, that contest must be adjudicated in an appropriate action or proceeding in which the issue of heirship properly arises. This matter is perhaps not very important in the case at bar, as there seems to be no disagreement as to who the heirs are; but in many cases there are sharp contests as to heirship. At all events, in the present proceeding the only question involved was whether or not the respondent should have the homestead, and the adjudication should have been limited to that question. The order must therefore be modified by striking out that part of it which undertakes to adjudicate heirship. In other respects the order must be affirmed.

The order appealed from is modified by striking therefrom the following: "And the title to said lot of land, with the dwelling house thereon and its appurtenances, is hereby vested in the heirs of said Joseph Bellamy Firth, deceased, subject to this order, judgment, and decree and said homestead, and entirely free from further administration of said estate; that is, is hereby vested in said Evelina L. Firth, the widow of said decedent, said Joseph Kirk Firth, the son of said decedent, and said Fanny Firth, the daughter of said decedent, subject to this order, judgment, and decree and said homestead, to wit, the undivided one-third part of said lot of land, with the dwelling house thereon and its appurtenances, and the title thereto is hereby vested in said Evelina L. Firth, and the undivided one-third part thereof is hereby vested in said Joseph Kirk Firth, and the undivided one-third part thereof is hereby vested in said Fanny Firth, subject to this order, judgment, and decree and said homestead." As thus modified the order appealed from is affirmed, without costs of this appeal to either party.

We concur: HENSHAW, J.; LORIGAN, J.

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145 Cal. 228

SPRAGUE v. WALTON et al. (Sac. 1,269.)

(Supreme Court of California. Nov. 4, 1904.)

NEW TRIAL—APPEAL—NOTICE—PARTIES TO BE SERVED—GIFTS—DELIVERY—DECLARATIONS — TRUSTS — EXECUTORS — ACTIONS — LIMITATIONS.

1. In an action by an executor against W. to collect money, notice of motion for new trial or of appeal need not be served on another executor made a defendant merely because he would not join as plaintiff, and who was not mentioned in the judgment, which was exclusively in favor of plaintiff and against W.; he not being an adverse party, and it not being possible for him to be adversely affected by a new trial or a reversal.

2. There is a sufficient delivery of possession to make a gift complete, if a gift was intended, where a husband having money, the community property of himself and wife, deposited in a bank in his name, gave her an order on the bank authorizing it to allow her to draw the money, and she drew it, and deposited it in her own name.

3. The declarations of deceased at or about the time he gave an order to his wife on a bank authorizing it to pay his deposit to her, which was done, is admissible, on the question of his intention to make a gift, in an action for the money between his and her executors.

4. If, as indicated by the order of one in whose name money, the community property of him and his wife, was deposited, authorizing the bank to allow her to draw any of it "and to have the right of survivorship," it was his intention that she should take the deposit as survivor after his death, the bank was constituted a trustee for her benefit, and her actual drawing of the money before his death would not defeat his intention to create a trust for her benefit.

5. An action will lie against an executor, without presentation of a claim against the estate, for money which can be identified in specie as belonging to plaintiff.

6. Where decedent's wife, under his order authorizing a bank to allow her to draw any of his deposit, drew it out and deposited it in her own name, she, if the deposit did not pass to her as donee or beneficiary of a trust, held it as trustee for decedent at the time of his death, and, she having been appointed his executrix, the claim of his representatives therefor is protected from the running of the statute in her favor as a claim for a debt from her to him would be protected.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Frederick D. Sprague, executor of Moses Sprague, deceased, against Hattie S. Walton, executrix of Nancy M. Sprague, deceased, and others. Judgment for plaintiff. Defendant Walton appeals. Reversed.

Phipps & Henion and Devlin & Devlin, for appellant. A. M. Seymour and R. Platnauer, for respondent.

BEATTY, C. J. This is an action by one of the executors of the will of Moses Sprague to recover from the executrix of Nancy Sprague (who was the wife of Moses) a sum of about $3,800, the amount of two savings bank deposits, community property of the spouses originally standing in the name of Moses, but drawn out by her under written authority from him, and redeposited in her own name shortly before his death.

B. F. Walton, named as a defendant, is the co-executor of the plaintiff, and is made a defendant only because he refused to be joined as a plaintiff. No relief is sought against him, and by his answer he merely denies that the estate of Moses Sprague has any interest in the deposits. Hattie Walton defends upon the ground that the deposits were a gift from Moses Sprague to her testatrix. The superior court found that there was no gift, and found against other special defenses, based upon statutes of limitations. Judgment was thereupon entered in favor of the plaintiff and against Hattie S. Walton for the amount remaining of said deposits at the death of her testatrix and received by her as executrix. From this judgment and from an order denying her motion for a new trial she appeals.

It appears from the evidence in the record that Moses and Nancy Sprague were the owners of community property, real and personal, including the deposits in question. In January, 1900, Moses, being at the time sick and confined to his bed, obtained from the banks the form of an authorization which would enable his wife to draw the deposits standing in his name, and he executed and delivered to her two orders in the form prescribed. They were substantially the same in terms, and the one addressed to the Sacramento Bank read as follows: "January 22, 1900. I hereby authorize the Sacramento Bank to allow my wife, Mrs. N. M. Sprague, to draw any money standing to my credit on Deposit No. 17097, fol. 825, in said bank and to have the right of survivorship." On the 30th of January Mrs. Sprague drew out the whole of the several deposits and immediately redeposited them in the same banks, but in her own name. On the 16th of March following, Moses Sprague died. Letters testamentary were issued to his wife in July, 1900, and she took possession of his estate, but died in June, 1901, leaving the administration unclosed. Upon her death the plaintiff, Frederick D. Sprague, and the defendant B. F. Walton were appointed joint executors in her place. Subsequently her will was proved, and letters testamentary were issued to her daughter, the defendant Hattie S. Walton. As executrix of her deceased husband's will Mrs. Sprague never charged herself with anything on account of said deposits, and what remained of them passed into the hands of her executrix, who claims that they were a gift from her father to her mother, and constituted no part of his estate.

The defendant urges a number of points in support of her appeal from the order denying her motion for a new trial, claiming, among other things, that the court erred in finding that there was no gift of the deposits, and in excluding evidence material to that issue. The respondent makes the preliminary objection that this court is without jurisdiction to review these assignments of error because neither the notice of motion for a new trial nor the notice of appeal was served upon the defendant B. F. Walton. There is a dispute as to the fact of service of these notices upon defendant Walton, but we consider it immaterial whether they were served or not, for Walton is not an adverse party. No interest of his would be adversely affected by the granting of a new trial or by a reversal of the judgment. Though a party to the action, he is not mentioned in the judgment, which was exclusively in favor of the plaintiff and against Hattie S. Walton. If the judgment stands, no part of the amount recovered could be collected by him. He would not be charged with it in his accounts, and would be entitled to no commissions thereon. Code Civ. Proc. §§ 1613, 1615; Hope v. Jones, 24 Cal. 89. He neither pays nor recovers costs, and the only possible effect of a reversal and new trial is that he might be benefited by the recovery of his costs in case of an ultimate judgment for the defendants.

Whether or not there was a gift of these deposits by Moses Sprague to his wife depends wholly upon his actual intention. He did everything necessary to the validity of the gift, if he intended a gift. He gave his wife orders in the form prescribed by the banks, which enabled her to cancel his accounts and transfer the deposits to her own account. In effect, he put her in possession of the funds and deprived himself of all control. If he intended to do this, and intended it as a gift, the gift was complete. The evidence that he did intend a gift seems to us very strong. He was sick and confined to his bed. On the 1st of January he had executed an olographic will or codicil to his attested will, by which he had given everything he possessed to his wife. That he intended her to have these deposits is clear, and the only question is whether he intended that she should take them under the will or as a gift free from the burdens of administration. When he made his olographic will on the 1st of January, no doubt he intended her to take under the will, but it would appear that before the 22d of the month he had changed his mind. Why, if he did not intend her to take the deposits as a gift, should he have given her authority to draw both deposits, amounting to nearly $4,000? She needed no such sum to pay current or household expenses, but in case of his death (and he was on his deathbed) it would be extremely convenient for her to have control of this fund of ready money pending administration of his estate. Considering that he intended her to have his whole estate in any event, there were good reasons why he should make her a present gift of a fund which would relieve her of the necessity of applying to the probate court for the means of support prior to distribution. But the burden of proving a gift rested upon the defendant, and it was essential for her to prove, among other things, that Moses Sprague intended a gift of the deposits. The evidence upon this point was, in our opinion, very persuasive, and there was uncontradicted and unquestioned evidence to prove the delivery of the deposits; or, what is the same thing, the furnishing of the means by which they could be reduced to possession by the donee if she was a donee. But this court can neither make a finding nor direct one where the evidence, however persuasive, is opposed to a presumption, as in this case. Nor can it be said in this case that the evidence of a gift is so absolutely convincing that the order denying a new trial could be reversed on the sole ground that the finding of no gift is wholly unsupported. But the superior court erred in excluding evidence of the oral declarations of Moses Sprague at and about the time he signed the orders upon which his wife drew the deposits. It does not appear from the bill of exceptions what was the particular reason for these rulings, but in the brief of respondent they are defended upon the ground that the effect of the declarations would be to contradict or vary the terms of the written orders. The rulings cannot be sustained upon that ground. The orders related solely to a matter between Moses Sprague and the banks. It was not necessary for him to inform the banks of his purpose in putting the deposits under control of his wife. His purpose was a matter between him and her exclusively, and was manifested and could be proved by his contemporaneous declarations, or by his declarations made before or after delivering the orders. There is no better proof of intention than declared intention, and it is often the only means of proof. The question here is not governed by subdivision 4 of section 1870 of the Code of Civil Procedure, but by subdivision 2 of that section.

We do not deem it necessary to notice particularly the several cases cited by respondent in support of his contention that there was a failure in this case to make a gift, even if a gift was intended. The case of Zeller v. Jordan, 105 Cal. 147, 38 Pac. 640, is fairly representative of the other cases cited, and clearly exhibits the distinction which makes them one and all inapplicable to this controversy. That was a claim of gift from a deceased wife. All the surviving husband had to show was an undated check on a savings bank for $19,000. He could not have drawn the money without the passbook, and he never had the passbook. And, besides, he testified himself that it was not intended that he should use the check until after his wife's death. And so in all the cases the supposed gift was not delivered or put in the power of the person claiming as donee. Here the means of reducing the deposits to possession were placed in the hands of Mrs. Sprague, and she took possession in her husband's lifetime. If this taking possession was in accordance with the understanding between her and her husband, the gift was complete.

It is necessary, perhaps, in view of the further proceedings in the trial court to notice briefly one or two other points. Even if it should be found that it was not the intention of Moses Sprague that his wife should draw out the deposits, or change them to her own account in his lifetime, the form of the orders ("with right of survivorship") indicates his intention that she should take them as survivor after his death, and, if such was his intention, the transaction would be brought within the doctrine of Booth v. Oakland Bank, 122 Cal. 19, 54 Pac. 370, where it was held that an arrangement substantially the same as in this case constituted the bank a trustee of the deposit for the benefit of the parties to whom the depositor desired the money to be paid in case of her death. The fact that Mrs. Sprague actually drew the money before her husband's death would not defeat the intention to create a trust in her favor. If it shall be found that these deposits did not pass to Nancy Sprague either as donee or beneficiary of a trust, they may be recovered, so far as identifiable, without presentation of a claim against the estate of Nancy Sprague. The right to sue an executor or administrator in cases like this without presentation of a claim against his decedent's estate arises from the fact that the specific thing sued for is not a part of such decedent's estate, and the action will lie whenever the thing demanded can be identified in specie as the property of another.

The superior court did not err in finding that the action was not barred by the statute of limitations. If the money in the hands of Hattie S. Walton was identified as a part of the deposits originally standing in the name of Moses D. Sprague, and if there was no gift to her or trust for her benefit, she held them in trust for him at the time of his death. They were his property, and recoverable in specie, and the claim of his representatives is protected from the running of the statute of limitations in favor of his executrix in the same way and upon the same principle that applies to a debt from an executor or administrator to his decedent. The claim against Nancy Sprague was not discharged by her appointment as executrix. She should have included the deposits in her inventory, and, whether she did or not, the statute did not run in her favor. Code Civ. Proc. § 1447. As to the defendant, she was appointed executrix of Nancy Sprague's will less than two years before the action was commenced, and there is no clause of the statute which could possibly bar the action against her within that period.

We discover no error in the judgment, but the order denying a new trial is reversed for the reasons stated, and the cause remanded.

We concur: HENSHAW, J.; McFARLAND, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

145 Cal. 202

EVA et al. v. SYMONS et al. (S. F. 2,957.)

(Supreme Court of California. Oct. 31, 1904.)

EJECTMENT—SUFFICIENCY OF FINDINGS—REVIEW.

1. Where defendants in ejectment claim title, possession, and right of possession under an alleged verbal gift from plaintiff's ancestor, a finding that such ancestor "took title to the land in his own name, and did not promise that he would then or thereafter convey the same to defendants, and that he never did convey to them," and that plaintiff is the owner and seised in fee of the whole property, is sufficient.

2. On appeal on the judgment roll alone, it will not be presumed, against the correctness of the judgment, that there was evidence on a point in respect to which there is no finding.

Commissioners' Decision. Department 2. Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Action in ejectment by Samuel J. Eva and others against John Symons and others. Plaintiffs had judgment, and defendants appeal. Affirmed.

David E. Marchus (Chas. C. Boynton, of counsel), for appellants. Chapman & Clift, M. C. Chapman, Frederick C. Clift, and R. H. Latimer, for respondents.

CHIPMAN, C. Ejectment. Plaintiffs are the heirs at law and devisees of James Eva, deceased, whose last will was duly probated, his estate settled, and final distribution made, and the executors discharged. The land in question was distributed to plaintiffs, and they bring the action for possession, for damages for withholding possession, and for rents and profits. Defendants denied specifically the averments of the complaint, and claimed to be the equitable owners of the land by virtue of verbal gift of James Eva in his lifetime, and possession taken thereunder and ever since retained; the alleged facts appearing in the answer and in a cross-complaint. In their answer to the cross-complaint, plaintiffs deny specifically defendants' allegations relating to the alleged gift of the land to them; admit defendants' possession, but deny that such possession was taken under the alleged agreement by defendants with James Eva; and pray that they (defendants) "have judgment as hereinbefore prayed for, and decree that plaintiffs are the owners, seised in fee, of all the said premises in said cross-complaint described," and that defendants have no title to or interest in the land. The findings of fact set forth that the cause came on regularly to be tried "upon the complaint of plaintiffs theretofore filed herein, and upon the answer and cross-complaint of the defendants theretofore filed herein. * * * Said cause was by stipulation of the parties in open court heard upon the equitable defense interposed by the defendants herein by their answer and cross-complaint filed herein, and the jury was impaneled to advise the court upon such questions of fact relating to said equitable defense as might be thereafter submitted to it by the court." The special issue submitted was, "Did James Eva give the land to defendants and place them in possession?" The jury answered "Yes," but the court disregarded the verdict and made findings against defendants. The court also found that James Eva took the title to the land in his own name, but did not promise that he would then or thereafter convey the same to defendants, and that he never did convey the title to them, or either of them; that plaintiffs claim as devisees of said James Eva, deceased, and "plaintiffs are the owners of said real property, and are seised in fee of the legal title thereto, and the whole thereof." As conclusions of law, the court found that defendants are not the owners of the land, nor seised in fee of all or any part thereof, and that plaintiffs are the owners and seised in fee of the whole thereof; that defendants are not entitled to judgment on their equitable defense interposed by their answer and cross-complaint, but that plaintiffs are entitled to judgment thereon. Judgment passed for plaintiffs, adjudging that "plaintiffs are the owners, seised in fee, of said lands and premises, and the whole thereof; that defendants are not entitled to judgment upon their equitable defense interposed in this action, but that plaintiffs are entitled to judgment" thereon. Defendants appeal from the judgment on the judgment roll alone.

The points made by appellants are that there is neither finding of fact nor judgment determining the issue of right of possession or of damages, and the court therefore failed to find on a material issue (citing O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225), and that there can be but one final judgment, and a judgment which determines "as to one or a portion of the issues only is premature and contrary to the course of law" (citing Fox v. Hale & Norcross S. M. Co., 112 Cal. 568, 44 Pac. 1022; White

v. White, 130 Cal. 597, 62 Pac. 1062, 80 Am. St. Rep. 150, and other cases).

So far as any right asserted by defendants is concerned, the court made complete findings against defendants. They claimed the title and possession and right of possession upon an alleged verbal gift, and not otherwise. The findings and judgment clearly negative these issues. The court further found, and also adjudged, that plaintiffs are the owners and seised in fee of the land. The findings are sufficient to support the judgment, and contain nothing inconsistent with it. The cause is here on the judgment roll alone. It will not be presumed against the correctness of the judgment that there was evidence upon a point in respect of which there is no finding. In Wise v. Burton, 73 Cal. 175, 14 Pac. 683, the rule was stated as follows: "This court will not reverse for want of a finding on an issue where there is no evidence in relation to such issue." See Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Gregory v. Gregory, 102 Cal. 52, 36 Pac. 364. In the recent case of Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828, the court said: "It is also settled that the failure to find upon an issue will not be ground for reversing a judgment otherwise correct unless it appears by statement or bill of exceptions that evidence was given upon such issue."

Whether plaintiffs have by the judgment obtained all the relief to which they are entitled or are seeking, or can in this action have further relief, are questions which do not now concern us. It is clear that, under the rule above stated, appellants are not entitled to have the judgment reversed, and we therefore advise that it be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment is affirmed. McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(145 Cal. 223)

WHITE v. BESSE et al. (S. F. 2,996.)[*]

(Supreme Court of California. Nov. 4, 1904.)

RESTRAINING EXECUTION SALE—INTERVENTION—PLEADINGS—DEED—HUSBAND TO WIFE—CONSIDERATION—REVIEW.

1. Where the judgment creditor intervenes in an action against the sheriff to restrain the sale of the wife's land as that of her husband, claiming merely that the deed from the husband, under which the wife held, was void as to creditors, he cannot, after the filing of findings of fact, claim that the deed was given as security, and thus constituted a mortgage leaving the equitable title in the husband.

2. A husband being neither insolvent nor in contemplation of insolvency, a voluntary deed of his land to his wife is valid.

3. A cross-complaint for affirmative relief by the judgment creditor as intervener in an action by a wife against the sheriff to restrain the sale of her land as that of her husband not being an answer to the complaint in the action, an averment therein that the wife is not, and never was, the owner of the land, cannot be deemed a denial of the averment in plaintiff's complaint that she is such owner.

4. An intervener who files a cross-complaint asking affirmative relief, without connecting himself with the pleadings between the plaintiff and defendant, cannot on appeal obtain any advantage from their pleadings, but must rest his case solely on his complaint in intervention.

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Anna R. White against Milton Besse, defendant, and Julius Lee, intervener. Plaintiff had judgment, and intervener appeals. Affirmed.

H. C. Wyckoff, for appellant. Chas. M. Cassin and Charles B. Younger, for respondent.

SHAW, J. The complaint states a cause of action against the defendant, Besse, as sheriff of Santa Cruz county, to enjoin him from selling certain land, alleged to be the property of the plaintiff, upon an execution issued on a judgment recovered by Lee, the intervener, against Edward White, the husband of the plaintiff. The judgment creditor, Lee, by leave of court, intervened and filed his complaint in intervention. The court, after a trial, made its decision, and gave judgment in favor of the plaintiff. The intervener alone appeals from the judgment, upon the judgment roll.

The plaintiff alleges, among other things, that she was, and ever since February 28, 1898, had been, the owner of the land in question. The intervener's judgment was recovered on September 24, 1898. The defendant, Besse, answered the plaintiff's complaint, specifically denying the allegation of ownership, as well as most of the other allegations thereof. The intervener, however, did not answer the complaint, but contented himself with filing a complaint in intervention, which was answered by the plaintiff. The complaint in intervention alleged the recovery of the judgment against Edward White; set forth that prior thereto Edward White had executed two deeds purporting to convey the property to the plaintiff, dated, respectively, September 25, 1897, and March 1, 1898; that intervener was then a creditor of Edward White for the claim upon which judgment was afterward recovered; and alleged that each of said deeds was without consideration, and was made by Edward White while he was insolvent and in contemplation of insolvency, and for the purpose and with the intent to defraud the intervener and other creditors of Edward White; that there was no other property out of which said judgment could be collected; that the fraudulent deeds obstructed the right of the intervener to have the same sold on execution; that said Anna R. White was not then, and never had been, the owner of or in possession of the property or any part thereof; that she had no right thereto or interest therein as against the intervener as a creditor; and that she had not, and never had, or claimed to have, any interest therein, save such as was conveyed to her by the said deeds of her husband. Upon these allegations, he asked that the deeds mentioned be declared fraudulent and void, as against him, and that they be canceled.

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[*] Rehearing denied December 3, 1904.

In the findings the court states that the plaintiff was at the time the action was begun, and ever since had been, the owner and in possession of the land in controversy, and that the deeds mentioned were each executed for a valuable consideration, and not with the intent to hinder, delay, or defraud creditors. The findings then proceed to state the consideration for the deeds. From this statement it appears that the husband was the owner of the land, and desired to obtain a loan; that, in order to do so, he was required to give his note, executed jointly by himself and wife; that he agreed with his wife that, if she would sign the note as surety for him, he would hold her harmless and secure her against all liability by reason thereof; that, in pursuance of this agreement, they executed the note, and also a mortgage on the land in controversy to secure the same, and the loan was obtained thereby; that the note became due, and was not paid by the husband; and that thereafter, for the purpose of fulfilling the agreement aforesaid with his wife, and to secure her against all liability on the note, and also to secure his creditors who had liens on the land, the husband executed the deed of September 25, 1897. The court further finds that "ever since the execution of said last-mentioned deed the said plaintiff has been, and yet is, the owner of all the real estate therein described," and that, in "pursuance of the purposes of said conveyance as aforesaid, said plaintiff paid" the note, and caused the mortgage to be satisfied. The findings with respect to the consideration and effect of the conveyance of March 1, 1898, are precisely similar, except that it involved a different note and mortgage. It is then further found that Edward White has not been the owner of the land, or of any right, title, interest, or estate therein, or claim thereto, at any time since the execution of the first deed to the plaintiff, September 25, 1897.

The appellant now claims that under these findings he is entitled to judgment. The ground for this contention is that the deeds were given as security only, and that, although absolute in form, they constitute in law nothing more than a mortgage. Hence he contends that, although the mortgage is prior to his judgment, the title still remains in Edward White, and he is entitled to have the lands sold on his execution subject to the mortgage. If the intervener had tendered any issue involving the proposition that the deeds were intended merely as mortgages, or had filed any pleading alleging the facts included in the findings tending to that conclusion, and asking relief on that ground, and the court had made its finding squarely upon such issue, perhaps the contention might have been sustained. The complaint in intervention states only a cause of action to set aside the deeds on the ground that they were made to defraud creditors, and it states no facts upon which to found the claim that the deeds were intended merely as mortgages. Upon the cause of action to cancel the deeds the court found, as a fact, that there was no fraudulent intent, and that Edward White was not insolvent, nor in contemplation of insolvency, at the time he executed them. This being the case, it is immaterial whether there was or was not a valuable consideration. There being no intent to defraud, and the grantor being neither insolvent nor in contemplation of insolvency the deeds were valid, although made without consideration. Civ. Code, § 3442; Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576; Threlkel v. Scott, 89 Cal. 353, 26 Pac. 879; Haas v. Whittier, 97 Cal. 420, 32 Pac. 449; Knox v. Moses, 104 Cal. 505, 38 Pac. 318.

The complaint of the intervener is not addressed to the plaintiff's complaint, does not purport to be an answer thereto, and contains no allegations in the form of denials. It states an independent cause of action, and is, in effect, a cross-complaint for affirmative relief. Hence the averment therein that Anna R. White is not, and never was, the owner of the land, cannot be deemed a denial of the allegation of the plaintiff's complaint that she is such owner.

In suits to quiet title and actions in ejectment it has been frequently decided that an allegation of ownership in the complaint, which is denied in the answer, raises an issue upon which the defendant may show that a deed under which plaintiff claims title was given as security for the debt, and was intended as a mortgage. And perhaps this doctrine would be extended to suits to enjoin an execution sale, such as that of the plaintiff herein, so that the defendant, Besse, upon that issue, could have had the judgment reversed if he had appealed. But the defendant does not appeal, and the intervener has not in any manner connected himself with the pleadings between the plaintiff and defendant, and cannot obtain any advantage therefrom. He must rest his case on appeal solely on the cause of action stated in his complaint in intervention.

In actions for relief on the ground of fraud, such as that of the intervener, where, after averments that a deed purporting to convey title was in fact fraudulent and void, the pleader concludes with a statement that the grantee is not the owner of the property described in the conveyance, the latter allegation cannot be allowed to change the cause of action from a suit to declare the deed fraudulent as against creditors to an action to declare that it was, in legal effect, a mortgage, nor to give the complaint the effect of stating two distinct causes of action, nor even to lay the foundation for evidence and findings to the effect that the deed, although not fraudulent, was intended as a mortgage, and did not convey title. The allegation in the intervener's complaint that the plaintiff is not, and never was, the owner of the land, in the connection in which it is found as part of a complaint to set aside deeds as fraudulent, is a mere conclusion from the previous statement that the deeds were made with intent to defraud creditors, and for no valuable consideration. In so far as the findings tend to show that the deeds were, in effect, mortgages, they must, so far as the intervener is concerned, be held to apply, as the findings show they were intended to apply, exclusively to the question of the consideration for the deeds; and they do not justify a judgment for the intervener, which would be in reality a judgment in his favor upon a cause of action not alleged by him, nor involved in the issues between him and the plaintiff.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

145 Cal. 195

HUMISTON v. SHAFFER, County Auditor. (L. A. 1,577.)*

(Supreme Court of California. Oct. 29, 1904.)

COUNTIES—OFFICERS—COMPENSATION—ALLOWANCES FOR ASSISTANTS.

1. Under sections 132 and 133 of the county government act of 1897 (St. 1897, p. 488, c. 277), which make it the duty of the district attorney to prosecute all persons charged with crime, and sue for the recovery of penalties and forfeitures accruing to the state or county, and to defend suits against the county, and to give, without fee, his opinion in writing to county officers and the board of supervisors, and prohibiting him from presenting any claim for allowance against the county, except for his own services, and under section 215 of the same act (page 572), which declares that the salaries and fees provided therein shall be in full compensation for all services rendered by the county officers or their deputies, and requiring deputies to be paid by their principals out of their salaries, unless otherwise provided, the district attorney cannot claim any extra compensation for his services, or for the services of any deputy or assistant, such as a stenographer employed in writing letters, pleadings, judgments, opinions, etc.

2. Nor are the services rendered by such a stenographer personal expenses of the district attorney, within the meaning of section 228 of the same act (page 575), which makes the traveling and other personal expenses of the district attorney incurred in criminal and civil cases, and other matters in which the county is interested, a county charge.

3. Const. art. 11, § 9, prohibits the increase of the compensation of county or municipal officers after their election, or during their term of office. The county government act of 1897, §§ 132, 133, define the duties of the district attorney, and section 215 of the act declares that the salaries and fees provided therein shall be in full compensation for all services rendered by the officers therein named, or by their deputies, and provides for the payment of deputies by their principals out of their salaries. *Held*, that the county board of supervisors cannot appoint a salaried stenographer for the district attorney, either directly or indirectly, by allowing a claim against the county for work done by such stenographer.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Application by Mabel I. Humiston for a writ of mandate against Eugene E. Shaffer, auditor of San Diego county. From a judgment awarding the writ, defendant appeals. Reversed.

Sam F. Smith and Collier & Smith, for appellant. Eugene Daney, for respondent.

COOPER, C. The plaintiff was employed in the office of the district attorney of the county of San Diego during the month of January, 1904, and did certain typewriting for the district attorney during said month, from the 2d to the 29th day, inclusive. She presented a claim against the county, duly itemized and verified, showing the total amount of the claim to be $49.30. The claim consisted of 100 different items performed by plaintiff for the district attorney as stenographer and typewriter—the work being in connection with the official duties of the district attorney—and consisted in writing letters to various parties, letters advising certain county officers as to the correct performance of their official duties, letters of advice to the county board of supervisors, the writing of pleadings and judgments in civil actions in behalf of the county, and in writing and copying criminal informations. The claim was allowed by the board of supervisors of the county. The defendant, as county auditor, refused to draw his warrant for the amount, and the court below, having heard the facts, ordered judgment for plaintiff, awarding her a writ of mandate against defendant, commanding him, as county auditor, to draw a warrant in favor of plaintiff for the amount. This appeal is from the judgment.

The question presented is as to whether the claim is a legal charge against the county. The duties of the district attorney are defined in sections 132 and 133 of the county government act of 1897 (St. 1897, p. 488, c. 277). He must draw all indictments and informations, attend to the prosecution of all persons charged with crime, defend all suits brought in his county or wherever brought, prosecute all recognizances forfeited in the courts of record, and all actions for the recovery of debt, fines, penalties, and forfeitures accruing to the state or his county. He must give, when required, without fee, his opinion in writing to county, district, and township officers on matters relating to the duties of their respective offices. He is the legal adviser of the board of supervisors, and must attend their meetings when required, and oppose all claims and accounts against the county when he deems them unjust or illegal. Except for his own services, he must not present any claim, account, or demand for allowance against the county. It is provided in section 215 (page 572) of the same act: "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers herein named, either as officers or ex-officio officers, their deputies or assistants, unless in this act otherwise provided, and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, unless in this act otherwise provided." It is evident that the above-quoted provisions do not allow the district attorney to claim any extra compensation for his services, or for the services of any deputy or assistant. If the law allows a deputy or assistant, and fixes the salary, then, and not otherwise, can the deputy or assistant be paid by the county.

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*Rehearing denied November 28, 1904.

Plaintiff relies upon the section 228 (page 575), which makes "the traveling and other personal expenses of the district attorney incurred in criminal cases arising in the county, and in civil actions and proceedings in which the county is interested, and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases, and in civil actions and proceedings and all other matters in which the county is interested," a county charge. The above-quoted language does not include charges of the kind claimed by plaintiff in this case. The district attorney must write his own letters, or pay some one to write them for him, in the absence of any law authorizing the paying of a deputy or assistant. If he could make the cost of copying or writing letters and opinions a personal expense, within the meaning of the section, he could, on the same principle, make the cost of employing an attorney to look up authorities and write briefs a personal expense. He could, on the same principle, incur personal expense by hiring everything done in connection with his office. His food, clothing, cigars, and amusements are personal expenses, but not such as contemplated by the statute. The statute contemplates expenses necessarily incurred in connection with the office of the district attorney outside of the performance of the duties required of him by statute. If money has to be paid for taking a deposition for the services of an expert, or for detective work, the statute makes it a charge against the county. In Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, it was held that an order of the board of supervisors of Marin county allowing a county clerk a deputy at a salary of $50 a month, to be paid by the county, was an increase of the compensation of the county clerk after his election, and therefore void, as being in conflict with section 9, art. 11, of the Constitution. In the concurring opinion of the Chief Justice it was said: "The sum allowed to any given officer being a lump sum, out of which he must pay for the services of all deputies and assistants necessary for the prompt and faithful discharge of all the duties of the office, it is evident that his own compensation consists of the residue remaining after payment of such deputies and assistants; and it is equally evident that, just so far as the county assumes the payment of such deputies and assistants, such residue is enlarged and the compensation increased." Applying the principles of that case to the case at bar, it is plain that the board of supervisors could not have made an order appointing the plaintiff stenographer and typewriter for the district attorney at a salary. If they could not do it directly, they could not do it indirectly; but, if we allow the plaintiff to recover in this case, the result is the same as though she had been appointed by the board of supervisors, and her salary fixed. She would in such case be paid for her month's work by the county. If it could be done for one month, it could be done for every other month in the year. If such allowance could be made to a typewriter, it could on the same principle be allowed to a clerk or an attorney employed by the district attorney. The case of Dougherty v. Austin has been universally followed by this court. It was applied in County of Orange v. Harris, 97 Cal. 600, 32 Pac. 594, where it was held that the tax collector was not entitled to a portion of the penalties collected on delinquent taxes for preparing the delinquent list. It was applied in County of Kern v. Fay, 131 Cal. 547, 63 Pac. 857, where it was held that the district attorney could not retain in addition to his salary the sum of $10 each in 63 suits recovered as costs, under a statute, as attorney's fees in actions to foreclose certificates of purchase to state school lands; and in County of Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324, where it was held that the county clerk of Humboldt county could not receive extra compensation for extra work done by him in preparing data for a claim of the county against the state; and in Matter of Dodge, 135 Cal. 512, 67 Pac. 973, where it was held that the assessor of the city and county of San Francisco was not entitled to receive for his own use a percentage of poll taxes fixed by section 3862 of the Political Code. It was applied in Agard v. Shaffer, 141 Cal. 725, 75 Pac. 343, where it was held that the county recorder of San Diego county was not entitled to extra pay for a clerical force employed to make abstracts of mortgages, deeds of trust, and contracts for the use of the assessor, under section 3678 of the Political Code, directing the board of supervisors, when necessary, to provide for such extra clerical force. It was there said: "In the statute before us in this case the compensation was to be allowed by the board to additional clerical force to assist the recorder in performing his official duties. In principle, there is no difference between helping out the recorder's compensation by furnishing him a deputy to perform the work of the office, and furnishing him a 'clerical force' to do the same thing. The one affects his compensation in exactly the same manner as the other. And if the power to do the one thing should not be delegated to the board of supervisors, then the power to do the other thing should not be so delegated."

The judgment should be reversed, and the court below directed to dismiss the proceedings.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to dismiss the proceedings: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

145 Cal. 219

GRANT v. BANNISTER et al. (S. F. 2,882.)

(Supreme Court of California. Nov. 3, 1904.)

CHANGE OF VENUE—AFFIDAVITS—WAIVER OF RIGHT.

1. An order granting change of venue for convenience of witnesses, and in the interest of justice, on affidavits alleging "that all the witnesses in this case who are necessary or material, except plaintiff, reside in the county" to which the change of venue was made, will not be disturbed because they did not contain the names of the witnesses and the testimony expected from them, where six of the seven defendants reside in such county.

2. Defendants did not waive the right to move for change of venue by obtaining an extension of time in which to plead, where the stipulation was silent as to the time in which to make a motion, and the statute gives the right to make the motion when defendants appear and answer or demur.

Commissioners' Decision. Department 2. Appeal from Superior Court, Marin County; F. M. Angellotti, Judge.

Action by William Grant against W. D. Bannister and others. From an order granting a change of venue, plaintiff appeals. Affirmed.

Mullany, Grant & Cushing, for appellant. R. H. Countryman (Ralph C. Harrison, of counsel), for respondents.

COOPER, C. This action is brought to quiet plaintiff's title to, and have it adjudged that he is the owner of, 250 shares of the capital stock of defendant corporation. All the defendants, except Hearfield and the corporation, are directors of defendant corporation.

Defendants, at the time of pleading, moved for an order changing the place of trial from the county of Marin, where the action was commenced, to the county of Tuolumne, upon the grounds, first, that the county of Marin is not the proper place for the trial of the said action, for the reason that the residence of each of the defendants, except Hearfield, was at the time the action was commenced, and ever since has been, in Tuolumne county, and that, while Hearfield was and is a resident of Marin county, he is not a necessary or proper party defendant, but was made such defendant for the purpose of preventing a change of venue from Marin county; and, second, that the convenience of witnesses and the ends of justice will be promoted by the change. The motion was made and granted upon the pleadings and affidavits filed by the respective parties. This appeal is from the order granting the motion.

If it be conceded that Hearfield was a necessary and proper party, the order may be sustained on the second ground stated in the motion. All presumptions are in favor of the order of the trial court, and, unless there is reason to believe that it has abused its discretion, this court will not interfere. Hanchett v. Finch, 47 Cal. 192. It clearly appears that the transaction out of which plaintiff's cause of action arose, as well as that upon which defendants rely for their defense, took place in the county of Tuolumne. The defendant corporation has its place of business there. McPherson, the person from whom the plaintiff claims to derive his title to the shares of stock, and who is necessarily the important and material witness, outside the parties, resides in that county. All the defendants who claim to be the owners of the stock reside in that county, and it is reasonable to suppose that they will either be witnesses, or be present at the trial in their own interest. The affidavit of Bannister, which is not denied, states that plaintiff is largely interested in business in Tuolumne county, and that he is often in said county, looking after his private affairs.

Appellant contends that the affidavits used by defendants on their motion for a change of venue are insufficient, because they contain only a general statement "that all the witnesses in this case who are necessary or material to the trial thereof, except the plaintiff, reside in said Tuolumne county." The affidavits would have been much more satisfactory if they had contained the names of the witnesses, and the testimony expected from each; and, if the court below had denied the motion, we would attach little importance to such affidavits, had defendants appealed. But the court granted the motion, and we cannot say that the affidavits, in connection with the pleadings and the papers on file, were not sufficient as a basis for the order. Particularly is this so in face of plaintiff's only affidavit to retain the case in Marin county, which contains only the general statement "that he will have at least four witnesess, all of whom reside either in San Francisco or Santa Rosa, Sonoma coun-

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¶ 1. See Venue, vol. 48, Cent. Dig. § 119.

ty." All parties seem to have relied upon general statements in their affidavits, and we do not think the statements of one any more subject to criticism than the statements of the other in this regard. It is stated and conceded that McPherson is a material witness, and that he resides in Tuolumne county. Where six defendants and the only material witness named reside in the county to which the place of trial is changed, we cannot say that the ends of justice will not be promoted by the order.

It is claimed that the defendants waived their right to move for a change of venue for the reason that they asked plaintiff's attorneys for a written stipulation for 30 days' additional time to plead or move in said action. Plaintiff's attorneys refused to grant further time to defendant's attorneys to move or make a motion, but modified the proposed stipulation by striking from it the words allowing additional time to move or make a motion in said action; thus extending the time to plead only. We can regard only the written stipulation. As modified, it extended the time to plead, but was silent as to any time in which to make a motion. The statute gave the defendants the right to make the motion "at the time they appeared and answered or demurred." The stipulation giving further time to plead carried with it the right to move for a change of venue at the time of pleading.

We advise that the order be affirmed.

We concur: GRAY, C.; SMITH, C.

For the reasons given in the foregoing opinion, the order is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

145 Cal. 207

COOPER v. SPRING VALLEY WATERWORKS. (S. F. 3,111.)*

(Supreme Court of California. Oct. 31, 1904.)

NEW TRIAL—DISCRETIONARY POWER—REVIEW.

1. Where a motion for a new trial was made on all the statutory grounds, and the court did not intimate on what ground the order granting it was based, the order must be affirmed, if it could be properly based on any of the grounds.

2. The fact that the evidence is conflicting on the questions at issue does not prevent the trial court from exercising its discretionary power in granting a new trial.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Erwin M. Cooper, executor of the estate of John H. Lochhead, deceased, against the Spring Valley Waterworks. Plaintiff had judgment, and from an order granting a new trial he appeals. Affirmed.

W. C. Sharpstein, for appellant. M. B. Kellogg and E. Mills Adams, for respondent.

McFARLAND, J. This is an action brought by plaintiff, as executor of the last will of John H. Lochhead, deceased, to recover of the defendant the value of 40 shares of its capital stock, alleged to have been wrongfully converted by defendant. The jury returned a verdict for plaintiff in the sum of $4,080, with interest. Defendant made a motion for a new trial, which was granted. From the order granting the motion, plaintiff appeals.

The motion for a new trial was made on all the statutory grounds, and the court did not intimate what ground the order granting the motion was based on, and, unless the order cannot be maintained upon any one of the grounds of the motion, it must be affirmed; and, assuming that it was granted for insufficiency of the evidence to support the verdict, there is no reason for disturbing it. In the case of In re Carriger's Estate, 104 Cal. 81, 37 Pac. 785, this court said as follows: "When the judge of a trial court is satisfied that a verdict is not warranted by the evidence, he should set it aside; and, when he does so, his order granting a new trial will not be reversed unless it appears to this court that he had no reasonable and just ground for holding that the verdict was against the weight of the evidence. The mere fact that there is some conflicting evidence on the points at issue does not preclude him from exercising the supervisory power of granting a new trial which is clearly given him." Citing cases. This language is directly applicable to the case at bar.

It is averred in the complaint that the deceased died on the 4th of May, 1899, and that at the time of his death he "was lawfully possessed of forty shares of the capital stock of the defendant, designated on the books of defendant as certificate No. 20,484." But the undisputed facts are that at the time of his death this certificate of stock regularly indorsed in the handwriting of deceased was in the possession of Dr. George M. Terrill, who afterwards transferred it to the First National Bank of San Francisco as security for money loaned him by the bank, with authority to have the stock transferred to the bank; and the respondent afterwards took up the old certificate, and issued a new one for the said 40 shares to the said bank. The issue in the case as asserted by appellant at the time of the trial, and presented to the jury by the court's instructions, which were not objected to, and to which no exception was taken, was whether Dr. Terrill was the lawful owner of the said stock, or whether he had obtained possession of it wrongfully. In the opening statement to the jury, counsel for appellant said that plaintiff would introduce evidence tending to show "that this stock was taken by Dr. Terrill from Dr. Lochhead's possession without Dr. Lochhead's knowledge or consent; in other words, that it was stolen." The court instructed the jury that "if you believe that George M. Terrill was in possession of this certificate, indorsed, and had such possession before the death of Dr. Lochhead, without stealing or finding the same, the court instructs you that there is no evidence that such possession was not rightful, and the presumption is that it was rightful; and if there was an understanding between Terrill and Lochhead that Terrill owned the certificate, or was authorized to pledge it for his own benefit, then the assignment thereof by Terrill to the First National Bank was lawful, as a pledge, and the defendant should receive a verdict at your hands." And further: "The court instructs you that, in order to establish the theft of the stock by Terrill, the plaintiff must produce satisfactory evidence of grand larceny." Now, about the only direct evidence as to this issue was the testimony of Dr. Terrill. We will not undertake to give his testimony in full, but will notice enough of it to show its general character. He testified that he was a physician and surgeon, and attended the deceased professionally for about eight or nine years previous to his death; that during the two years, or a year and a half, before his death "he had organic trouble called 'angina pectoris,' a disease of the heart—suffering from severe spasmodic pains in the heart. This disease depresses the system, and is a dangerous disease. I had to remain sometimes three or four hours at a time with him. He did not want me to go away. I relieved his pains, and he did not want me to leave him. He finally died of this disease. * * * In fact, I gave up my vacation for the summer. He begged me not to go away." He further testified that in January, 1899, the deceased indorsed the certificate of stock and delivered it to him in payment of his professional services—the deceased reserving the right to have the dividends thereon during his lifetime, which were paid to him until his death—and that before that time "Dr. Lochhead had spoken to me repeatedly about my services, and compensating me for the same." There was some conflicting evidence, consisting mainly of testimony of witnesses of declarations of Dr. Terrill tending to show that he was giving his services to the deceased gratuitously; but, considering the direct testimony of Dr. Terrill, the undisputed fact that he was in possession of the certificate, regularly indorsed, together with the other evidence in the case, there is no warrant whatever for here holding that the court below abused its discretion in granting the new trial. Therefore the order appealed from must be affirmed.

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*Rehearing denied November 30, 1904.

¶ 2. See New Trial, vol. 37, Cent. Dig. § 144.

We do not deem it necessary to notice the various other points made by respondent. Many of them are not of any very great importance, and may not arise again. It is proper to say, however, that the court should have ruled out the testimony offered by appellant that the deceased had never told certain witnesses that he had transferred the stock, and that Dr. Terrill had never told the witnesses that the stock had been transferred to him. We see no relevancy or pertinency in this testimony. People are not called upon to speak of such transactions to third persons, and usually do not.

The order appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

145 Cal. 186

Ex parte CLIFTON. (Cr. 1,180.)

(Supreme Court of California. Oct. 28, 1904.)

IMPRISONMENT—CREDITS FOR GOOD BEHAVIOR—CUMULATIVE SENTENCES.

1. St. 1889, p. 410, c. 264, § 20 (Pen. Code 1903, p. 701), provides that a convict shall be allowed from "his term," for good behavior, a deduction of two months in each of the first two years, four months in each of the next two years, and five months in each of the remaining years of said term. *Held*, in view of Pen. Code 1876, § 1590, providing that a prisoner shall be granted certain credits for good behavior, increasing in amount for each succeeding year, during his imprisonment, and that such credit is deducted from the "entire term" of penal servitude to which he has been sentenced, that under the act of 1889, where one is convicted of two offenses, and, as a punishment for each, sentenced to imprisonment, the second sentence to commence at expiration of the term of imprisonment imposed by the prior sentence, each term is to be considered by itself, as regards the allowance of credits for good behavior.

In Bank. Habeas corpus proceedings by one Clifton. Petitioner remanded to custody.

E. J. Wachorst and Frank J. Murphy, for petitioner. U. S. Webb, Atty. Gen., for respondent.

LORIGAN, J. Petitioner seeks, under habeas corpus, to be released from imprisonment in the State Prison. In September, 1897, he was convicted in the superior court of Los Angeles county on two separate charges of burglary in the second degree, and, as punishment for the first offense, was sentenced to imprisonment in Folsom for five years, and on the second was sentenced for a similar term in the same prison; the latter sentence to commence, as provided by section 669 of the Penal Code, at the expiration of the term of imprisonment imposed by the prior sentence. Having actually served, up to the time of filing this petition, a period of six years and eight months, and having earned, as he claims, credits for good behavior, under section 20 of the act of 1889 (St. 1889, p. 410, c. 264), to the extent of three years and six months, he insists that he is now entitled to be discharged from imprisonment.

The only point involved in this matter is whether, in computing the credits for good behavior to which petitioner is entitled, the two sentences of five years each are to be taken as constituting a continuous term of ten years, or do they constitute separate, distinct, and independent terms of five years each. If, for the purpose of computing credits, the two terms constitute a continuous or entire term of ten years, then petitioner is entitled to his discharge, because, under the act, the time he has served, added to the credits he has earned upon the basis of a continuous term, has terminated his period of imprisonment. On the other hand, if, under the act, the terms are to be considered separate and distinct, the petitioner must be remanded, as he has not served sufficient time and earned sufficient credits upon the second term of imprisonment imposed to warrant his discharge.

The solution of this question must be determined from the language of the act itself, read in the light of previous legislation upon this subject. The only previous legislation on the matter necessary to be particularly considered is that found in St. 1867-68, p. 675, c. 504, which, upon the adoption of the Codes, was substantially carried into the Penal Code as section 1590 thereof, and which provided that in deducting credits for good conduct, in favor of a convict, they should be deducted from "the entire term of penal servitude to which he has been sentenced." In Ex parte Dalton, 49 Cal. 463, this court held, where a person was convicted of two offenses, for which he was sentenced to ten years for each offense, that, within the intent of the statute, and as a basis for allowing credits, "the entire term of penal servitude" must be considered as 20 years; that each period of 10 years was but a part of the "entire term," and it is insisted by petitioner that the same construction should be applied to the provisions of section 20 of the act of 1889 upon the same subject. Undoubtedly this should be done if the language in both sections of the statute were the same. But it is not. There is a radical and essential difference between the provisions of the original section 1590 of the Penal Code, construed in the Dalton Case, and the language employed in the act of 1889, under which the matter at bar is to be determined. Under the original section considered in the Dalton Case, it was apparent, as the court decided, that it was the intention of the Legislature, from the language used, that, for the purpose of credit commutation in favor of a prisoner, cumulative sentences of imprisonment should be considered as an "entire term of penal servitude to which he has been sentenced." The Dalton Case was decided in 1875, and at its session of 1877-78 (Amendments to Codes 1877-78, p. 124, c. 438) the Legislature amended the original section so as to provide that the credit deductions for good behavior in favor of a prisoner "shall be allowed from his term," and the new act of 1889, now in force, contains the same language. We think it is manifest from this amendment of the original section so soon after the decision in the Dalton Case, providing that the deduction of credits in favor of a prisoner "shall be allowed from his term," and not from the "entire term * * * to which * * * he has been sentenced," that the Legislature intended that such deductions, when cumulative sentences were imposed, should thereafter be made from the terms as they were served, treated and considered as separate and independent terms of imprisonment, as, but for the comprehensive language in the original section, they would otherwise, in law undoubtedly be. If this were not the intention of the Legislature, it cannot well be perceived why, in the amendment and the subsequent act of 1889, such a radical difference in language was used than was employed in particularly defining the basis of commutation in the original section, particularly when we consider that the meaning of the language in that section had already received judicial construction immediately preceding the amendment, by the decision in the Dalton Case, and its meaning as there employed placed beyond question. If the Legislature had intended that the same basis for commutation should obtain under the amendments as under the original section, it would not have departed from the plain and judicially construed language used in that section, and have provided for credit commutations from "his term," instead of from the "entire term * * * to which he has been sentenced." It is clear that, under the language of the original section, it was intended to make the successive periods of imprisonment under cumulative sentences continuous for commutation purposes; and it is equally apparent by the subsequent amendment, and also under the present act, that it was intended to leave the terms—as the law leaves them—separate. If the provision of the act of 1889 had been inserted in the original section, instead of the language there employed, there would be no room for contending that a prisoner's terms on cumulative sentences meant for commutation purposes the "entire term" of imprisonment to which he had been sentenced, because, in the absence of any language limiting or qualifying the use of the word "term," it must be given its legal significance, and, so given, each period of sentence prescribed under cumulative sentences is legally separate and distinct from the other, and there is nothing in common between them upon which such a contention could be sustained. The judicial records upon which such cumulative sentences are based are themselves separate and distinct. The offenses are different, and the convictions and judgments are distinct. The terms of imprisonment thereunder may be different in point of duration, as they are certainly separate in point of commencement, and are enforced under separate commitments; the term of each successive imprisonment commencing at the expiration of the prior term. It was this legal separateness and distinctness between terms of imprisonment under cumulative sentences which the Legislature in the original section intended, for the purpose of credit commutation, to destroy, and which in clear and comprehensive language it effected, by making the "penal servitude to which a convict has been sentenced" an "entire term." When, however, in subsequently dealing with the subject, it abandoned the definition of an "entire term," which it had theretofore created, and used simply the words "his term," it certainly intended that the word "term" should be employed in its legal significance, and to embrace the period solely which a prisoner was actually serving under a given sentence, treated as separate and distinct from any other sentence which, under an equally separate judgment, he would, on its expiration, be required to serve.

It is insisted by petitioner that his "entire term" and his "term" mean the same thing. Considered with relation to their places in the acts of the Legislature under discussion, we do not think so. In the original section it is the period to which the convict "has been sentenced," whether it be one term, or successive terms, which shall be treated as an entirety for commutation purposes, and is so defined by the Legislature in that section. In the act of 1889, "his term," used without any words of further definition or qualification, in law, means the term he is actually serving under a particular sentence, and considered as legally distinct from any other to which he has been sentenced, or which he may be required to subsequently serve under an independent and separate judgment of imprisonment.

Our conclusion therefore is that, when cumulative sentences are imposed, a prisoner is entitled to commutation credits for good behavior upon each term only as it is served, and not upon the separate terms to which he may have been sentenced, treated as a continuous period of imprisonment, or as an entire term, under the original section of the Penal Code, as construed in the Dalton Case.

The prisoner is remanded to the custody of the warden.

We concur: BEATTY, C. J.; McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.

145 Cal. 303

HELLING v. SCHINDLER. (S. F. 3,036.)*

(Supreme Court of California. Nov. 11, 1904.)

INJURIES TO EMPLOYÉ — FELLOW SERVANTS — DEFECTIVE MACHINERY—EVIDENCE OF NEGLIGENCE.

1. Where the duty of keeping a planing machine in order was delegated to one of six or seven employés whose duty it was to use the machine in common, and one of such employés

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*Rehearing denied December 9, 1904. Beatty, C. J., dissenting.

was injured by the knives of the machine becoming dull and the belt driving the same becoming loose, if the injury resulted from the negligence of any other of such employés than the one injured it was from the negligence of a fellow servant.

2. In an action for injuries to plaintiff, alleged to have resulted from the knives of the planing machine used by him being dull and the belt driving the machine being loose, evidence that immediately after the accident the knives were sharpened and the belt was tightened is inadmissible as an admission of prior negligence.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action for personal injuries by C. Helling against H. B. Schindler. From a judgment for plaintiff, defendant appeals. Reversed.

C. H. Wilson, for appellant. J. L. Geary, Jr., for respondent.

ANGELLOTTI, J. This is an action for damages for personal injuries. The plaintiff was employed by defendant as a wheelwright, and his left hand was badly cut by the knives of a buzz planer while he was using such planer in the course of his employment. His claim, as set forth in his complaint, was that at the time of the accident the planer "was out of repair, and unsafe for the uses and purposes for which said machine and apparatus were intended, to wit, the knives and apparatus thereof were dull, and the belt thereof connecting said machine with the power shaft of said plant and putting said machine and the said knives in motion was loose, and failed to give to said knives speed and velocity sufficient and necessary to plane a board upon which plaintiff was then operating," by reason of which, while planing a board, his left hand was thrown upon and in the knives of the machine. He obtained a judgment for $2,500, and the defendant appeals from the judgment and from an order denying his motion for a new trial. The defendant, in his answer, denied these allegations of the complaint. He also alleged contributory negligence on the part of plaintiff, and also that the injury was caused by the fault and negligence of a fellow servant.

1. The principal question discussed by counsel in this case is as to whether, assuming that the accident was due to the dullness of the knives or the looseness of the belt, the evidence does not show a case where, under the circumstances, the negligent condition must be attributed to the negligence of a fellow servant, rather than that of the employer. The trial court adopted the theory that for any such conditions the employer must be held responsible, and that there was no question as to the negligence of a fellow servant involved in the case. It therefore refused to grant a nonsuit, refused to instruct the jury upon the question of negligence of a fellow servant, and instructed the jury to the effect that, if the planing machine was not in a reasonably safe and suitable condition in either of the particulars claimed, and plaintiff did not, or could not by the exercise of reasonable care, know of such condition, and his injuries were the result thereof, their verdict must be for the plaintiff. Excluding from consideration the evidence as to subsequent repairs, which, as we shall show hereafter, was improperly admitted, the case presented was substantially as follows: The planing machine in question was used, as their needs required, for the purpose of planing small pieces of wood, by all of the men employed in the woodworking department of defendant's establishment, including a foreman of such department. There were six or seven men so employed. The planer was at the time of the accident in perfect condition, except that the knives had then become dull to some extent, and the belt somewhat loose, from use by these employés. No part of the machine broke or gave way. It was the duty of the foreman to see that the knives were kept sufficiently sharp and the belt sufficiently tight to properly run the machine. When the belt became so loose as to slip, the usual and customary way of remedying the defect was by putting on belt dressing, unless it became so loose as to require being shortened. When the knives became dull from use—which was a frequent occurrence—the ordinary method of sharpening was for the foreman to file them, without removing them from the machine, unless the edges had become so worn from long use that they could not be filed to advantage, in which event they were taken out and sent away to be ground. As long as the machine would, when used in the ordinary manner, efficiently do the work, it could not be said to be defective in either of the respects suggested; and both alleged defects were of such a nature that, admittedly, they would at once come to the knowledge of any experienced operator attempting to use the machine, for the effect of the machine upon the board sought to be planed would indicate the condition. Plaintiff had been employed in this shop for more than 19 months, and had continuously used this machine, as required by his work, sometimes 10, 15, or 20 times a day, up to the time of the accident. He had used it on the day before the accident. At the time of the accident, having occasion to plane a board, he waited for the foreman to finish planing a board, and then put his own board on the machine. He passed the board over the machine once, and noticed nothing wrong with the manner in which it worked, and, the board not being sufficiently smooth, he commenced to pass it over again, when, as he said, "it started jumping repeatedly, and threw my hand into the knives." He knew that the knives in this planer became dull from use, and frequently had to be sharpened, and that the belt frequently became somewhat slack from use; but claimed that he did not know that the

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¶ 2. See Negligence, vol. 37, Cent. Dig. § 255.

knives were dull, or the belt slack, in this instance, until the moment of the accident. There is nothing to indicate that the machine had not worked efficiently up to that very moment. The knives were dull to an extent, but not so dull but that they would do the work all right; and the same is true as to the slackness of the belt. The machine had been constantly used on the morning of the accident, right up to the happening thereof between 10 and 11 o'clock. Nor is there anything in the record to indicate that anything more was necessary to fully sharpen the knives than the mere filing thereof, or that the slackness of the belt could not be easily remedied by means at hand, which it was the duty of the foreman to use.

We have thus evidence tending to show a case where the duty of keeping a single piece of safe and adequate machinery in proper running order had been confided to one of six or seven employés, whose duty it was to use the machinery in common, and a case where the particular defects complained of were defects necessarily attendant upon the use of such machinery, which would at once manifest themselves to an operator thereon, and which could immediately be easily remedied by simply filing the knives and tightening the belt—duties which may, with propriety, be said to have to do only with the operation of the machinery. It is manifest that the rule requiring an employer to keep appliances furnished to employés in a reasonably safe and suitable condition—a rule absolutely essential to the proper protection of employés—cannot be held applicable to every defect arising in the daily use of the appliance, and consequent upon such use. It is incumbent upon the employer to furnish an appliance that is reasonably safe, and to use reasonable care to keep the same in proper repair, and this duty he cannot delegate so as to escape liability. The well-settled rule in this regard is clearly stated and the authorities cited in Skelton v. Pacific Lumber Co., 140 Cal. 507, 511, 74 Pac. 13. But there are certain duties necessarily attendant upon the operation of some appliances, and which really have to do only with their proper operation, which, if left unperformed, render the machinery unsafe, or at least inefficient. Take, for instance, the necessity of keeping certain machinery well oiled. A locomotive engineer is injured solely because of the negligence of his fireman in the matter of oiling the machinery of the engine. The machinery was made unsafe by reason of such negligence, but, if the employer has used reasonable care in the employment of the fireman, he cannot be held responsible to the engineer for his negligence. Such a duty must, of necessity, be intrusted to the operatives, and has nothing to do with the employer's duty of furnishing and keeping in repair. And the same would clearly be true as to the duty of keeping the planing machine in question well oiled, which duty, the record shows, was that of another one of the six or seven employés using the machine. As was said in the case of Webber v. Piper, 109 N. Y. 496, 17 N. E. 216, which was the case of a circular saw dull from use: "There are many matters of detail in the management of safe and adequate machinery which must be intrusted to the operatives, and as to which the master owes no duty except the employment of competent workmen. * * * The line of division between the duty of the master to furnish and maintain safe and adequate machinery and that of the operative to manage and handle it with prudence and care is difficult to define by any general description, but is quite obvious when each case, as it arises, comes under consideration. In the one before us the neglect, if any, was in a detail of the management of the machinery. A master builder might furnish proper tools to his workmen, but it would not be his duty to sharpen every chisel as it became dull, or set every saw when that need arose." In Cregan v. Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854, it was said: "The servants cannot furnish the machines. That is the master's right and duty. But the servant who uses them can and should keep them in order for their proper and safe daily use when furnished with the necessary means of so doing and when perfectly capable of correcting the defect." In 1 Bailey's Personal Injuries, § 259, it is declared that "the general rule does not apply to defects arising in the daily use of an appliance which are not of a permanent character and do not require the help of skillful mechanics to repair, but which may easily be, and usually are, repaired by the workmen, and to repair which proper and suitable materials are supplied." See, also, Cregan v. Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854; 20 Am. & Eng. Ency. of Law (2d Ed.) p. 89; 1 Shearman & Redfield on Negligence (5th Ed.) § 195; McGee v. Cordage Co., 139 Mass. 445, 1 N. E. 745. This principle has been applied in many cases, and we know of no case that has gone to the extent of holding that there is not some such limitation as above suggested upon the general rule. The differences that we find in the reported cases are upon the question as to whether the facts of a particular case bring it within the operation of the general rule or the qualification thereof, for, as said in Webber v. Piper, supra, the line of division is difficult to define by any general description. The statement quoted above from Bailey's Personal Injuries is, at least so far as those engaged in the common use of an appliance are concerned, sustained by the great weight of authority. Of course, if any such defects as are included therein become actually known to the employer, or continue for so long a time or under such circumstances as to warrant the conclusion that in the exercise of reasonable care he should have known thereof, another element is introduced, upon which a liability upon his part might be based. There is, however, no such element shown by the record in this case. The qualification we are considering relates only to such slight defects attendant upon the operation of machinery as, from their nature, require remedying at the hands of the operators themselves, and as a part of the proper operation of the machine. We are of the opinion that it is clear that any such mere dullness of the knives in the planer in question, produced by the ordinary use thereof, as might be sufficiently remedied by the use of a file in the hands of one of the employés, was a defect of such a nature that the employer could not be held responsible therefor, in the absence of other circumstances. It was something necessarily attendant upon the use of the machine, which could be easily remedied, whenever it occurred, by the operators themselves, and for which the means of remedying were supplied to one of their number. The remedying of such a defect would really be a part of the proper operation of the machine, and therefore not "an act the duty for the performance of which belongs in law to the master," and any negligence in the performance of that duty by the particular employé whose business it was to perform it would be the negligence of a fellow servant. The same, we think, is true as to the belt, if it be assumed that the slackness thereof could have contributed to the accident.

We have examined all of the many cases cited by plaintiff's counsel, and find nothing therein in conflict with the views already stated. The general rule as to the employer's liability is fully conceded, and it may be freely admitted that he must take notice of the liability of appliances to wear out from use and become unsafe, and guard against such conditions. The qualification of the rule as to such defects as are attendant upon the operation of the machinery, and the remedying of which is, in its nature, really a part of such operation, and therefore the duty of the employé rather than the employer, is not disputed by the authorities cited, but is, in fact, expressly recognized by some of them. It is manifest from the foregoing that, independent of the question as to whether there was evidence which would support a finding of negligence on the part of defendant, and as to which the trial court said, in denying the motion for a nonsuit, "it is a very, very close question in my mind," the court erred in instructing the jury to the effect that they should find for plaintiff if they believed that the machinery was, at the time of the injury, not in a reasonably safe and suitable condition in both or either of the particulars claimed by plaintiff, that plaintiff did not know of such defective condition or could not have known thereof by the exercise of ordinary care, and that his injuries were the result thereof. There was certainly evidence which, under the views already stated, would have sustained a finding that any defective condition in the respects suggested was due to the negligence of a fellow servant, rather than that of the master. The instruction noted ignored this condition of the evidence, and required a verdict for plaintiff, even though the negligence was solely that of the fellow servant.

2. There was also error necessitating reversal in the admission of evidence as to repairs made after the accident. Whether or not any negligence on the part of defendant was the proximate cause of the accident to plaintiff was one of the matters in issue. The evidence plainly showed that the knives of the planer were more or less "dull," and that the belt connecting the machine with the motive power was more or less "loose." The questions in this connection were, however, whether the knives were so dull and the belt so loose as to render the planer in any degree unsafe for use in the manner in which it was ordinarily used, whether the defendant knew, or in the exercise of reasonable care should have known, of these conditions, and whether such dullness or looseness, or both, proximately caused the accident. Unless these questions could be answered in the affirmative, there could be no finding of actionable negligence on the part of defendant.

Under these circumstances, over the objection of defendant that the proposed evidence was irrelevant, immaterial, and incompetent, and that it was not proper to show the mere fact of repairs made after the accident, or to show any act done by defendant with reference to the machine after the accident, plaintiff was allowed to introduce evidence to the effect, merely, that immediately after the accident the knives, before being again used, were taken by order of defendant's foreman to a planing mill and sharpened, and also that directly after the accident the belt was tightened by said foreman by taking an inch and a half or two inches out of it. There was nothing in the evidence so given to indicate how much "sharpening" was done, or what work was necessary to make the knives "sharp." The only conceivable effect of this evidence as to the sharpening of the knives, limited as it was to the mere fact of the making of repairs immediately after the accident, was to impute to defendant's foreman an admission to the effect that the knives were so dull as to render the machine unsafe for use, and that such condition was the cause of the accident. Assuming that the foreman could bind the defendant by any such admission, it is now well settled in this state, in accord with the rule prevailing generally elsewhere, that evidence of precautions taken and repairs made after the happening of the accident is not admissible to show a negligent condition at the time of the accident. This matter was fully discussed in the case of Sappenfield v. Main Street, etc., Co., 91 Cal. 48, 27 Pac. 590, where this court said: "The negligence of the employer which renders him responsible for the accident depends upon what he did and knew before the accident, and must be established by facts and circumstances which preceded it, and not by acts done by him after its occurrence." The court there approvingly quoted from Nalley v. Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47, as follows: "The fact that an accident has happened and some person has been injured immediately puts a party on a higher plane of diligence and duty, from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend, rather than to condemn, the person so acting. If the subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence, which has no business there, not being in existence at the time." The Sappenfield Case has been followed and approved in Hager v. S. P. Co., 98 Cal. 309, 311, 33 Pac. 119; Turner v. Hearst, 115 Cal. 394, 401, 47 Pac 129; Limberg v. Glenwood L. Co., 127 Cal. 598, 604, 60 Pac. 176, 49 L. R. A. 33. The decision in Butcher v. Vaca Valley Ry., 67 Cal. 518, 525, 8 Pac. 174, so far as it is in conflict with these views, has been, in effect, overruled by each of the cases cited. Counsel for plaintiff concedes that it is settled in California that evidence of subsequent repairs or changes is not admissible to prove prior negligence. He, however, claims that the evidence was admissible here to show the actual condition of the machinery at the time of the accident.

There is a line of decisions in other states upholding what may be said to be a qualification to the rule just discussed, to the effect that, where evidence of subsequent changes, though it may be in the way of repairs or additional precautions, fairly tends to show the actual conditions existing at the time of the accident, it is admissible for that purpose. It would seem unnecessary to consider this alleged qualification of the general rule, for we cannot see that it is at all applicable to the evidence under consideration. So far as the knives were concerned, absolutely nothing was shown thereby beyond the mere fact that they were put through the process of being sharpened anew before again being used. This mere fact tended to show, at most, nothing more than an admission on the part of the foreman that they were so dull as to render the machine unsafe for use, and that the accident was caused by this condition, and came within the effect of the general rule already discussed.

The qualification relied on by plaintiff does not go to the extent necessary to sustain respondent under the facts of this case. The first decision cited and quoted from by him—Louisville & Nashville Ry. Co. v. Malone, 109 Ala. 518, 20 South. 36, 37—declares emphatically as follows: "In our opinion, if nothing can be shown except the fact of repairing, that fact is not competent to be considered by the jury. To hold that an act of repairing affords evidence tending to show that a previous injury was the result of a defect in the appliances, would deter a prudent person from making repairs." In the second case cited and quoted from by him—Kuhns v. Wis. I. & N. Ry. Co., 76 Iowa, 71, 40 N. W. 92—there was a disputed question of fact as to whether there was a low joint in the railroad track at the place and time of the accident, and evidence was admitted to show that some sectionmen, discovering the accident, went to the place where the low joint was, and raised it up to a level. This evidence was held admissible solely as tending to show the actual condition of the joint at the time of the accident; but the judgment was reversed for the reason that the evidence had been admitted without any limitation as to its purpose, and the jury had been left at liberty to consider the evidence as an admission or confession of the defendant that the condition of the joint was the cause of the accident.

As the particular evidence in question was, in our judgment, inadmissible for any purpose, it is unnecessary to consider the contention of respondent to the effect that appellant should have had it limited by proper instruction to the purpose for which it may have been admissible.

It is further urged that, if the evidence was improperly admitted, the error was not prejudicial, "in view of the admission of appellant that the machine was in a defective condition." We find no admission on the part of appellant, except such as may be shown by the particular evidence under consideration, to the effect that the knives were in such a condition as to render the machine unsafe for use. It was said of improperly admitted evidence in Estate of James, 124 Cal. 653, 57 Pac. 578, 1008, approvingly quoted in Rulofson v. Billings, 140 Cal. 452, 460, 74 Pac. 35, 37: "If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows, it may have been that particular evidence which turned the scale and lost the case to the appellants. This must, of necessity, be the rule wherever improper evidence has been admitted which upon its face tends in any degree to affect the final conclusion of the court." This is manifestly applicable to the case at bar. Under the circumstances here appearing, it is impossible for this court to say how far the evidence as to the sharpening of the knives subsequent to the accident, tending to show an admission on the part of defendant's foreman to the effect that the accident was due to an unsafe condition of the knives, operated to induce a verdict for plaintiff. As said in the case quoted from, it may have been all-powerful to that effect.

It is unnecessary to discuss any of the other questions presented. We have sufficiently indicated our views as to the general questions presented for all the purposes of a new trial.

The judgment and order are reversed.

We concur: SHAW, J.; VAN DYKE, J.

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145 Cal. 285

WALSH et al. v. ABBOTT et al. (S. F. 2,942.)

(Supreme Court of California. Nov. 11, 1904.)

DEED—CONSTRUCTION—LAND QUITCLAIMED.

1. A deed executed by one having paper title to an undivided one-third of a certain tract of land, executed on the day that suit was instituted against him and others for a decree that by reason of mistakes in description he was the owner of a third interest in the eastern half instead of the northern half of the tract, and which resulted in such a decree, will be held to quitclaim his interest in the entire tract, not merely the north half; it, after granting the undivided one-third of the northern half of the tract known as M., proceeding: "Together with all the estate," etc., "which I had or may have of, in or to the same, or any part or parcel thereof, to have and to hold the aforesaid premises."

Department 2. Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Action by James Walsh and others against J. P. Abbott and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

John O'B. Wyatt (E. W. McGraw and Rodgers, Paterson & Slack, of counsel), for appellants. H. O. Beatty, M. R. Jones, Hartley & Abbott, A. A. Moore, and George A. Lamont (W. S. Goodfellow, Garret W. McEnerney, Sanborn & Beatty, and Chickering & Gregory, of counsel), for respondents.

HENSHAW, J. By this action plaintiffs sought to have partition of the southeast quarter of the Rancho Medanos, in Contra Costa county. The rancho lies on the southern bank of the San Joaquin river and Suisun Bay. The plaintiffs claim as heirs at law of James Walsh, deceased, and seek to establish his ownership in an undivided one-third interest in the southeast quarter of the rancho, claiming that by succession it has devolved upon them.

In 1839 the Mexican government granted the Rancho Medanos to Jose Antonion Mesa and Jose Miguel Garcea. Mesa and Garcea in 1849 granted to J. D. Stevenson the southern half part of the tract of land known as "Medanos." Their deeds were recorded in 1851. In 1850 Mesa and Garcea in like manner granted to Michael Murray, James Walsh, and Ellen Fallon the north half of the same tract. These deeds were recorded in June, 1850. Upon August 2, 1850, James Walsh, by deed of that date, granted to Martin Murphy the undivided one-third of the northern half of the Rancho Medanos. This deed was recorded in 1851. On the day of the execution of the deed by Walsh to Murphy, Stevenson brought suit in the Third District Court of the state against the Garceas, the Mesas, and their grantees, Murray, Walsh, and Fallon, to reform and correct the deed to him and to the other grantees, and to partition the rancho. The suit was based upon an alleged error of description running through all the deeds. It consisted in describing the San Joaquin river as bounding the rancho on the east, when in fact it formed the northern boundary. The action resulted in a judgment favorable to Stevenson's contention, and deeds were exchanged between Stevenson upon the one hand and Murray, Walsh, and Fallon upon the other, whereby there was conveyed to Stevenson the west half of the rancho, and to Murray, Walsh, and Fallon the east half thereof. Subsequently, in 1853, Stevenson, Murray, Walsh, and Fallon filed with the board of land commissioners their petition for the confirmation of the grant. In that year, or in the year after, James Walsh died. After proceedings had before the board of land commissioners and before the United States District Court for the Northern District of California, the grant was confirmed, the west half to Stevenson, the east half to Murray, Walsh, and Fallon, and upon October 8, 1872, the United States issued its patent to them. Plaintiffs, for title, introduced the deeds and records to which reference has been made, and supplemented these with evidence that James Walsh, the patentee, was never married; that of his immediate kin, brothers and sisters, all had died unmarried without issue, saving one brother, who was the father of plaintiffs, who died in 1887, and whose death was followed by that of his wife, leaving no other issue than the plaintiffs herein. The court, upon motion of defendants, nonsuited the plaintiffs upon this showing, and the soundness of its ruling in this regard is here attacked.

Sundry propositions are urged by respondents in support of the court's order. We pass them by, not as being without merit, but because they go merely to the question of the failure of the proof to establish title by succession in the plaintiffs. As, for example, it is urged that the proofs failed utterly to show that both the original James Walsh and the father of these plaintiffs had not, by will, devised all of their title to the lands in question; that there is no presumption of intestacy; and that the ruling of the court was proper for this reason. These points, though only for the argument which is based upon them, concede that some title to the rancho remained in James Walsh, subject to his legal disposition by grant or devise. They are passed by because their consideration is rendered unnecessary in view of the conclusion we have reached that Walsh, by his deed to Martin Murphy, divested himself of all title. That deed is as follows:

"Know all men by these presents, that I, James Walsh, for and in consideration of the sum of ten thousand dollars to me in hand paid by Martin Murphy, of Santa Clara County, California, at or before the ensealing and delivery of these presents, the receipt whereof I do hereby fully confess and acknowledge, I have given, granted, sold and conveyed, and by these presents, do give, grant, sell and convey unto the said Martin Murphy, his heirs and assigns forever, the undivided one-third of all that northern half part of all that certain tract of land situate in upper California, known by the name of 'Medanos' or 'Meganos' and bounding as follows: On the north by River San Joaquin, on the south by Jonathan D. Stevenson, on the east by Doctor Marsh, and on the west by Salvio Pacheco.

"Together with all the estate, right, title, interest and demand whatsoever which I had or may have of, in or to the same, or any part or parcel thereof, to have and to hold the aforesaid premises with all right, privileges and appurtenances thereunto belonging unto the said Martin Murphy, his heirs, assigns, executors and administrators to his and their use and behoof forever.

"In testimony whereof, I have hereunto affixed my hand and seal this 2nd day of August, Anno Domini, one thousand eight hundred and fifty.

"James Walsh. [Seal.]"

The contention of appellants is that Walsh by this deed divested himself only of such title as he had to the northern half of the rancho, and that, as by the patent from the United States he and his co-tenants, Murray and Fallon, were granted the eastern half of the rancho, he still retained his undivided interest in the south half of that east half. The particular part of the deed calling for construction is the quitclaim clause beginning with "together with all the estate, right, title," etc. If it shall be found that the true meaning and intent of Walsh was to grant his undivided one-third interest in the northern half of the rancho, which was all of the interest in the rancho to which he then had paper title, and that the quitclaim clause had reference only to this northern half, the construction for which appellants contend will be established. If, upon the other hand, the view of the respondents, which view was adopted by the trial court, is the true one, then by this clause Walsh divested himself of all of his interest in and to all of the rancho, and the effect of the patent from the United States to Walsh is, not to create a new title in him, but to confirm in his grantees, through him, the title which had formerly been his. Stark v. Barrett, 15 Cal. 362; More v. Steinbach, 127 U. S. 70, 8 Sup. Ct. 1067, 32 L. Ed. 51. Certain familiar principles of construction are to be invoked: First, as between the parties to the deed it is to be construed more strongly in favor of the grantee; second, it is to be construed, if possible, so as to give all of its operative words effect; and, third, if any doubt still exists as to the intention of the grantor, in arriving at that intention there shall be considered the situation of the parties, the subject-matter at the time of contracting, and the attendant and surrounding circumstances leading to the execution of the instrument. Brannan v. Mesick, 10 Cal. 95. The first of these principles requires no special elucidation. As to the second, it is to be noted that the construction contended for by appellant gives no meaning nor effect whatsoever to the quitclaim clause. According to this construction, Walsh, having made his deed of grant to all of his interest in the northern half, in the next breath quitclaims to his grantee the same property. Such a construction makes of the clause in question nothing but empty and useless verbiage, while, upon the other hand, to construe it as respondents contend it should be construed, would give reasonable and effective force to the language designedly employed. The deed would then be understood to mean that Walsh, having conveyed by grant all of the land to which he had paper title, as further assurance and confirmation of title to his grantee, and to save the possibility of conflict over boundaries, quitclaimed to him whatever interest he might have in all of the rancho. Under this construction the "same" has reference to the Rancho "Medanos" or "Meganos," as previously employed in the deed, and in the subsequent phrase found in the habendum clause "to hold the aforesaid premises," "aforesaid premises" is referable to the word "same." The belief that such was the true intention of the grantor fairly expressed in his deed becomes fixed when consideration is paid to the surrounding circumstances. Walsh was the owner of one-third of an uncertain half of the rancho. By his paper title it was the northern one-half. It is fairly inferable that Walsh knew that it was in question and in dispute as to which one-half it was within which his land lay. It is fairly inferable, also, that he knew this at the time he made his deed to Murphy, because the suit to determine this question was brought upon the very day he made his deed, and it is not to be supposed that such a suit would have been commenced without an effort first made by Stevenson to reconcile these differences with Walsh, Murray, and Fallon by an exchange of deeds without the necessity of the intervention of a court. It seems in every way reasonable to conclude, therefore, that Walsh knew that his ownership to one-third of the north half was disputed; that the result of the dispute could only be one of two things—to confirm him in the ownership of that particular piece, or to assign to him the ownership of one-third of some other one-half, as was actually done. Was it, then, the intention of Walsh, in conveying to Murphy for a valuable consideration, to give him a title to a limited piece, which title might prove valueless, or was it his intention to convey to him the title which he apparently had to one-third of the north half, and for his grantee's further protection to assure him in this title, should it prove defective, by a quitclaim of whatever interest it might be found in truth that he did have? There can be no hesitation in saying, under all of these circumstances, that the latter was the true intention of the grantor.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

145 Cal. 292

PEOPLE v. SOWELL. (Cr. 1,146.)

(Supreme Court of California. Nov. 11, 1904.)

CRIMINAL LAW—JURY—SELECTION — MATERIAL DEPARTURE FROM FORMS OF LAW—FAILURE TO SELECT JUROR FROM CERTAIN TOWNSHIP—KEEPING OF SEPARATE LISTS—JURORS—QUALIFICATIONS—PREJUDICE—INSANITY AS A DEFENSE — HARMLESS ERROR — EXPERT TESTIMONY.

1. Under Code Civ. Proc. § 204, making it the duty of supervisors to select jurors, mere failure of the minutes of the board to show that jurors were selected as they in fact were is not a material departure from the forms prescribed in respect to the drawing of the jury, within Pen. Code, § 1859, authorizing a challenge to the panel for such a departure.

2. Under Code Civ. Proc. § 204, making it the duty of supervisors to select the number of jurors which the court estimates will be required, mere unexplained omission of two names from a list prepared under an order requiring the selection of 300 jurors is not a material departure from the forms prescribed in respect to the drawing of the jury, within Pen. Code. § 1059, authorizing a challenge to the panel for such a departure.

3. Under Code Civ. Proc. § 206, providing that jurors shall be selected from townships in proportion to the number of inhabitants, it will be presumed that failure to select any jurors from a township was caused by the fact that none of the inhabitants were qualified as jurors.

4. Conceding that Code Civ. Proc. § 206, requires the lists of jurors selected from each township to be kept separate from each other, failure to do so is not a material departure from the forms prescribed in respect to the drawing of the jury, within Pen. Code, § 1059, authorizing a challenge to the panel for such a departure.

5. Under the express provision of Pen. Code, § 1076, a juror is not biased by a qualified opinion based on rumor and newspaper articles, removable by evidence, and not interfering with impartial action.

6. In a prosecution for crime, in which the defense is insanity, a juror is not disqualified by a prejudice against the possible interposition of feigned insanity as a defense; it appearing that his prejudice does not extend to cases where proof of real insanity is made.

7. On contradictory testimony by a juror as to bias, the finding of the trial court as to competency is conclusive.

8. Error, if any, in admitting as part of a dying declaration a statement by deceased that he thought defendant thought he had shot him in the body, was harmless, especially in view of testimony by defendant that he thought when he fired that he had hit deceased in the side.

9. A statement by the court to an expert that he need base his opinion only on the evidence he deemed true was harmless, where the answer was in fact based on the hypothesis that all the evidence was true.

10. An expert in insanity may testify that certain symptoms could not all be present in the same individual at the same time.

In Bank. Appeal from Superior Court, Butte County; John C. Gray, Judge.

Shadwick Sowell was convicted of murder, and appeals. Affirmed.

W. E. Duncan, Jr., for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

LORIGAN, J. The defendant was convicted of murder in the first degree, and sentenced to be imprisoned for life, and from the judgment and order denying his motion for a new trial he appeals. No point is made as to the sufficiency of the evidence to sustain the verdict, but he claims that, for certain alleged errors committed during the trial, the judgment should be reversed, and these are presented as follows:

1. He insists that the court erred in denying his challenge to the panel of trial jurors drawn to try his case, which challenge was interposed upon the ground that there had been a material departure from the forms prescribed by sections 204, 205, and 206 of the Code of Civil Procedure, in the selecting and listing by the board of supervisors of jurors from which said panel was drawn, and which departure is made the basis of a challenge by section 1059 of the Penal Code. The particular grounds urged were that there was no record of the board of supervisors disclosing that any trial jurors had been selected by such board, as ordered by the superior court, under said section 204 of the Code of Civil Procedure; that, if such selection were made, there were but 298 jurors listed, notwithstanding the order of the superior court required the selection of 300; that the jurors selected and listed were selected by the board of supervisors by supervisor districts, and not by townships and in proportion to the population therein; and that the lists of selected jurors were not kept separate and distinct from each other. Code Civ. Proc. §§ 205, 206.

We do not think the action of the court in denying the challenge should be disturbed. The first two objections urged—the absence of any record on the minutes of the board, and the selection of a less number than required by the order of the court—do not pre-

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¶ 5. See Jury, vol. 31, Cent. Dig. §§ 471-478.

sent such substantial departures from the provisions of the law governing the selection of jurors as deprived the defendant of an opportunity to secure a fair and impartial jury, which is the main purpose to be conserved by adherence to the requirements of the provisions of the Codes cited. As far as the failure of the minutes of the board of supervisors to contain a record of the selection is concerned, it appears clearly from the uncontradicted evidence of members of the board of supervisors who made the selection, and that of the deputy county clerk, that the list of jurors from which the panel to try defendant was drawn was in fact selected by said supervisors under the order of the court, and was certified to by the said board as so drawn, and was delivered by it into the possession of the county clerk. There was no question as to the identity of the list as being the one that was selected by the board under the order, nor was there any question that it was from this list of jurors, whose names were placed in the box, that the panel which defendant challenged was drawn. Under this showing that, as a matter of fact, the jurors on the list certified and delivered to the county clerk were selected by the board of supervisors, the circumstance that an entry of such selection was omitted from the records of the board would not warrant the court in sustaining the challenge on that ground.

As to the ground of challenge that a less number of jurors were selected than were designated by the order of the court: It is not apparent from the record how the omission to return the full number required by the order occurred. It was not claimed, however, to have been intentionally done, and was doubtless inadvertent, because it appears from the certificate of the members of the board of supervisors to the list, and from their testimony on the hearing, that they intended to select and return 300. The list purports to be numbered from 1 to 300, but it appears that jurors whose names should have been placed opposite numbers 178 and 179 in the list, together with these numbers, were omitted. How this occurred was not explained upon the hearing. No inquiry was made by either side about it, and there is now no suggestion that this failure was prompted by any improper motive or was the result of design. It may have occurred, and probably did, through a clerical omission in preparing the complete list for certification to the county clerk from the separate lists made out by each supervisor. It is true that this omission was a failure to follow the order of the court under the plain mandate of the statute, and, while it cannot be too strongly urged that in selecting and returning jurors the provisions of the statute should be literally followed, yet the law has recognized possible departures from what is required, and, to meet them, has provided that not every such departure should be a successful ground of challenge, but only material ones. Material departures are only such as affect the substantial rights of a defendant in securing an impartial jury, and it is not apparent from the record before us how the fact that the supervisors returned 298 instead of 300 jurors could have at all prevented this defendant from securing such a jury. There was no question but that the jurors who were selected were individually suitable and qualified to be returned as such, and that more than enough were returned by the board from which the defendant might select and obtain a jury, and, in fact, out of the panel of 91 which he challenged, such a jury was ultimately selected and tried the cause.

A point similar to the one here discussed was made in the case of People v. Davis, 73 Cal. 355, 359, 15 Pac. 8, and it was there held that the failure to return the full number of jurors designated by the order of the court was not such a material departure as warranted sustaining a challenge to the panel on that account.

As to the challenge on the ground that the jurors were selected from supervisor districts, and not by townships, in proportion to the population thereof, and that the lists were not kept separate and distinct, less need be said. The testimony of the members of the board who made the selections showed that in each supervisorial district such selections were made and apportioned from the judicial townships therein, and were in general proportioned to their population, except as to Humboldt township, which contained 87 voters, and from which no jurors seem to have been selected. While it is probable that there were some persons among these voters suitable to have been returned as jurors, it is still possible that there were not. The fact that there were a given number of voters in the township is not evidence that any of them were qualified to be returned as jurors. The qualifications of jurors and of electors are quite different. A person may be qualified as an elector who would be disqualified as a juror, and it must be assumed, in the absence of all evidence to the contrary, that as the law directed the supervisors to select a proportionate number of jurors from Humboldt township, as well as the other townships, this was not done because there were no persons in the former who were suitable and qualified as such. If this were not so, it was incumbent on the defendant (the presumption being that the board properly discharged its duty) to introduce evidence (which he did not) showing that there were persons in that township suitable and qualified to have been selected and returned as jurors.

As to the point that the lists were not kept separate and distinct: It is assumed by both sides in this case that the requirement of section 206 of the Code of Civil Procedure in that regard applies to the township selections; that the lists of selection from each township must be kept separate and distinct from each other. It may well be questioned whether this requirement does not really apply to keeping the lists of grand and trial jurors, which, under the order of the court, the supervisors are required to select, separate and distinct from each other, rather than to so keeping township lists. If this were the true construction to be given to the section, as the lists of grand and trial jurors were in fact kept separate, no further mention of this point would be necessary. On the assumption, however, made by both sides, which for present purposes only will be deemed correct, that the requirement applies to the township selections, it appears as a fact that each supervisor selected the jurors from the township within his district, and the general lists certified to the county clerk showed such selections. Counsel for defendant, in his brief, has found no difficulty in tabulating from these selections and listings the jurors selected from each township, and it appears to us that no one interested in the matter would be unable to do so. But were it otherwise, and independent of the question whether the requirement does not apply exclusively to keeping grand and trial jury lists separate, we would not feel disposed to hold that, where it appeared that the jurors had been selected from townships, the mere fact that they had not been so listed in the certification to the county clerk was of such substantial merit as to warrant sustaining a challenge on that account.

2. It is next insisted that the court erred in denying defendant's challenge to some 12 jurors on the ground of actual bias. This bias was claimed to be evidenced by their statements upon their voir dire that they were of opinion that the defendant, in killing deceased, had committed a crime. But these opinions were founded solely upon public rumors or based upon statements in public journals, and were not unqualified. They were subject to removal by evidence on the trial, and it appearing to the court that, notwithstanding such opinion, the jurors would act impartially and fairly upon the evidence, the challenges were properly denied. Pen. Code, § 1076; People v. Brown, 59 Cal. 354; People v. Miller, 125 Cal. 46, 57 Pac. 770.

In this same line it is also urged that the court erred in denying certain challenges of defendant to jurors whose testimony, it is insisted, showed that they entertained a prejudice against insanity as a defense, and this was the defense alone which the defendant interposed. The examination of these jurors as to insanity as a defense was quite exhaustive, and the inquiries were as to insanity in general. Attention was not particularly directed to that insanity which alone is recognized by the law as a defense, and the existence of which relieves the defendant from responsibility. People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651. And it is quite obvious that, under the inquiries which were made of the jurors concerning their views upon such a defense in general, the prejudice which they expressed was directed to the possible interposition of simulated or feigned insanity as a defense to avoid responsibility for crime, instead of the existence of real insanity, which relieves from it; and, while it is true that their preliminary statements were that they entertained a prejudice, to some extent, against such a defense, it is equally clear from their testimony upon further examination, and in fact from their entire examination upon the point, that this prejudice did not extend to cases where proof of real insanity was made, and that in the case at bar, if such insanity were proven by the defendant, they would recognize and adopt it as a good and perfect defense, and that, as to the law governing the matter of insanity, they would abide by and follow the instructions of the court relative to it. Under this showing, we cannot say that the court erred in denying the challenges. The defendant was only entitled to a jury which would give the defense of insanity, like any other defense, full and fair consideration, and act upon it when duly proven as a valid and complete defense; and this the responses of the jury, taken as a whole, satisfied the court they would do. But if it were not obvious from the testimony of these jurors that whatever degree of prejudice they entertained arose from the impression, popularly entertained, that insanity as a defense is often simulated and feigned, and that the prejudice of which they were speaking had no relation to real insanity, still the most that can be urged upon the record is that the evidence given by each of these jurors on the subject was in itself contradictory; and it is well settled that under such circumstances it is exclusively the province of the trial court to determine the credit which should be given it, and that its determination in that respect is not subject to our review. As was said in People v. Fredericks, 106 Cal. 559, 39 Pac. 944: "In this case the examination of some of the venire, who were subsequently unsuccessfully challenged upon the ground of actual bias by the defendant, discloses a state of facts which might well have justified the trial court in excluding them from the jury box. But the evidence of these various jurors taken upon their voir dire is not at all conclusive that they were disqualified from acting in the case. When the matter was submitted to the court for a decision upon the evidence taken, it can at least be said the question was an open one as to their disqualification. The evidence of each juror was contradictory in itself. It was subject to more than one construction. A finding by the court either way upon the challenge would have support in the evidence, and under such circumstances the trial court is the final arbiter of the question. For under such circumstances the question presented to this court by the appeal is one of fact, and our power to hear and determine is limited to appeals upon questions of law alone." Also People v. Scott, 123 Cal. 435, 56 Pac. 102.

3. The point that the court erred in refusing to strike out the testimony as to the dying declaration of the deceased, on the ground that no sufficient foundation had been laid for its admission, is without merit. The point urged was that there was no sufficient proof that it was made in the belief that every hope of life was gone. The evidence, however, fully showed that the declaration of the deceased concerning the circumstances attending the shooting was made in expectation of death, and after all hope of recovery, if ever entertained, was abandoned.

The dying declaration of the deceased was oral, and in detailing it the witness called for that purpose testified that the deceased stated to him "that the defendant, after shooting him, had walked over to where he was lying and said, 'You damned old cripple! I will finish you now;' that the deceased begged of him not to shoot again, as he would die from the wound he had already received; that he thought the defendant thought he was shot through the body"; and that defendant then left him. The defendant moved to strike out the latter portion, as to what the deceased "thought the defendant thought" as to the shot, which was denied, and he assigns this as error. Assuming that the motion should have been granted, we do not perceive that its refusal was such prejudicial error as would warrant a reversal upon that ground, particularly when it appears that the defendant, in giving his version of the shooting after it occurred, himself stated that when he fired at the deceased he thought he had hit him in the side.

4. The defense interposed being insanity, and evidence on that matter having been introduced in defendant's case in chief, in rebuttal the prosecution called one Dr. John W. Robinson as an expert witness upon that subject. The doctor had been present in court during several days while the witnesses for the defense were giving their evidence as to the insanity of the defendant, heard it all, and had observed the manner and conduct of the defendant during that period. Certain hypothetical questions purporting to be based on the entire evidence in the case having been put to the witness, and he having answered that there was nothing embraced in the statement contained in the question which, in his opinion, indicated that the defendant was insane, the prosecution then directed his attention particularly to various acts and peculiar conduct on the part of the defendant, claimed by the defense to indicate insanity, and he was asked whether, in his opinion, they did so. In answering he said (and here arises the particular error complained of): "It would be to my mind impossible to have all these symptoms present in the same man. It would indicate acute mania, melancholia, homicidal melancholia. or suicidal melancholia—possibly all of those, but not in the same individual. For that reason it is necessary for me to again apply to the judge: Is it necessary for me to believe all the testimony I hear as an expert? Am I compelled to pass my opinion? The Court: On what you deem the truthfullness of the testimony." This was objected to as incompetent, the objection was overruled, and the witness then completed his answer: "If all these conditions existed in the same individual, I would believe the man was certainly insane. As an expert, I do not believe that all these conditions can exist in the same individual." It is claimed by defendant that allowing the witness to pass his opinion on "what he deemed the truthfulness of the testimony" was an invasion of the province of the jury, to whom is committed exclusively the right to judge of the credibility of the witnesses. It is quite apparent, however, that, whether the rule announced by the court was right or not, the subsequent answer of the witness discloses that he did not make any application of it, or, if he did, its application was favorable to the defendant. As we understand his answer, given after the objection was interposed, nothing was said by him from which it could be inferred that the particular credibility of any witness was taken into consideration by him, nor was his answer predicated at all upon an application of the rule announced by the court. Indeed, the first part of his answer was based upon the assumption that all the facts concerning the defendant referred to in the inquiry put to him, as collated from the testimony of the witnesses for the defense, were true, and his answer thereon was favorable to the claim of the defense that the matters referred to indicated that the defendant was insane. Certainly it cannot be said that an assumption by the witness that all the matters relied on by the defendant were true, and a favorable opinion announced on them, could be in any manner prejudicial to him. And the last portion of his answer—that, as an expert, he did not believe that all the conditions testified to could exist in the same individual—is in no respect different from what he had testified to in his answer given previous to the objection interposed, namely, that, to his mind, it was impossible to have all the symptoms recited present in the same individual. There was no discrimination made as to the testimony of any particular witnesses, or as to any particular facts. His opinion was addressed to the condition of the testimony in the case on the part of the defendant, as it disclosed symptoms claimed to be indicative of the insanity of the defendant. This was certainly a matter upon which, as an expert on insanity, he was competent to give his opinion. No

exception could be taken seriously if the inquiries had been directed toward ascertaining from the witness, by reason of his particular knowledge of mental diseases, what particular symptoms would be indicative of the presence of a particular phase of insanity—whether mania, melancholia, or other phases—and whether those symptoms which manifested the presence of one phase would be present or absent in another. And this being true, we do not perceive upon what principle an expert in mental diseases should be precluded from giving it as his opinion, upon the general manifestations relied on to support insanity, that, as a principle of medical science, they could not be all present in the same individual.

This disposes of all the points made, and, there being no error in the record, the judgment and order denying a new trial are affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; HENSHAW, J.; VAN DYKE, J.; SHAW, J.

145 Cal. 282

HEATON-HOBSON ASSOCIATED LAW OFFICES v. ARPER. (S. F. 2,970.)

(Supreme Court of California. Nov. 11, 1904.)

PLEADING — DENIALS — SUFFICIENCY — FINDINGS—CONSTRUCTION.

1. In an action for the reasonable value of services, an answer denying that "defendant is indebted to the said plaintiff in the sum of $699, or in any sum," is sufficient to present an issue in the case.

2. A finding, in accordance with the allegations of the complaint, that a certain account was a mutual, open, and current account, instead of a stated account, as alleged in defendant's answer, but further stating that there was no balance due from defendant to plaintiff at the time of the commencement of the action, could not be construed as a finding that all of the allegations of the complaint were true.

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by the Heaton-Hobson Associated Law Offices, a corporation, against George W. Arper. From a judgment for defendant, plaintiff appeals. Affirmed.

Welles Whitmore, O. G. Heaton, and Frank W. Sawyer, for appellant. F. W. Fry and H. M. Owens, for respondent.

VAN DYKE, J. This is an appeal from a judgment in favor of defendant for his costs. The appeal is upon the judgment roll, without a statement or bill of exceptions.

The appellant's point on the appeal is that the findings are not within any issue of the case. After alleging the assignment of the claim in suit by Frank W. Sawyer to the plaintiff, and that said Frank W. Sawyer was a duly admitted and licensed attorney at law in this state, the complaint avers that at the city of Oakland, county of Alameda, state of California, the said Frank W. Sawyer, as such attorney at law, at the special instance and request of said defendant, performed services to and for said defendant in various actions and matters, the reasonable value of which was and is the sum of $699, and that the last service performed was within two years of the bringing of the suit; that in the city and county and state aforesaid said Frank W. Sawyer purchased coal oil of said defendant, and borrowed money of said defendant, all in the sum of $160, and no more; that said account had by and between the said Frank W. Sawyer and said defendant was a mutual, open, and current account, and the balance due from defendant on account of the same is the sum of $539, after deducting all just credits and offsets. Wherefore plaintiff demands judgment against said defendant for the sum of $539, the said alleged balance and costs of suit. The answer denies the said defendant is indebted to the said plaintiff in the sum of $699, or in any sum; and by an amendment added to said answer it is alleged that on the 19th day of August, 1898, Frank W. Sawyer, plaintiff's assignor, was indebted to the defendant in the sum of $16.90 over and above all claims and offsets, and that on said 19th day of August, and subsequently, and while said Sawyer was so indebted to the defendant, an account was stated between said Sawyer and this defendant, and that upon such statement a balance was found to be due and was due from said Sawyer to the defendant, in the sum of $16.90. The pleadings are unverified.

After preliminary finding in reference to the assignment, and that said Frank W. Sawyer was an attorney at law duly admitted and licensed, the court finds as follows: "At the city of Oakland, county of Alameda, state of California, said Sawyer, as such attorney, at the request of said defendant, performed services in various actions and matters, the reasonable value of which was and is the sum of $645, and that the last service so performed was within two years next preceding the commencement of this action, and that a portion of said services, of and to the value of $600, was performed with the express understanding and agreement that it should be paid out of certain property or a certain fund, after first deducting the amount due said defendant from one Wilson, and that said fund or property has been and is insufficient to pay to said defendant the amount due him from said Wilson. That in the city and county and state aforesaid said Frank W. Sawyer purchased coal oil of and borrowed money of said defendant, all in the sum of $160, which is now due and payable. That said account had by and between said Frank W. Sawyer and said defendant was a mutual, open, and current account, and at the commencement of said action and at the time of said assignment there was no balance due from said defendant to said

Frank W. Sawyer, or to the plaintiff in this action." And as a conclusion of law the court found that the defendant was entitled to judgment against plaintiff for his costs, and judgment was thereupon rendered accordingly.

The answer was sufficient to present an issue in the case. As said in Young v. Rummell, 2 Hill, 478, 38 Am. Dec. 594, quoted with approval by this court in Meredith v. S. Clara Min. Ass'n, 56 Cal. 183: "Although, in point of form, the plea of non assumpsit puts nothing in issue but the making of the promise, it has been long settled that nearly every defense is admissible under that plea which shows that there was not a subsisting cause of action at the time the suit was brought." And in Burris v. People's Ditch Co., 104 Cal. 248, 37 Pac. 922, this court says: "It may be said generally that any allegation in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse, and sufficient as a denial." To the same effect is Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064. The appellant is mistaken in claiming that the court finds that all the allegations of the complaint are true. The court only finds, as already shown, that the account was a mutual, open, and current account, instead of a stated account, as alleged in the defendant's answer, but further finds that at the commencement of the action there was no balance whatever due from defendant to said Sawyer, or to his assignee, the plaintiff. In Alhambra Co. v. Richardson, 72 Cal. 606, 14 Pac. 383, it is said: "We do not think the court should strain the language of a finding to make out a case of conflict. The finding should be reconciled if it can be reasonably done." See, also, Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053; Code Civ. Proc. § 475.

No such error or defect is here shown as to justify a reversal. The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(145 Cal. 291)

LUBLINER v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 4,123.)

(Supreme Court of California. Nov. 11, 1904.)

MUNICIPAL CORPORATIONS — CHARTER—AMENDMENT—ELECTION.

1. Under Const. art. 11, § 8, providing that a city charter may be amended at intervals of not less than two years by proposals therefor submitted by the legislative authority of the city at a general or special election, and that, whenever 15 per cent. of the voters shall petition the legislative authority to submit any proposed amendment or amendments for approval, the legislative authority must submit the same, it is discretionary with the legislative authority of the city to call a special election on petition for submission of amendments, or to wait until the next general election.

In Bank. Petition for writ of mandate by Morris Lubliner against the board of supervisors of the city and county of San Francisco. Writ denied.

Henley & Costello, for petitioner.

PER CURIAM. The petitioner, a taxpayer of San Francisco, prays for a writ of mandate to compel the defendants to order a special election for the ratification of certain amendments to the city charter proposed by petition of more than 15 per cent. of the qualified voters of the city. Whether or not it is the duty of the defendants to call a special election at this time depends upon the proper construction of the following clause of section 8 of article 11 of the Constitution: "The charter, so ratified, may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof at a general or special election, held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city, and ratified by a majority of the electors voting thereon, and approved by the legislature as herein provided for the approval of the charter. Whenever fifteen per cent. of the qualified voters of the city shall petition the legislative authority thereof to submit any proposed amendment or amendments to said charter to the qualified voters thereof for approval, the legislative authority thereof must submit the same." We are of the opinion that under this provision of the Constitution the defendants are invested with full discretion to order a special election, or, if they deem that course unadvisable, to wait until the next general election to submit the proposed amendments to a vote of the people.

Writ denied.

(145 Cal. 272)

BROWNING v. McNEAR. (S. F. 3,081.)*

(Supreme Court of California. Nov. 10, 1904.)

SALES—ACCEPTANCE OF GOODS—BREACH OF WARRANTY — DAMAGES — SALE BY SAMPLE—AGENCY—UNCOMMUNICATED LIMITATION ON AUTHORITY.

1. A buyer of personalty cannot, after acceptance without protest, and in the absence of fraud or breach of warranty, claim that the goods were damaged when delivered.

2. Where a breach of warranty of the quality of goods sold is discovered after delivery, the buyer may retain the goods, and sue for the breach or set off the damage caused thereby in an action for the price.

3. Where the buyer's agent in the absence of the seller took samples of grain, which he inspected and submitted to the buyer, who, to the seller's knowledge, purchased on the agent's representations that the samples were fair samples, there was no sale by sample, within Civ. Code, § 1766.

4. Under the express provision of Civ. Code, § 1764, a contract of sale does not imply a warranty.

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*Rehearing denied December 10, 1904. Beatty, C. J., dissenting.

5. The mere fact that payment for grain sold is deferred to the time of shipment, and to be made against the shipping receipts, does not show that title did not pass till shipment.

6. Uncommunicated limitations privately placed on an agent's general authority do not bind a person with whom the agent deals for his principal.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by J. W. Browning against G. W. McNear. From a judgment for plaintiff for less than his demand, he appeals. Reversed.

Crane & Rutledge and Adams & Adams, for appellant. Chickering & Gregory, for respondent.

ANGELLOTTI, J. The plaintiff brought this action to recover $6,632.27, alleged to be the balance due him for 21,277 sacks of barley sold and delivered by him to defendant at the agreed price of 81¼ cents per 100 pounds. The defendant, who had received, accepted, and used 20,445 sacks thereof, claimed that the original transaction was no more than an executory agreement for the sale of the 21,277 sacks at the price named, and alleged by way of counterclaim that "said barley was to be delivered to said defendant free on board barge at Eddy's Landing, California, in good order and condition, and equal to a sample theretofore shown said defendant by said plaintiff"; that defendant agreed to pay such price for the barley "when so delivered on board barge and in said condition"; that plaintiff delivered only 20,445 sacks; and that the portion so delivered "was, prior to the delivery of said barley upon said barge, seriously damaged by rain and other causes, so that when placed on said barge the same was greatly inferior in quality to said sample and was not merchantable barley"; and that, by reason of said damaged condition of said barley, defendant suffered damages in the sum of $5,000. He therefore asked that judgment be rendered against him for $1,632 only. The trial court found that the agreement between the parties was executory in its nature; that "it was understood by both parties that said grain was purchased and was to be paid for only against shipping receipts to be thereafter furnished by plaintiff"; that at the time of the transaction, October 9, 1899, the barley was in good order and condition, and equal to samples which had been obtained by the purchaser; that both parties "understood * * * that the barley was being purchased by such samples"; that after October 9th, and before the shipping, it was damaged to the extent of $4,182.96 by rain and mud, so that when it was delivered on board the barges it was not in good order and condition, or equal to the samples referred to, and was not merchantable barley; that 832 sacks, weighing 84,864 pounds, have never been delivered, but are still in plaintiff's warehouse. The court deducted from plaintiff's claim the said sum of $4,182.96 on account of the damage done by the rain to the barley delivered, and also the sum of $689.52 for the 832 sacks still in plaintiff's warehouse, and gave judgment in his favor for $1,759.79, interest, and costs of suit. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

It will be seen from the foregoing that the question here is, except as to the 832 sacks of barley that are now in plaintiff's warehouse, whether or not the defendant, having accepted and retained and used the property, can, in this action for the agreed price, recover, by way of counterclaim, the amount of damage done to the property by rain between the time of the transaction, October 9, 1899, and the time of the loading of the property upon defendant's barges. If the transaction of October 9, 1899, amounted to an absolute sale of the property, and the title thereto then passed to defendant, concededly plaintiff would in no way be liable for the damage. It appears to be equally clear that if the transaction amounted only to an executory agreement of sale of a specific, identified lot of barley, and the defendant, without protest, accepted, retained, and used the property, without attempt to rescind or offer to return, he cannot, in this action for the price, offset the damage caused by the rain, in the absence of a breach of warranty on the part of the vendor. An acceptance of property by the vendee, in the absence of fraud or breach of warranty on the part of the vendor, renders him liable for the price agreed on, and precludes him from alleging that the property is not of the character and quality called for by the contract. This must necessarily be so, in view of the fact that by such action he affirms the sale, and, in the absence of fraud, his only possible cause of action against the vendor in this connection must arise from some undertaking on the part of the vendor as to the condition or quality of the property. The authorities appear to be without conflict as to this. See 24 Am. & Eng. Ency. of Law (2d Ed.) p. 1092, and cases there cited. It is the law of this state, as it is generally elsewhere, that where there is a warranty, and it is discovered after delivery that there has been a breach thereof, the vendee may retain the property, and bring an action for the breach of the warranty, or may plead the breach in reduction of damages in an action brought by the vendor for the purchase money. Snow v. Holmes, 71 Cal. 142, 149, 11 Pac. 856; Polhemus v. Heiman, 45 Cal. 573, 579. This rule, which is vigorously asserted by defendant, is not disputed by plaintiff, but its application to this case is dependent upon the question as to whether or not there was a warranty. If there was not a war-

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¶ 6. See Principal and Agent, vol. 40, Cent. Dig. § 377.

ranty, defendant was not entitled in this action to any offset on account of the damage caused by the rain to the property that he has accepted and retained; and this is true regardless of the question as to whether the transaction of October 9, 1899, amounted to an absolute present sale, or only an executory agreement to sell. It was undoubtedly upon this theory that defendant alleged in his counterclaim that the "barley was to be delivered on board barge * * * in good order and condition, and equal to a sample theretofore shown said defendant by said plaintiff."

Passing for the present the question as to whether or not the transaction of October 9th amounted to an absolute present sale of the barley, we shall consider the question as to warranty. The superior court failed to find that there was any express undertaking on the part of plaintiff as to the condition of the property at the time of the transaction of October 9th, or as to what condition it should be in at the time of delivery. The evidence was without conflict to the effect that there was no such express undertaking on the part of plaintiff. In fact, the only evidence as to any express understanding on the subject was that as to what occurred in the Bank of Colusa on October 9th, when the transaction was being there closed, where, according to the evidence of defendant's agent, Mr. Hickok, who negotiated the purchase, Mr. Harrington, an officer of the bank, said, "Mr. Browning, I suppose you sold this barley, so if it gets wet you would not be the loser?" and Browning replied, "Yes; I have sold the barley to Mr. McNear. They have to look out for the weather;" and Hickok said, "You need not be worrying about the weather, because I think the barge will be there in a day or two and get it, and there is no indication of rain to-day." This evidence is more than corroborated by the evidence of Harrington and Browning, and it would be difficult, under such circumstances, to find that there was any express agreement or warranty on the part of plaintiff as to the condition in which the barley should be at the time of delivery. There is no claim that there was any express warranty as to its condition at the time of the transaction.

The question then remains as to whether there was any implied warranty. In this connection, the defendant relies upon the finding of the trial court to the effect that at the time of the transaction the barley was equal to samples which had been obtained by the purchaser, and that both parties understood that the barley was being purchased by such samples, as showing a sale by sample, and therefore an implied warranty, under section 1766, Civ. Code, which provides, in accord with the general rule, that "one who sells or agrees to sell goods by sample, thereby warrants the bulk to be equal to the sample." If we concede that the finding of the court above referred to is a finding that the plaintiff agreed to sell this barley by sample, within the meaning of this section of the Code, it must be held that the finding is without support in the evidence. No sample of this barley was at any time exhibited or furnished by the plaintiff. The barley lay in plaintiff's yard, and the defendant's agent, Hickok, had examined it carefully, and on two occasions samples were taken for him by another party under his directions; and so far as appears, these samples were taken without the presence of plaintiff, and without his knowledge. It does not even appear that plaintiff ever saw the samples, Hickok stating that he was not positive that he ever showed them to him. All that plaintiff knew at the time of the transaction was that it was customary for grain buyers to sample for themselves all grain that was for sale; that Hickok had in fact selected and taken, for himself, samples of his barley, had sent a set of the same to his principal, the defendant, and retained a set in his office; and that McNear was acting entirely upon the representations of his agent, Hickok, to the effect that the samples taken and forwarded by such agent were in fact fair samples of the bulk of the barley. There was no act of any kind on the part of plaintiff conveying the slightest intimation on his part as to the correctness of the samples. It would be a novel application of the rule of warranty arising from sale by sample to hold that a vendor is to be held responsible for a sample that he has never seen or exhibited, and concerning which he has made no representation, and which was selected and taken by the purchaser himself, or his agent, upon an inspection of the property. On a sale by sample the law implies the warranty that the bulk is equal to the sample, upon the theory that by his acts and representations the vendor assures the vendee that such is the fact. It says that, where one makes or agrees to make a sale by sample, such act on his part is a representation that the bulk is equal to the sample—an affirmation that the specimen exhibited is a fair sample of the bulk of the commodity. Gurney v. A. & G. W. Ry. Co., 58 N. Y. 364. The sale by sample contemplated by the law is one the circumstances of which indicate something in the way of representation by the vendor to the effect that a sample exhibited fairly represents the bulk. To constitute a sale by sample, it must appear that the parties "contracted solely in reference to the sample exhibited; that they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity corresponded with it." Beirne v. Dord, 5 N. Y. 95, 55 Am. Dec. 321; Benjamin on Sales, American note (7th Ed.) p. 685; 15th Am. & Eng. Ency. of Law (2d Ed.) 1227.

While the question as to whether the circumstances of a transaction show a sale by sample is, of course, a question of fact for the court or jury, there must be evidence fairly sufficient to support a finding of such a sale, or it cannot stand. Taking the evidence in this case in the light most favorable to defendant, it discloses no more than that the plaintiff knew that the defendant, through his agent, had personally inspected the barley, and, for the purpose of enabling himself to properly exercise his judgment as to the quality thereof, had himself, through his agent, selected and taken samples, and that he was basing his conclusion as to the quality of the barley and its value upon the result of such inspection and the samples selected by himself. This mere knowledge of plaintiff as to the means used by defendant in determining as to the quality of the barley, unaccompanied by any act of his, could not make the sale one by sample. It was clearly a case where the defendant relied entirely upon his own examination, and took such precautions as he deemed essential to satisfy himself as to the quality of the property, without assistance of any kind from the vendor.

It is further contended that, if there was not an agreement to sell by sample, there was an implied warranty that the goods should be sound and in merchantable condition when delivered upon the barge. The theory appears to be that this is the rule as to all executory sales, as distinguished from the rule applicable to executed sales. In this state the question as to whether there is an implied warranty must depend upon the provisions of our Civil Code. Section 1764 thereof provides that, "except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty." See Sutro v. Rhodes, 92 Cal. 123, 28 Pac. 98. Except for the section relative to sale by sample, admittedly no provision of that article of the Code is applicable to this case, unless it be section 1771. That section provides that "one who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable." This section makes no distinction between executed sales and agreements to sell, and simply means what it says, viz., that if at the time of the sale, or the agreement to sell, the merchandise is inaccessible to the examination of the buyer, the warranty that it is sound and merchantable will be implied. It can have no application to this case, for the simple reason that this barley was not only not inaccessible to the examination of the buyer, but was, as a matter of fact, inspected and examined by him, through his agent, prior to the making of the agreement. It must therefore be held that there was no express or implied warranty on the part of plaintiff, or any undertaking on his part, as to the condition of the property at the time of delivery, and it follows that defendant was not entitled to set off against the agreed price the damage caused by the rain to such of the barley as was received and accepted and used by him.

Upon the question as to whether the transaction of October 9, 1899, amounted to an absolute sale of the barley, there is some doubt as to whether the evidence supports the finding of the court. We do not deem it necessary to discuss this question, in view of the fact that the judgment and order must be reversed for the reasons already stated. Whether or not the parties, plaintiff and Hickok, representing defendant, then agreed upon a present transfer of the barley is a question of fact, the determination of which may well be left to the superior court upon another trial. It is proper to say, however, that the mere fact that payment for the grain was expressly deferred to the time of shipment, and was to be made only as against shipping receipts, does not conclusively establish that the purchase was against shipping receipts only, or that there was no agreement for a present transfer of the property. It is also proper to say that, in the determination of the question as to what the agreement actually was, limitations as to the general transaction privately placed by defendant upon the general authority of the agent, and not communicated to plaintiff, cannot, under the circumstances of this case, play any part.

The status of the 832 sacks of barley that have not been taken by defendant from plaintiff's warehouse must depend upon the determination of the question as to whether the transaction of October 9, 1899, was an absolute sale. If the title thereto then passed to defendant, he is liable in this action for the agreed price; otherwise, not.

The judgment and order are reversed, and the cause remanded.

We concur: SHAW, J.; VAN DYKE, J.

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145 Cal. 259

WILLIAMS, BELSER & CO. v. ROWELL.

(S. F. 3,825.)

(Supreme Court of California. Nov. 9, 1904.)

MECHANICS' LIENS—CONSTRUCTION OF SEWER—"IMPROVEMENTS."

1. Under Code Civ. Proc. § 1191, giving a lien to any one improving a lot at the request of the owner, a contractor who has, under contract with the property owners along a street, constructed a sewer therein, has a lien both for the portion of the sewer which is a part of the general system and for the branch sewers.

Shaw and Angellotti, JJ., dissenting.

In Bank. Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Williams, Belser & Co. against Carrie L. Rowell. From a judgment for defendant, plaintiffs appeal. Reversed.

J. C. Bates, for appellants. John W. Stetson and Jas. G. Quinn, for respondent.

BEATTY, C. J. In this case the superior court sustained a general demurrer to the complaint, and, upon the plaintiffs declining to amend, entered a final judgment for the defendant, from which plaintiffs appeal.

It appears from the complaint that the board of trustees of the town of Emeryville adopted a plan or system of sewers for the town, and that the plaintiffs entered into a written contract with the defendant and other lot owners by which they agreed to furnish the material and construct the whole system, together with the necessary Y branches, manholes, lamp holes, etc., according to the plans and specifications of the town engineer as approved by the board of trustees, and to the satisfaction of the engineer and said board; that the defendant and other owners of lots upon their part agreed in consideration of the performance of this contract to pay to the plaintiffs the sum of 45 cents per front foot according to their frontages set down with their signatures to the contract and representing the amounts of their individual frontage directly along the lines of the proposed sewers. It was stipulated that said rate of 45 cents should include all manholes, lamp holes, inspectors' and engineers' fees, and all incidental expenses, and also all work on crossings. But the respective lot owners were to pay for as many Y branches as they indicated in connection with their signatures at the rate of $1.50 each. The defendant was the owner of a lot fronting 129.57 feet on Auburn avenue and the same length on Lulu avenue, and she, as the owner of said lot, agreed to pay for the work done under the contract, $58.18 for 129.6 feet front at 45 cents, and $4.50 for three Y branches; or a total amount of $62.68. The plaintiffs duly performed their contract, but defendant has failed to pay, and they seek in this action to enforce a lien against her lot for her share of the agreed price of the work and for costs, etc.

Defendant's demurrer was general for want of facts and lack of jurisdiction, and, if it was rightly held by the superior court that plaintiffs had no lien to be foreclosed, the amount claimed under the contract was too small to give the superior court jurisdiction. The main, and in fact the only, question, therefore, which we have to decide, is whether there was a lien. It is true the respondent makes some claim that the complaint does not show that the sewer was constructed in front of her lot, and it is true that in this respect the complaint is ambiguous and uncertain, but this was a defect that should have been pointed out by special demurrer. As against a general demurrer for want of facts we think the complaint may be held to show with sufficient certainty that the sewer was laid for 129.6 feet in front of the defendant's lot, and that three Y branches were placed in that part of the sewer for her accommodation. (Though, as to this matter of Y branches, it is immaterial whether the complaint shows a lien or not, they were separately provided for by a severable clause in the contract, and, if the complaint established a lien for that part of the contract price determined by the frontage, it was error to sustain the demurrer.)

We think that the superior court erred in holding that there was no lien. By section 1191 of the Code of Civil Procedure it is provided that "any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the streets or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith, has a lien upon said lot for his work done and materials furnished." A system of sewers is an improvement to the lots within the sewer district. This is clearly recognized in the provisions of the Vrooman act, relating to sewers. From its first enactment, in 1885 (St. 1885, p. 161, c. 153, § 24), through all its amendments (St. 1887, p. 148, c. 130; St. 1889, p. 170, c. 151, St. 1891, p. 206, c. 147, and St. 1893, p. 172, c. 144, passim), city councils have been fully empowered to order the construction of sewers in defiance of any protest of property owners, and at their expense. They have power to define sewer districts, including the property in which in their judgment will be benefited—i. e., enhanced in value—by the proposed work, and to assess the whole cost, including all incidental expenses, upon the property so benefited, thereby creating a lien upon each lot for the amount of its assessment. St. 1885, p. 162, c. 153, § 27. The power to subject each lot within an assessment district to a lien for its due proportion of the cost of street or sewer work rests solely upon the assumption that the lot is improved—i. e., enhanced in value —in an amount at least equal to its assessment; and accordingly it is held that the lot alone is liable, the owner being free of any personal liability. Taylor v. Palmer, 31 Cal. 254. There is no difference in this respect between the construction of a sewer and the improvement of a street except in the wider latitude of discretion given to the city council in determining what property will be benefited, and the mode of apportioning the cost. Assessment according to frontage in this and other cases is only a mode, more or less equitable, according to circumstances, of making the apportionment; but, whatever the mode adopted, the several assessments, if lawfully made, represent in legal contemplation the improvement to the several lots, and are a lien thereon.

Now, in this case it appears that the trustees of Emeryville had adopted a system of sewers for the town upon plans and specifications recommended by the town engineer. This manifested their intention to order the work, let contracts, and assess the cost of the whole work, with all its incidents, ratably upon the lots within the town. In this situation the defendant and other lot owners agreed to assess themselves for their ratable share of the expense. Knowing that they would be subjected to no personal liability if the improvement was carried out by proceedings in invitum, but that their lots would be charged with the expense according to an assessment to be made, they voluntarily entered into an agreement by which they assessed themselves for what each must have deemed his fair share of the expense; or, in other words, the amount of the improvement to his particular lot. It is true that it is not shown that all lot owners in the town joined in this agreement, and it is highly probable that some of them did not. In cases of this kind there are generally found a few individuals who are willing to shift their own burdens to other shoulders, and no doubt the parties to this contract took that into consideration. They may be trusted, however, to have concluded that on the whole it would cost each of them less to have the work done under this contract than to have it carried out under compulsory proceedings by the board of trustees. They were looking out for their own interests, and no doubt they took proper care of them. They secured the improvement of their lots upon terms which they voluntarily accepted in place of the terms which they apprehended might be imposed upon them. This being so, they are brought within the letter and spirit of the law above quoted. The plaintiffs improved their lots at their request, and their claim of lien is for no more than the agreed value of the improvement. The fact that the contract price included the general and incidental expenses of the system, as well as the cost of the branch sewers in front of the respective lots, is no impeachment of this statement. When a system of sewers is constructed under the orders of a city council in the usual way, all these expenses are apportioned to the several lots, and become a part of the whole amount secured by the lien. And justly and reasonably so. A branch sewer laid in front of a lot, but unconnected with a main or outfall sewer, would be simply a nuisance. To make it a real improvement it must be connected with other parts of the system, and the main sewers must be furnished with the means of cleansing, ventilation, and inspection, such as manholes, lamp holes, etc. Street crossings must also be restored where the sewers are laid, and the labor and services of the official engineers and inspectors must be compensated by the contractor. These costs appertaining to the whole system, and essential to its existence and efficiency, must be apportioned, and whether they are assessed by the superintendent of streets in the usual way, or apportioned by voluntary agreement of the lot owners according to frontage, or by some other method, the share apportioned to each lot is to be deemed a part of the price of the improvement to that lot, and, if so, it is a lien thereon. The complaint, in our opinion, sustains the claim of lien, and the superior court had jurisdiction to enforce it.

The judgment is reversed.

We concur: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

SHAW, J. I dissent. Section 1191 of the Code of Civil Procedure is a part of the chapter of that Code relating to mechanics' liens. The provisions conferring a lien upon a lot for work done in connection therewith in the adjoining street were first incorporated into this section by the amendment made in 1885. There is much ground for the contention that there was no intention by this amendment to give a lien upon the lot for any work except for private improvements made for the benefit of the particular lot. It is a great stretch of construction to hold it applicable to public improvements, such as a public sewer composing part of a general system for the town or city. But for the purposes of this case it may be conceded that in a proper case, where the owner of a lot requests the construction of a public sewer in the street abutting upon the lot, the lot would, under this section, be subject to a lien for its proportional part, according to frontage, of the total cost of the sewer constructed at the owner's request. If by the complaint in this action it had been made to appear either that all of the owners of lots fronting upon the proposed system of public sewers had joined in the contract employing the plaintiffs to construct the sewer, each agreeing to pay his proportion of the cost of the entire work, or that the defendant and the other property owners who did join in the contract had each agreed to pay only that portion of the entire cost of the system which would be properly chargeable to his particular lot upon an apportionment of the total cost according to frontage, then it would follow, under this construction of the section, that each lot would be subject to a lien for such proportional amount of the cost. But that is not this case. It is alleged that the defendant and other property owners employed the plaintiffs to construct the sewer according to the plans and specifications adopted by the town trustees, and to the satisfaction of the town engineer and board of supervisors; but it does not appear that the property owners thus employing the plaintiffs comprised all the owners of lots abutting upon the proposed system of sewers. It further appears that each agreed to pay for the construction of the proposed system a sum equal to 45 cents per front foot upon his particular frontage, but it is not alleged that this sum was the proportional part of the entire cost which would be chargeable to the particular lot if an apportionment were made according to frontage. There can be no presumption that such was the case. It must be con ceded that, if these facts are necessary to give the plaintiffs a lien for the amount they claim, it was incumbent upon them to show them by proper allegations in the complaint. The result is that, so far as appears from the case made by the complaint, the lien is imposed upon the lot of the defendant for a portion of the total cost of the system of sewers, which bears no relation whatever to the cost of the portion of the sewer in front of the lot, or to its proportional part of the entire cost estimated according to frontage. The mere fact that the contract provided for a certain amount per front foot is of no consequence to the proposition. The sum agreed to be paid by each was entirely arbitrary, and, so far as it has any bearing upon the merits of the question, it could as well have been determined by any other method, or by stating the exact sum which each agreed to pay without regard either to frontage or to the total cost. In any system of sewers for a town there would usually be numerous branch sewers entering into the main sewer at different points along the line, and intended to serve the purpose of drainage for lots fronting upon the side streets. It does not appear from this complaint whether the defendant's lot abutted upon the street in which the main sewer was laid, or upon some side street, upon which only a branch was laid. But in either case branch sewers which did not abut upon this lot would be of no benefit whatever to the lot. As there is nothing to show that such was not the case, and as, under ordinary circumstances, there would be such branch sewers, it must be presumed in this case that such were in existence. A lien is therefore charged against the defendant's lot for a sum of which a part, at least, is for that part of the sewer made for the benefit of other lots and for the city in general. The effect of the decision is that in a case where a few lot owners contract for the construction of a public sewer, or system of sewers, for the town, and agree to pay some part of the contract price, there will be a lien imposed by this section, in favor of the contractor, upon the lots owned by each contracting owner, for the amount which he has agreed to pay upon the contract price, regardless of whether such amount is or is not the ratable proportion of the total cost chargeable to his lots, and regardless of whether it really goes in part to pay for portions of the sewer beneficial solely to other lots than his own. It would thus practically impose upon his lot a mortgage for a benefit conferred upon another. In my opinion, section 1191 was not intended to have such effect.

In so far as the majority opinion assumes that the amount each owner agreed to pay in this case was his ratable share of the whole expense apportioned by frontage, it is without support from the facts alleged.

I concur: ANGELLOTTI, J.

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145 Cal. 255

LIMBERG v. GLENWOOD LUMBER CO.

(S. F. 3,056.)

(Supreme Court of California. Nov. 9, 1904.)

SERVANT'S INJURIES—EVIDENCE—MATERIALITY—HARMLESS ERROR—LAW OF THE CASE.

1. Where, on appeal in an action for injuries to a servant, it was held that he had assumed the risk, such decision as to the effect of the evidence became the law of the case, and was binding on the appellate court on the next appeal, where the evidence was the same.

2. Where, in an action for injuries to a servant employed as a teamster, the only negligence complained of was that the lines were too short and the wagon without a seat, and the issue was assumption of risk, evidence that there was no brake on the wagon was immaterial.

3. Where, in an action for injuries to a servant employed as a teamster, it appeared that he had assumed the risk arising from shortness of the lines and the absence of a seat, there was no prejudicial error in a ruling of the trial court excluding evidence tending to show negligence on the part of the master in furnishing such lines and no seat.

Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Albert Limberg against the Glenwood Lumber Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

J. C. Black, for appellant. D. W. Burchard and Joseph R. Patton, for respondent.

ANGELLOTTI, J. This is an action for damages for personal injuries suffered by plaintiff while in the employ of defendant as a teamster; the claim of the plaintiff being that such injuries were caused by the negligence of his employer, in that the appliances furnished him with which to do the work were defective. There have been two trials of the case. The first trial resulted in a judgment for plaintiff. On appeal by the defendant from such judgment, and an order denying its motion for a new trial, the judgment and order were reversed, and the cause remanded. Limberg v. Glenwood Lumber Co., 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33. Upon this trial the court granted defendant's motion for a nonsuit, and judgment was entered accordingly. The plaintiff moved for a new trial, which was denied, and he appeals from the order denying his motion for a new trial. He contends that the trial court erred in granting the motion for a nonsuit, and also in excluding certain testimony.

1. We are of the opinion that the ruling of the trial court upon the motion for nonsuit is sufficiently specified as an error of law in the statement on motion for a new trial to enable us to review it. That ruling was, however, undoubtedly correct. Upon the former appeal it was held, after a full discussion of the evidence, that the defendant's motion for a nonsuit made on the trial should have been granted, upon the ground that the evidence for the plaintiff clearly showed that, even if it were conceded that the defendant was negligent in not furnish-

ing proper appliances, the plaintiff had, with full knowledge of the defects, voluntarily continued to work therewith for several months prior to the accident, and that he had thus assumed the risk of working therewith. The alleged defects complained of were that the lines furnished for the driving of the horses were too short, and that there was no seat on the wagon. It is unnecessary to discuss the evidence given on behalf of plaintiff on the second trial, further than to say that it is substantially the same, so far as is material to the question of the assumption of the risk of working with the appliances furnished is concerned, as the evidence given on the first trial, and discussed by this court on the former appeal. The decision of this court upon such appeal as to the effect of this evidence has become the law of this case, and is binding upon this court on this appeal. It is suggested by appellant that the evidence on the second trial showed "a new element of negligence of defendant, in not having a brake on the wagon." This was an "element of negligence" not embraced within the issues made by the pleadings; the complaint specifying with great particularity the only negligence complained of, viz., that the lines were too short, and that the wagon was without a seat. The plaintiff's knowledge as to the brake was apparently the same as his knowledge as to lines and seat, for he testified, "There never was a seat on that wagon, nor a brake." We are unable to see how the evidence as to the want of brake in any way affected the question as to whether plaintiff had assumed the risk of working with the short lines on a wagon without a seat.

2. As to the rulings of the court sustaining objections to certain questions asked by defendant, we find no warrant for disturbing the judgment or order denying a new trial. The question asked the witness Sanor, as to whether it was usual or customary, in the business of hauling lumber with four horses, to have a wagon equipped as this wagon was, and with lines such as were here used, was material, if at all, only to the question of negligence; and, if it be conceded that the proposed evidence was competent, the ruling of the court rejecting the same could not have prejudicially affected plaintiff's rights, as it could not affect the determination of the question as to whether plaintiff had assumed the risk of working with the appliances furnished. It being determined that he did assume such risk, it is immaterial whether or not there was, in fact, negligence on the part of defendant. The same may be said as to the question asked the plaintiff as to whether or not, if he had had lines long enough to set back on the load, he would have been pulled off the load by the lines, which went, at most, to the question of negligence and the cause of the accident. There was, however, no error in the ruling of the court sustaining the objection to this question. We are unable to see the materiality of the question asked the plaintiff as to what use he could have made of a brake if there had been one on the wagon.

The order is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

(145 Cal. 268)

BLUNT v. FIDELITY & CASUALTY CO.

(S. F. 2,973.)*

(Supreme Court of California. Nov. 10, 1904.)

ACCIDENT INSURANCE—LIMITATION OF LIABILITY— INJURIES RECEIVED WHILE INSANE—CONSTRUCTION OF EXEMPTION CLAUSE.

1. An insurance company may insert in its policy clauses not mentioned in the application.

2. A provision in an accident policy that it shall not cover injuries received while assured is insane is lawful.

3. In an accident policy, a provision that "in case of injuries * * * intentionally inflicted on himself by the insured, or inflicted on himself or received by him while insane," the company shall not be liable, exempts the insurer from liability for injuries to insured while insane, whether intentionally inflicted or not.

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Sarah Blunt against the Fidelity & Casualty Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Morehouse, Kooser & Alexander, for appellant. A. E. Shaw, for respondent.

SHAW, J. The plaintiff appeals from the judgment. The suit is upon a policy of insurance, of the kind usually designated as an "accident policy," issued by the defendant to John P. Blunt for the term of 12 months. It provided that, if death should result from an injury within 90 days from the time the injury was received, the defendant would pay to the wife of the insured, if she survived him, the sum of $5,000. The fourth clause of the policy was as follows: "(4) In case of injuries fatal or otherwise intentionally inflicted upon himself by the assured; or inflicted upon himself or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy." At the end of 12 months the policy was renewed for the same period, and at the end of that time it was again renewed. During the last year of the insurance, John P. Blunt became insane, and was committed to the Mendocino State Hospital. During the term of insurance, and while insane, he fell against a steam radiator in the hospital, and thereby received injuries from which, within 90 days thereafter, he died. The plaintiff is the surviving wife of the assured. Before the action was begun, the defendant tendered her the full amount of the premium paid, and in its answer it offered to allow judgment for that sum in favor of the plaintiff. The court found these facts, and gave judgment in favor of the plaintiff for the sum tendered, and against the plaintiff, in favor of the defendant, for its costs.

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*Rehearing denied December 10, 1904.

In contracts of insurance, as in other contracts, the rights of the parties are determined from the terms of the contract, so far as it is lawful. The contract here in question consisted of the application for insurance made and delivered by the assured to the defendant, and the policy of insurance made and delivered by the defendant to the assured. It cannot be conceded that the company was not at liberty to insert conditions in the policy which were not mentioned in the application. The application contained the affirmative stipulations and warranties made by the assured, and the policy contained the stipulations and limitations made by the insurer. The two together constitute the contract. If the policy of the company, which was issued by the company upon receipt and approval of the application, had contained any clause to which the assured did not agree, he, of course, would have been at liberty to reject it, and either demand a rescission and return of the premium paid, or insist upon a policy without the clause to which he did not assent. But when he received the policy and accepted it without objection, and especially when, as the record here shows, with the policy in his possession, he twice renewed it for an additional year, neither he nor the beneficiary can with good reason claim that there is anything contained in it to which he did not fully consent and agree. The fourth clause above quoted is not unlawful, and it cannot be eliminated on the ground that it is not expressly referred to in the application. The effect of this clause is that the defendant did not agree to insure the policy holder against injuries from accidents received by him during such part of the time covered thereby as the assured should be insane, except to the amount of the premium paid; and this regardless of the question whether the injuries were inflicted by himself, intentionally or otherwise, or were received by him from some other cause. Insurance during such insanity, except to that extent, was simply not a part of the contract; and the agreement, in that contingency, was that the company should be liable only for a sum equal to the premium paid. Language could not express this idea more clearly than it is expressed in the policy. The courts have always construed in favor of the assured every ambiguity and uncertainty in contracts of insurance. But where the words are clear and free from uncertainty, and the meaning plain, the contract as made by the parties is beyond the power of the courts to change by a forced construction. There was good reason for the insertion of the clause. A sane man will naturally and instinctively protect himself from injury, while if insane he might unconsciously expose himself thereto. It is to be presumed that, in fixing the amount to be paid as a premium, the company took into consideration its proposed exemption from full liability during such insanity, if it should occur, and reduced the premium accordingly. The assured received the benefit of this clause in the reduced amount of the premium, and hence the contract cannot be deemed inequitable or unfair.

The appellant contends that the fourth clause should be construed by interpolating the word "intentionally" a second time, making it read thus: "In case of injuries fatal or otherwise intentionally inflicted upon himself by the assured; or intentionally inflicted upon himself or received by him while insane," etc. It is obvious that this would be an unfair and forced construction. The natural inference from the context is that the element of intent was designedly omitted with respect to injuries happening to him while insane, so that in case of injury while he was insane, either consciously or unconsciously inflicted by himself, or received by him while in that condition, whether by reason of his consequent inability to avoid injury, or from causes entirely apart from his insanity, the company should be liable only to the amount of the premium. The language used seems well adapted to convey this meaning, and it is apparent that the word "intentionally" was purposely omitted from the second clause in order to avoid any question on that point.

The cases holding that a provision exempting an insurance company from liability if the assured shall commit suicide while insane does not give exemption where the suicide is the result of the insanity go upon the theory that the use of the term "suicide," or other similar description of the mode of death, implies a conscious and voluntary self-destruction, and not an act impelled by the insane delusion, and in that sense involuntary. They do not apply to this policy, which makes the insane condition, and not the volition of the assured, the test of nonliability.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

145 Cal. 246

STOCKTON v. BOARD OF EDUCATION OF CITY OF SAN JOSE et al. (S. F. 3,016).

(Supreme Court of California. Nov. 7, 1904.)

SCHOOLS—TEACHERS—DISMISSAL — POWERS OF BOARD OF EDUCATION—LIMITATIONS OF AUTHORITY.

1. Under St. 1897, p. 621, c. 15, art. 9, § 5, authorizing the board of education of a city to employ, pay, and dismiss teachers, and section

14, p. 624, of said article, providing that teachers elected to permanent positions, who are reported upon favorably by a majority of the committee on classification, shall retain their positions for the ensuing year without re-election, and shall be removed only for cause, the board of education has the right to remove any teachers, including those elected to permanent positions, at will, except such teachers holding permanent positions as have been favorably reported upon by the committee on classification.

2. Nor does a further provision of section 5 of said article and act, to the effect that no election of a teacher shall be construed as a contract, either as to the duration of time or amount of wages, give the teacher any greater right or security from removal, but the object of such provision is to protect the city against a claim that a teacher is entitled to serve for any particular time or at any particular compensation.

3. Under St. 1897, pp. 621, 624, c. 15, art. 9, §§ 5, 14, empowering the board of education of a city to dismiss teachers, but providing that teachers elected to permanent positions, and reported upon favorably by a majority of the committee on classification, shall be removed only for cause, any irregularity in the proceedings of the classification committee cannot avail a teacher who has not been favorably reported by that committee, in proceedings to regain her position.

Department 1. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Application by Fannie Stockton for a writ of mandate against the board of education of the city of San Jose and others. From a judgment denying the application, plaintiff appeals. Affirmed.

John G. Jury and D. M. Delmas, for appellant. H. L. Partridge, F. C. Jacobs, and J. R. Patton, for respondents.

ANGELLOTTI, J. This is an appeal, on the judgment roll, from a judgment denying the application of plaintiff for a writ of mandate compelling defendants to admit plaintiff to the use and enjoyment of her alleged right to act as a teacher in the school department of the city of San Jose.

The plaintiff has never held a "city" or "city and county" certificate, and therefore does not come within the provisions of section 1793, Pol. Code, providing that holders of such certificates, when elected, shall be dismissed only for insubordination or other causes. No other provision of the general state law applicable to common schools is cited as precluding the board of education of the city of San Jose from removing plaintiff at its pleasure, and plaintiff bases her claim entirely upon certain provisions of the charter of such city as originally adopted, and as they existed until amended in the year 1901 (St. 1897, p. 592, c. 15); contending that she was regularly elected a "permanent teacher" of the school department, within the meaning of such provisions, and that she has never been legally removed from that position.

In view of the fact that the San Jose charter provisions relative to the status of teachers, and the right and manner of their removal, were materially amended in 1901 (St. 1901, p. 957, c. 37), the question as to the proper construction of the original charter provisions is no longer of general interest, and affects only those who, like this plaintiff, may have been retired thereunder.

As originally adopted, the charter provided, in section 5 of article 9 (page 621), that the powers and duties of the board of education are as follows: "Third. To employ, pay and dismiss teachers, janitors, school census marshals, and such persons as may be necessary to carry into effect the powers and duties of the board, and to fix, alter, allow, and order paid their salaries or compensation, * * * provided, that no election of a teacher or other person employed by the board shall be construed as a contract, either as to the duration of time or amount of wages of such person." It further provided for a standing committee on classification, to consist of two members of the board of education and the city superintendent, the duties of the members of which were, among other things, to make themselves thoroughly acquainted by personal inspection with the work of every employé of the board, and to make a written report to the board at least 20 days before the close of any school year, and to therein "distinctly state what employees shall, in their opinion, be retained for the ensuing year." Section 13, art. 9, of charter. It was further provided by section 14 of article 9 (page 624) as follows, namely: "No teacher shall be elected or appointed to a position in the school department, except in technical or industrial schools that may be established, or as special teacher of some branch, who does not hold a California primary or grammar grade certificate, in full force; and no one shall be elected to a permanent position who has not taught successfully at least one school year in the schools of the city. All teachers thus elected to permanent positions in the department, who are reported upon favorably by a majority of the committee on classification, shall retain their positions for the ensuing year without re-election, and shall be removed only for cause. No teacher shall be removed from a position held in the schools of the city, except by the votes of four members of the board. * * *" These are the only provisions that at all bear upon plaintiff's case.

The findings show that on June 2, 1897, the classification committee, by its written report, recommended that plaintiff be retained in her position as a teacher for the ensuing school year. She entered upon the discharge of her duty as such teacher, and continued to act until the close of the school year, June 30, 1898. The committee did not report favorably upon her for the ensuing year, and she ceased to act as a teacher until December 5, 1898, when she was elected "as a regular teacher in the school department," and acted as such until the end of the school year, June 30, 1899. The classification committee recommended her for employment as a teacher for the school year ending June 30, 1900, and she, pursuant to that employment, entered upon her duties as a teacher, and continued to act until the last-named date. The majority of the classification committee did not report favorably upon her for the ensuing school year, and the report excluding her, by failing to report favorably upon her, was regularly adopted by the board of education, and she was not reelected. Since that time she has not been recognized as a teacher by the board, and has not been allowed to perform any of the duties of a teacher. In addition to these specific findings, the trial court found that plaintiff never was "elected to a permanent position, or employed as a permanent teacher in the school department of the city of San Jose."

The charter, as it then stood, nowhere defined the term "permanent position" or "permanent teacher." It made a distinction between such teachers and others, and by section 14 of article 9 sought to confer some advantage as to tenure upon those who had been elected to "permanent positions," and had thus become "permanent teachers" of the department. But that advantage, as we read the charter provisions, was the advantage of only such permanent teachers as were reported upon favorably by a majority of the committee on classification at the close of any school year, and simply gave to them the right to hold their positions for another school year, without re-election by the board, unless removed "for cause." In other words, there was no "permanent position" in the broad sense that one elected to such a position continued to hold indefinitely, in the absence of removal for cause, but the position was "permanent" only so long as a majority of the classification committee at the close of each school year reported favorably upon the incumbent. In the absence of such a favorable report, the board of education, without other cause, had the right to remove the incumbent.

Whatever right the incumbent of a "permanent position" had to continue in the position, notwithstanding the express desire and act of the board of education to the contrary, must be found in that provision of section 14 of article 9, which declared that "all teachers thus elected to permanent positions in the department, who are reported upon favorably by a majority of the committee on classification, shall retain their positions for the ensuing year without re-election, and shall be removed only for cause." If that provision had not been incorporated in the charter, there could be no doubt that the board of education could remove any teacher, permanent or otherwise, at will, by a vote of four members of the board. This provision was the only limitation on that absolute power that was contained in the charter. By its express terms, the limitation was applicable not to all those who had been merely elected to permanent positions, but only to those who, having been so elected, were favorably reported upon by a majority of the committee on classification at the close of a school year. It gave to those who were so favorably reported upon the right to continue in their positions for another school year, unless removed for cause. Such is the plain reading of the limitation upon the power of the board to remove at will, and the plaintiff, not having been favorably reported upon by the committee on classification at the close of the school year in 1900, did not come within its provisions.

The provision of subdivision 3 of section 5 of article 9 of the charter, "that no election of a teacher or other person employed by the board shall be construed as a contract, either as to the duration of time or amount of wages of such person," in no degree assists the plaintiff. The object of this provision was clearly to protect the city against the claim of any one who might contend that by reason of his election he was entitled to serve for any particular time or at any particular compensation. One elected to a position in the department acquired, as claimed by plaintiff, a "status" thereby, but it was a status that could be terminated by the board of education at any time, subject to the limitations already mentioned.

It is contended that the findings show an irregularity in the proceedings of the classification committee, in that the majority report had not been adopted at any formal meeting of the committee, it having been prepared and signed by a majority, and, without prior consultation with the third member, was presented to him for signature. A sufficient answer to this contention is that, in the absence of a favorable report of the committee as to an incumbent, there is no limitation on the power of the board to remove the incumbent.

In view of our conclusion as to the proper construction of the charter provisions, it is not necessary to determine whether the specific findings show that plaintiff was a "permanent teacher," nor is it necessary to consider the suggestion of defendants to the effect that the charter provisions are in conflict with the general state law relative to common schools.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

145 Cal. 251

FREY et al. v. VIGNIER et al. (S. F. 2,952.)*

(Supreme Court of California. Nov. 7, 1904.)

APPEAL—SUFFICIENCY OF COMPLAINT—REVIEW—WITNESSES—ACTION AGAINST EXECUTOR—TESTIMONY OF ASSIGNOR—PLEADING—AMENDMENTS—NEW CAUSE OF ACTION.

1. The sufficiency of a complaint is not reviewable on appeal from an order denying a new trial, but only on appeal from the judgment.

2. Code Civ. Proc. § 1880, provides that an assignor shall not be a witness "on a claim or demand against the estate of a deceased person as to any matter or fact occurring before the death of deceased." *Held*, that where one of several lessees of a building used for milling purposes assigned his interest to the others, and after the building was damaged by fire the landlord agreed to reconstruct a kiln used in the mill, in an action against his executor by the tenants for breach of the contract the assignor was a competent witness.

3. In an action for breach of contract, an amendment of the complaint by inserting the words "for a valuable consideration" was not a statement of a new cause of action.

4. A landlord, after the damage of the leased factory by fire, agreed to repair a certain kiln in the factory, and in an action by the tenants for a breach of the contract plaintiff amended the complaint by striking out the allegation that defendant "repaired said premises and property" except the kiln. *Held*, that no new cause of action was averred by such amendment.

5. Where a building leased for milling purposes was damaged by fire, and the landlord agreed to repair the premises and rebuild a certain kiln used in the building if the tenants would rebuild the parts of the machinery damaged, the promise and performance of their premise by the tenants was a sufficient consideration for the promise to rebuild the kiln.

6. After plaintiff had amended his complaint, defendant moved for leave to amend his answer by making a special traverse of each of the material allegations in the complaint, but the motion was denied. *Held*, that on appeal it was not necessary to inquire whether the court was correct in ruling that the original answer sufficiently set forth the defense of defendant, it appearing that afterwards, and after all amendments to the complaint had been made, defendant filed an amended answer, in which he had an opportunity to deny, and did deny, all the material averments of the complaint as amended.

Department 2. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by John Frey and others, doing business as the Monarch Milling Company, against A. Vignier and another, as executor and executrix of the will of Francis T. Eisen, deceased. From a judgment for plaintiffs, defendants appeal. Affirmed.

C. M. Jennings, for appellants. Edward J. McCutchen and Page, McCutchen & Eells, for respondents.

McFARLAND, J. Judgment went in the court below for plaintiffs, and the defendants appeal from an order denying their motion for a new trial. There is no appeal from the judgment. The action was originally against Francis T. Eisen to recover damages against him for his failure to replace a certain kiln used for drying oats and other grains, which kiln had been in a house leased by him to plaintiffs and their predecessors, and had been destroyed by fire. During the pendency of the action Eisen died, and his executor and executrix were substituted as defendants. The transcript presents the difficulty of discovering what questions are involved, rather than the difficulty of determining the questions when discovered. The court, in addition to formal matters, found these facts: On October 7, 1887, said Eisen leased to the present plaintiff Frey and Jesse Newbauer and J. C. Holloway, who then composed the firm of the Monarch Milling Company, and were engaged in the business of manufacturing meals of various kinds out of wheat, oats, and other grains, certain premises in San Francisco, consisting of floors and parts of floors in the building on Stevenson street known as Nos. 12, 14, and 16, together with certain machinery therein owned by Eisen and used for milling purposes, and a kiln for drying, situated on the third floor. The said lessees took possession and began therein their said business. Afterwards Holloway sold and conveyed all his interest in the lease and business to the said Frey and Newbauer, and at other times there were sales of interests in the lease and business to and from other parties until finally the plaintiffs Frey and Hoffman and Schwabacher became and remained the owners and continued to conduct the business. On the 21st day of September, 1887, without any fault of plaintiffs, a fire occurred, which injured and damaged said building and property, and entirely destroyed the kiln and some of the machinery. Immediately after the fire Eisen agreed with plaintiffs, and promised them to repair the premises and rebuild the kiln if plaintiffs would repair and rebuild the parts of the machinery which had been damaged and destroyed by the fire, which plaintiffs promised to do. Plaintiffs complied with their part of this contract, and replaced said machinery; but Eisen neglected and refused to rebuild said kiln or to build any kiln. The kiln was necessary to the proper conduct of said business of plaintiffs, and they were damaged by Eisen's refusal to rebuild the same in the sum of $756.47, for which amount judgment was rendered against defendants. The evidence fully warrants these findings. The order denying the new trial must therefore be affirmed, unless it should be reversed upon some of the special grounds suggested by appellants; and we do not think that any of such grounds are tenable. We will notice such of them as seem to call for any discussion.

Appellants attack the sufficiency of the complaint, but as to this matter it is enough to say that the sufficiency of a complaint can be considered only on an appeal from the judgment, and is not reviewable on an appeal from an order denying a motion for a new trial. Bode v. Lee, 102 Cal. 583, 36 Pac. 936, and cases there cited.

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*Rehearing denied December 5, 1904.

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 3478.

It is contended that the court erred in overruling appellants' objections to the testimony of respondents' witness J. C. Holloway; the objection being that he was an assignor of respondents, and therefore disqualified as a witness, under section 1880, Code Civ. Proc., which provides that an assignor shall not be a witness "upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." But the objection was not good, because Holloway had transferred all his interest in the lease and business before the fire; and, as the cause of action arose upon a contract made after the fire to which he was not in any way a party, he was not an assignor of the "claim or demand" sued on.

We do not see any merit in the contention that the action was barred by the statute of limitations. There is no claim that the action was not originally brought in time, as it was commenced within one year after the alleged cause of action accrued. But afterwards the respondents, by leave of court, amended the complaint by inserting after the averment of appellants' promise the words "for a valuable consideration," and it is contended that by this amendment a new cause of action was averred. It is obvious, however, that the amendment referred entirely to the cause of action originally alleged, and was merely a statement of something existing at the time of the accruing of that cause of action, and, being part of it, and which the pleader thought proper to add in order to make the complaint more full. No new cause of action was set up in the amendment. And the same may be said of the other amendments—one striking out the words "and Holloway," and another striking out the allegation that defendant "repaired said premises and property" except the kiln. There is no material variance between the cause of action stated in the complaint and the cause of action upon which the judgment rested. The cause of action alleged was the promise of Eisen to rebuild the kiln, and his failure to do so; and upon these facts the judgment was rendered.

The contention that the claim or demand presented to the executor after the death of Eisen was insufficient, and was different from the cause of action stated in the complaint, is not maintainable. The claim presented was very full, and stated as the ground of the demand the promise of Eisen to rebuild the kiln, and his failure to do so, as alleged in the complaint. The promise of respondents to replace the machinery and their fulfillment of that promise constituted a sufficient consideration for Eisen's promise to rebuild the kiln.

After plaintiffs had amended by striking out the words "and Holloway," the defendants moved for leave "to amend their answer by making a special traverse of each of the material allegations in plaintiffs' complaint." The motion was denied, and appellants assign this ruling as material error. It is not necessary to inquire whether the court was right in holding that the original answer sufficiently set forth the defenses of defendants, and that, therefore, an amended answer was not called for, because it appears that afterwards, and after all the amendments to the complaint had been made, defendants were allowed to file and did file an amended answer, in which they had an opportunity to deny, and did substantially deny, all the material averments of the complaint as amended. The defendants therefore could have availed themselves of any defense which they had, and of the right to introduce evidence pertinent thereto; and they could not have been in any way prejudiced by the said ruling excepted to.

We see no other points calling for special notice. The merits of the case lie in the questions whether Eisen promised to replace the kiln upon the consideration that plaintiffs would replace the machinery, and whether plaintiffs were damaged by his refusal to do so, as found by the court; and each party had a fair opportunity to try those questions. And as there are no good reasons for disturbing the conclusions of the court below as to those questions, there is no ground for reversing the order appealed from.

The order denying a new trial is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

145 Cal. 241

BATEMAN BROS. v. MAPEL et al. (S. F. 2,967.)*

(Supreme Court of California. Nov. 5, 1904.)

PRINCIPAL AND SURETY—IMPAIRMENT OF SURETIES' RIGHTS—INDEPENDENT TRANSACTIONS.

1. Where a contract provided for payment for materials delivered on their being satisfactory to the architect, a further provision that payments might be made in advance of delivery did not constitute a waiver of the requirement of the approval of the architect.

2. Under Civ. Code, § 2844, giving a surety all the rights of a guarantor; section 2840, exonerating a surety in the same manner as a guarantor, and to the extent to which he is prejudiced by acts of the creditor, and section 2819, exonerating a guarantor when, by act of the creditor, the original obligation is altered, or the remedies of the creditors against the principal impaired or suspended—he cannot complain of advancements by the creditor to the principal, outside of the contract, to enable the latter to complete his contract, where the creditor makes no claim for recovery on account of such advancements, and where they have in no manner affected the rights of the surety.

3. A surety on a contract of a materialman to deliver material is liable, in case of a default of his principal, for the difference between the contract price and the price paid for material in open market.

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*Rehearing denied December 5, 1904.

Department 2. Appeal from Superior Court of City and County of San Francisco; John Hunt, Judge.

Action by Bateman Bros. against E. T. Mapel and others. From the judgment rendered, plaintiffs appeal. Reversed.

Sullivan & Sullivan, for appellants. Whitworth & Shurtleff and Chas. A. Shurtleff, for respondents.

HENSHAW, J. This action was prosecuted by plaintiffs against the defendant Mapel, as principal, and the defendant American Surety Company of New York, as surety, for the sum of $2,000, damages sustained by plaintiffs by reason of defendant Mapel's breach of a contract between himself and the plaintiffs, for the due performance of which contract the American Surety Company became responsible as surety. The action was tried against the surety company alone. Mapel had entered into a contract with the plaintiffs to supply the latter at the site of the Hall of Justice building in San Francisco "all the terra cotta, ornamental pressed brick and fireproofing of said Hall of Justice building, in accordance with the plans and specifications of same, and to the satisfaction of Messrs. Shea & Shea, architects." Bateman Bros. agreed to make payments to Mapel of "ninety per cent. of the value of the materials as per this contract, delivered at said Hall of Justice, conditioned that materials are satisfactory to said Messrs. Shea & Shea, architects." The contract also contained the following clause: "It is hereby further agreed that said Bateman Brothers, if they desire, may make payments to said E. T. Mapel in advance of delivery of the said materials before mentioned to be furnished to them, and said E. T. Mapel agrees to accept such payments as part payments on this contract." The undisputed facts are that Mapel failed to manufacture and deliver any material. He was experimenting in his kilns and factories, but the product of them was unsatisfactory and unacceptable. To aid him in his endeavors to produce satisfactory material, Bateman Bros. advanced him moneys from time to time to the total amount of some $7,000. Mapel's efforts thus ending in a failure, plaintiffs were obliged to buy the material in the open market, and did so buy it, at a loss over the contract price of many thousands of dollars. The gravamen of their action is found in paragraph 7 of their complaint: "That by reason of the failure of said Mapel to deliver said materials mentioned in said contract, and to perform said contract, plaintiffs were obliged to purchase said materials elsewhere, and were compelled to pay and are now obliged to pay for said materials mentioned in said contract, and agreed to be delivered by said Mapel, an amount more than $2,000 in excess of the prices mentioned in said contract." This allegation is fully supported by the evidence, and the court finds it to be true. The surety company set up many defenses, upon one of which the court found in its favor. This defense was to the effect that Bateman Bros. had paid to the defendant Mapel this sum of $7,000 prior to the delivery by Mapel of any material, "without first or ever obtaining from Messrs. Shea & Shea, architects, as in and by said contract required, a declaration or expression or acknowledgment upon their part that the materials prepared and manufactured by the said E. T. Mapel under said contract prior to the dates of said payment and payments were satisfactory to them, the said Shea & Shea." Mapel, it appears, had conveyed to the surety company property of the value of $450 to indemnify it. Judgment for this amount was rendered in favor of the plaintiffs, but they were refused further relief.

It thus appears that, in the view of the court, the moneys so advanced by plaintiffs to Mapel without the knowledge of the surety company were construed to be moneys advanced in violation of the terms of the contract and in impairment of the surety's rights, and that the surety was thus exonerated, excepting for the value of the indemnifying property of the principal which it held in its possession. The briefs in this case are devoted largely, if not wholly, to the proper construction of the contract in this regard, but, in the view which we take of the case, that construction is wholly immaterial, although it may be said that it was properly construed by the court. The contract contemplated the privilege to the plaintiffs to pay at their pleasure in advance of delivery, but the condition as to approval by the architect was not waived. It was still required that the material should be acceptable to the architects before such payment was justified under the contract. But, as we have said, this determination is immaterial, and quite inconclusive of the case. If the payments were made within the terms of the contract, then clearly the surety cannot be heard to complain. If they were not, then they were merely advancements of money made by plaintiffs to defendant Mapel, entirely without the terms of the contract, and the surety has no grievance, unless in some substantial way his condition is changed, or a new liability is sought to be imposed upon him because of such payments. "A surety has all the rights of a guarantor, whether he becomes personally responsible or not." Civ. Code, § 2844. "A surety is exonerated (1) in like manner with a guarantor. (2) To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security." Id. § 2840. "A guarantor is exonerated except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto, in any way impaired or suspended." Id. § 2819. It is, of course, well recognized that the surety is favored in law, and that any act injurious to his rights will operate as an exoneration under his contract. Sutherland thus expresses it: "A surety is a favorite of the law, and where any act is done by the obligee that may injure him, the courts are very glad to lay hold of it in his favor. If the creditor does any act injurious to the surety, or inconsistent with his rights, * * * he will be discharged." 3 Sutherland on Dam. (3d Ed.) § 735. Thus the question whether the advancements made by Bateman Bros. were or were not within the strict terms of the contract could only affect the surety if, in fact, they were improperly made, and if a recovery was sought against the surety because of them, or because of some other change in its condition because of them. But such is not this action. Plaintiff does not plead the payments. He bases no claim for a recovery upon them, and the surety can avail himself of them to defeat a recovery only if the making of them has prejudiced him, or if the making of them has altered the original obligation of the principal in any respect, or if thereby the remedies or rights of the creditor or of the surety against the principal have become in some way impaired or suspended. Such is not the case here presented. So far as the contract is concerned, since no material was delivered by Mapel, and no material had been accepted by the architects, there were no payments to be made, and the payments which were made were mere voluntary loans to Mapel, the better to enable him to perform his contract. These advancements did not injuriously affect the rights of the surety, nor did they affect them at all. At the utmost, it was but a transaction outside of the contract, to the benefit of both Mapel and his surety, in that it supplied the former with money by which he could complete his contract, if it were possible for him to do so at all. So, as we have said, if a recovery were here sought against the surety because of these advancements, he might well be heard to say that he was not responsible therefor, and was exonerated under his bond, because they were not made in accordance with its terms. And such were the precise facts in United States v. Tillotson, 1 Paine, 305, Fed. Cas. No. 16,524. In that case the United States had advanced to its contractors large sums of money to aid in the construction of a fort, under a contract providing restrictions and limitations in the payment of the money, to the effect that materials should be delivered, with the invoices, at the fort, and pronounced by the engineer of proper quality, and that payments should be made at the end of each month for the work actually performed. The United States sued the surety upon his bond, alleging that of the large advancements so made the contractors had accounted in work and material for but a very small sum, and the recovery was sought for the difference between the amounts so advanced by the United States and the amounts accounted for by the contractors. But it was made to appear that the payments by the United States were without the terms of the contract, and, under the plainest principles of suretyship, it was held that the limitations as to payment ran with the surety's contract, and that they were exonerated as to all payments made not in accordance with these limitations and conditions. So here, as has been said, if the recovery were sought for the $7,000 so advanced, the materials for which were not furnished, the surety could rightfully claim his exoneration. But such is not this action. The surety has not been injured by these payments, and a recovery is not sought on account of them. The case, in effect, is that, notwithstanding the liberality of the plaintiffs in advancing moneys to enable the contractor to furnish the material, he still failed to do so, compelling plaintiffs to purchase the material in open market, and for the difference between the contract price and the price paid in open market the surety is responsible to the extent of his undertaking.

It follows, therefore, that the alleged defense is not a defense to the action, and that upon the facts found plaintiff is entitled to the judgment prayed for. It is therefore ordered that the judgment appealed from be reversed, and that upon the findings made the court enter its judgment in favor of plaintiffs.

We concur: McFARLAND, J.; LORIGAN, J.

145 Cal. 266

GABRIEL v. BANK OF SUISUN. (Sac. 1,078.)

(Supreme Court of California. Nov. 9, 1904.)

MASTER AND SERVANT—TERMS OF EMPLOYMENT—PRESUMPTIONS — EVIDENCE — CORPORATE MINUTES—APPEAL—REVIEW OF FINDINGS.

1. Under Civ. Code, § 2012, providing that where, after the expiration of an agreement respecting wages and term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service, evidence showing that plaintiff had been employed for the year 1898 at an annual salary of $1,200, payable monthly, and that he continued in that employment during the first two months of 1899, raises the presumption that the employment was renewed for the same wages and term as for 1898.

2. An appellate court cannot interfere with the finding of the trial court on conflicting evidence.

3. The minutes of the meeting of the directors of a corporation are not conclusive evidence of the terms of a contract between the corporation

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¶ 1. See Master and Servant, vol. 34, Cent. Dig. §§ 11, 86.

and another, where the latter had no knowledge of such minutes.

McFarland, J., dissenting.

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by F. Wm. Gabriel against the Bank of Suisun. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Geo. A. Lamont, for appellant. Gregory & Gregory and O. R. Coghlan, for respondent.

SHAW, J. This is an action to recover $1,000 as damages for a breach of contract of employment of the plaintiff by the defendant. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The court below finds that the defendant employed plaintiff as its assistant cashier and bookkeeper on or about January 1, 1899, for the year 1899 at a salary of $100 per month, payable monthly, and that plaintiff entered upon service of defendant under said employment, remained in its said service until March 1, 1899, was then wrongfully discharged by the defendant, and was not allowed to remain in said employment for the remainder of the year 1899, whereby he was damaged in the sum of $1,000, for which sum the judgment was rendered.

It is contended that the evidence does not support the finding that the plaintiff was employed by the year for the year 1899. This contention, however, cannot be sustained. The plaintiff testified that he was employed as bookkeeper and assistant cashier in July, 1895, and was continued in that employment to the end of that year "at a salary of $100 a month—$1,200 a year." He then proceeds as follows: "I was employed after that at the end of December, 1895, in the same capacity, for the year 1896, at the same salary—$1,200. I continued in that employment during the whole year 1896. I was again employed December, 1896, for the year 1897, in the same capacity, at the same salary. I remained in the employment during the year 1897. I was again employed at the end of 1897 for 1898, in the same capacity, at the same salary, payable monthly. I continued in that capacity during the year 1898. Q. Did you continue in the service of the bank in that capacity any longer than 1898? A. I did; two months—January and February, 1899"—and further that he then quit the employment because he was discharged by the defendant. By the provisions of section 2012, Civ. Code, "Where, after the expiration of an agreement respecting the wages and term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service." The above testimony sufficiently shows that the plaintiff had been employed for the year 1898 at an annual salary of $1,200, payable monthly, and that he continued in that employment during the first two months of 1899. From this the presumption arises, under the section quoted, that the employment was renewed for the same wages and term as for the previous year. There was evidence contrary to this, but we cannot interfere with the finding of the court because of the conflict. The minutes of the meeting of the directors of the corporation cannot be considered as conclusive evidence of the terms of the contract, where, as in this case, the plaintiff, one of the contracting parties, had, as he testified, no knowledge thereof.

The appellant further contends that the evidence shows that the contract of employment, if made for the year 1899, was rescinded after two months by mutual consent. It is sufficient to say on this point that, while there was some evidence tending to show a rescission, there was sufficient evidence to the contrary to justify the finding of the court.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; HENSHAW, J.

McFARLAND, J. I dissent. I do not think there is any support in the evidence for the finding that the plaintiff was employed by the year for the year 1899.

(145 Cal. 400)

In re SHIVELY'S ESTATE. (S. F. 3,784.)

(Supreme Court of California. Nov. 18, 1904.)

ADMINISTRATION OF ESTATES—ACCOUNTS OF ADMINISTRATOR—PAYMENT OF INCUMBRANCE ON HOMESTEAD—EVIDENCE—PRESUMPTIONS.

1. Pending the administration of an estate, the administrator by authority of the court executed a mortgage for $1,800 and credited the estate with the amount thereof. One tract, 14 acres, was thereafter sold to a third person for $750, and the other tract, 122 acres, was set aside as a probate homestead for the minor children. The mortgagee demanded the payment of $650 before it would release the 14-acre tract, which sum the administrator paid. *Held*, that the administrator was entitled to a credit for such payment, though it was a greater sum than the 14 acres were liable for in proportion to its value. Code Civ. Proc. § 1465, which provides that, when no homestead has been selected, the court must select one for the minor children, making it the duty of the court to set apart a homestead from the unincumbered estate, authorized the court to allow the proceeds of such sale to be applied on the mortgage

which incumbered the homestead at the time it was set aside.

2. The opinion of the trial judge is not evidence, and is no part of the record.

3. Where, in proceedings for the settlement of the final account of an administrator, the appellant has not pointed out the evidence as to an item complained of, the court will not search the record for it, but will presume that the evidence sustains the finding.

4. The account of an administrator is not, in proceedings for a final settlement, evidence as to contested items.

Commissioners' Decision. Department 1. Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Proceedings for the settlement of the final account of the administrators of W. B. Shively, deceased. From an order settling the final account, the administrators appeal. Modified.

Henry S. Ford and J. S. Burnell, for appellants. J. N. Gillett, for respondent.

COOPER, C. This is an appeal by the administrators of the above estate from an order settling their final account. Several items were charged to the administrators, or disallowed, which are the subjects of controversy here. These items we will dispose of in the order presented.

1. The first is the sum of $535.29, which the court ordered charged to the administrators. Pending the administration of said estate, the administrators by authority of the court executed a mortgage to the Savings Bank of Humboldt County for the sum of $1,800. The Code authorizes such mortgage to be made when it appears to the court to be for the advantage of the estate. Code Civ. Proc. §§ 1577, 1578. The administrators credited the estate with the $1,800, and the same was evidently used in paying the debts and expenses of administration. The mortgage covered about 14 acres of land, which was afterwards sold to one French, and also about 122 acres, which was, subsequent to the execution of the mortgage, set aside by the court as a probate homestead for the minor children. The 14-acre tract, not included in the homestead, was afterwards sold to one French for $750. The bank demanded the payment of $650 of the $750 before it would release the 14 acres from the mortgage, which was accordingly paid to the bank. The court refused to allow the item to any greater extent than $114.71, "that sum being the relative proportion that the mortgage on the homestead bore to the mortgage on the 14 acres sold according to their respective values." There is no claim made that the administrators received the $535.29, but it is claimed, and the trial court held, that they could not apply it on the mortgage, upon the theory that the moneys of the estate could not be used for the purpose of paying off an incumbrance upon a probate homestead. In this we think the learned judge was in error. The homestead had been incumbered by the administrators for the benefit of the estate. The money obtained by the mortgage became assets of the estate. The administrators had the right to use the money of the estate for the purpose of paying its debts. Suppose they had borrowed the $1,800 on their own responsibility, and credited the estate with it, using it for paying the debts of the estate, does any one doubt that they could have paid themselves from the proceeds of the sale of the 14 acres as far as it would go?

The Code (Code Civ. Proc. § 1465) provides that, where no homestead has been selected and recorded by the deceased, the court "must select, designate and set apart, and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children." The above section is imperative and the court has no discretion in the matter. Estate of Ballentine, 45 Cal. 696; In re Davis, 69 Cal. 458, 10 Pac. 671. It was, then, the duty of the court, in this estate, before the property was mortgaged, to set apart a homestead from the unincumbered real estate; and this, regardless of creditors of the estate. The homestead laws are to be liberally construed, with a view of securing shelter, care, and support for the widow and minor children. If the court in this case had set apart the homestead before the mortgage was executed, it would have ceased to be assets of the estate, and could not afterwards have been mortgaged by the administrators. The court would have had the right to set aside the 122 acres unincumbered as a homestead, and to have ordered the 14 acres sold. It certainly had the right to allow the proceeds of the 14 acres to be used to assist in paying off the incumbrance which it had authorized on the homestead. There is no question as to creditors involved. The estate is solvent, and the administrators cannot be allowed to deprive the minor children of a homestead, because the court authorized a mortgage upon it, when it would not have done so if the facts had been called to its attention.

In case the mortgagee had brought suit to foreclose the mortgage, the parties owning the homestead would have had the right to a decree that the land not included in the homestead be first sold, and the proceeds applied toward the satisfaction of the mortgage debt, and, if the proceeds had been sufficient to pay off the mortgage, to have the homestead premises freed of the incumbrance. Estate of Huelsman, 127 Cal. 275, 59 Pac. 776, is not in conflict with what has been said. In that case the lien of the mortgage upon the property set apart as a homestead existed at the death of the deceased. The court therein properly held that there is no provision for paying off liens on probate homesteads, but it was speaking of liens that existed at the death of deceased. It did not

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¶ 3. See Executors and Administrators, vol. 22, Cent. Dig. §§ 2248, 2250.

hold that the administrators could not pay off liens on a probate homestead, which they, of their own volition, contrary to the spirit and intent of the law, had placed there.

2. The court ordered the administrators to be charged with "$100, rent received from W. B. Meakin." Appellants call our attention to the evidence of Daniel Shively, one of the administrators, that neither he nor his coadministrator had received from Meakin any other sums than stated in the account. Respondents have not called our attention to any evidence in support of the ruling on this item, nor have we been able to find any. There are certain reasons given in the opinion of the trial judge which would tend to justify his action, but the opinion is not evidence and is no part of the record. Regarded as a brief, it does not point out any evidence to justify the decision as to this item. Therefore the court erred in charging the administrator with this $100.

3. The court directed that the administrators be charged with $250 as stumpage for pepperwood logs, and $25 as stumpage for redwood taken for shingle bolts, taken by the administrators off lands of the estate. The evidence supports the action of the court in this regard. It seems that the court exercised its discretion in favor of the administrators as to the amount of the stumpage and the price in each case, and its action must be upheld as to these items.

4. It is said: "The court erred in finding that the administrators sold a horse for the sum of $50, and did not account for the same." As the appellant has not pointed out the evidence as to this item, we do not deem it our duty to search through the record for it. We will presume that the evidence sustains the finding as to this item.

5. The items by "cash paid for clothes and maintenance of Maud E. Shively, a minor, $100, and Earnest E. Shively, a minor, $18," were disallowed by the court. It is not pointed out as to why these items should have been allowed, nor is our attention called to the evidence to justify them. The pages and folios of the transcript to which our attention is called only show that the items were included in the account, but the account is not evidence as to contested items.

The decree should be modified, in accordance with what has been said, as to the "item of $535.29," and as to the item of "$100, rent from Meakin," and the administrators credited with said items, and, as so modified, affirmed; appellants to recover their costs on this appeal.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the decree is modified, in accordance with what has been said, as to the item of $535.29, and as to the item of $100 rent from Meakin, and the administrators credited with said items, and, as so modified, affirmed; appellants to recover their costs on this appeal. ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

145 Cal. 405

BOLAND v. ASHURST OIL, LAND & DEVELOPMENT CO. (Sac. 1,294.)

(Supreme Court of California. Nov. 18, 1904.)

BROKERS—COMMISSIONS — ACTIONS — CREDITS—COSTS—APPEAL—CONCLUSIVENESS OF FINDINGS—HARMLESS ERROR.

1. A finding upon issues of fact on conflicting testimony must be accepted as correct.

2. A principal cannot deprive his broker of any part of his commissions for making a sale by subsequently agreeing with the purchaser to accept a less price than that procured by the broker, or by neglecting to collect the price, but the broker is entitled to commissions based on the price procured by him.

3. In an action by a broker for commissions, where plaintiff testified to the receipt of certain commissions, the court should have allowed defendant such amount as a credit upon plaintiff's claim.

4. In an action in the superior court, where plaintiff recovered less than $300, he was not entitled to costs.

5. Error in finding that plaintiff was entitled to costs was harmless, where no costs were included in the judgment.

Commissioners' Decision. Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by C. A. Boland against the Ashurst Oil, Land & Development Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Modified and affirmed.

O. B. Parkinson and Dennett & Walthall, for appellant. L. J. Maddux and Arthur L. Levinsky, for respondent.

HARRISON, C. Action to recover a balance due for commissions for services rendered in the sale of certain stock. Judgment was rendered in favor of the plaintiff for $186.25, with interest thereon from September 1, 1901, from which, and from an order denying a new trial, the defendant has appealed; contending that the court erred in allowing the plaintiff any commission upon the sale to Underwood, and in the amount allowed upon the sale to Brown.

The agreement between the parties, as found by the court, is that the defendant agreed to pay a commission to the plaintiff "for all sales made to persons by the plaintiff, or to any persons by the assistance of the plaintiff." Whether he is entitled to a commission upon the sale to Underwood depends upon whether he assisted in making the sale. Upon this issue there was conflicting testimony, and the finding of the court that he assisted in procuring Underwood to purchase the stock must be accepted as correct.

The sale to Brown was of 2,000 shares for the sum of $1,000, and was also made through

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¶ 2. See Brokers, vol. 8, Cent. Dig. §§ 55, 56.

the solicitation of the plaintiff. The purchase was closed by Brown with one of the officers of the defendant upon the payment by him of $250, instead of requiring him to pay for the full amount of the purchase; and the defendant, without the knowledge or consent of the plaintiff, agreed with him that he might pay the balance whenever he wished to, and has since made no effort to collect it. The court properly allowed a commission upon the full amount of the sale. The defendant could not deprive the plaintiff of this commission after the sale had been made by agreeing with the purchaser to accept a less amount, or by neglecting to collect from him the price at which it was sold.

At the trial the plaintiff testified that he received as commission on the Courtright sale $9.40. The court should have allowed the defendant this amount as a credit upon the plaintiff's claim.

In its findings, the court held that the plaintiff was entitled to recover his costs from the defendant. As the plaintiff recovered less than $300, this was error; but as no costs are included in the judgment—the provision therefor being followed by a blank space—the error is harmless.

We advise that the superior court be directed to modify its judgment by deducting therefrom, as of the date of its entry, the sum of $9.40, with interest thereon from September 1, 1901, to that date at the rate of 7 per cent. per annum, and, as so modified, that the judgment and order be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons stated in the foregoing opinion, the superior court is directed to modify its judgment by deducting therefrom, as of the date of its entry, the sum of $9.40, with interest thereon from September 1, 1901, to that date at the rate of 7 per cent. per annum; and, as so modified, the judgment and order are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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145 Cal. 370

GATJE v. ARMSTRONG. (Sac. 1,230.)*

(Supreme Court of California. Nov. 14, 1904.)

DEED—CANCELLATION FOR FRAUD—SUFFICIENCY OF EVIDENCE—RETURN OF CONSIDERATION—EQUITABLE RELIEF.

1. Evidence in an action to set aside a conveyance of land alleged to have been procured by means of fraud and undue influence considered, and held to warrant a judgment for plaintiff.

2. A court of equity, having decreed cancellation of a conveyance of land for fraud, to do complete justice between the parties, will adjust the accounts between them in relation to the land, and will not require plaintiff to restore to defendant money received, where defendant has already realized from the land more than the amount paid to plaintiff in the original transaction.

3. It is no defense to an action to cancel a deed procured by fraud and undue influence that plaintiff, in making the deed to defendant, intended to defraud another person.

Department 2. Appeal from Superior Court, Glenn County; Oval Pirkey, Judge.

Action by Johanne Gatje against E. M. Armstrong. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

E. A. Bridgford and Wm. M. Finch, for appellant. Charles L. Donohoe, C. F. Humphrey, O. V. Eaton, and Frank Freeman, for respondent.

GRAY, C. This is an action to set aside a conveyance of upwards of 300 acres of land in Glenn county, alleged to have been procured by defendant from plaintiff by means of fraud and undue influence exercised by the latter toward the former, and to compel defendant to reconvey said lands to plaintiff. The case was tried without a jury, findings were waived, and judgment was entered in plaintiff's favor. The appeal is by defendant from an order denying him a new trial.

The main contention of appellant is to the effect that the decision of the court is unsupported by the evidence, and, there being no findings in the case, appellant endeavors to show that upon no reasonable theory of the evidence can the judgment of the court find support.

In support of the judgment, it is proper to presume that the trial court gave full credit to the testimony of the plaintiff in the case, and refused to believe the evidence adduced by defendant, wherein it conflicted with plaintiff's evidence.

Plaintiff's story, as told upon the witness stand, was, in substance: That she was a German woman, little versed in the English language, with very little knowledge of business, and no knowledge of law. That a short time before meeting the defendant she had been divorced from her husband. That the real property in dispute here had belonged in part to her divorced husband, and in part to herself; the whole having a mortgage on it for about $3,000. That the husband had conveyed his part of the property to plaintiff, that she might dispose of it the more conveniently, by sale or otherwise, and thereafter restore to him in money the equivalent of his interest in the aggregate property. The plaintiff was sent by an employment agency in San Francisco, at the request of defendant, to see the defendant, on Taylor street, in said city, where defendant seems to have been waiting in bed to undergo some kind of a surgical operation. The plaintiff waited on defendant for a few days subsequent to the operation, for which the defendant paid her. He also engaged her to go with him to Iowa Hill, in Placer county, there to cook for him and his men for wages at a certain mine which defendant was managing. Soon after going there, and after mutual protestations of love between the pair, plaintiff and defendant became engaged to be married, and also thereafter became intimate sexually. This relation existing between them, and he being a shrewd business man, the plaintiff soon came to rely on defendant for advice and aid in conducting her business in connection with her land in Glenn county. The defendant undertook to procure a loan for plaintiff to take up the $3,000 mortgage when the same should fall due, but failed to obtain the same. While her affairs were in this condition, defendant came to plaintiff with a paper in his hand, and informed her that her divorced husband was threatening a suit to get his property back from her. Defendant advised plaintiff that she would lose her property if she did not follow his directions. The plaintiff acted upon this advice, and, in obedience to defendant's directions, conveyed the property to defendant; receiving therefor his note for $500, together with a check for $500 more. She testifies, in substance, that this was a mere colorable transaction; that defendant agreed that plaintiff "could have her property back for the same amount of money." She says: "He told me, 'You can take this five hundred dollar check, and you can buy your children some clothes, and send for your children.'" That thereafter she offered him the said note and check, and demanded her property back. That he then informed her that it was not time yet to reconvey, for the reason that her husband had sued her "down in the city." She says: "When I told him to give me my property back, he said: 'It isn't time to do it now. Your home is with me. You go to Iowa Hill. That is the place where you have to stay.'" Thereafter she returned to Iowa Hill. Some months later defendant repudiated his agreement to marry the plaintiff, refused to return her property to her, and told her "to get out"; claiming that he had bought the property, and that it was his own. It further appears from the evidence that the property in dispute is of the value of about $10,000.

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*Rehearing denied December 14, 1904.

We think that the foregoing evidence warrants a court of equity in finding that the deed from the plaintiff to defendant was obtained by fraud, and that the same should be canceled. Conceding that there was no false representation as to a suit having been threatened by plaintiff's divorced husband, the relations of the parties were of such a character that it was natural for plaintiff to repose, as she did, the highest trust and confidence in defendant. The defendant took advantage of this confidence and of the ignorance of plaintiff to obtain a deed to this property for about half what it was worth. The gross inadequacy of the consideration, combined with the condition of dependence, trust, and confidence of the plaintiff in the defendant, we deem entirely sufficient to predicate the decree of fraud upon.

The decree requires the plaintiff to cancel and surrender to defendant the $500 note which she received from him, but does not require the restoration of the $500 received in the check, or any other sum of money paid out by defendant on account of this land. In this, however, we see no error. It is true, defendant paid off the mortgage on the property, amounting to $3,304. He also remortgaged it for $1,500, which amount, at least, seems still to be a lien on the property. In addition to this, the defendant received rents from the property, as conceded in his reply brief, to the extent of $1,588.55. It also appears that defendant sold some 45 acres of the place. It is fair to presume that the trial court, sitting as a court of equity, to determine what the decree should be, charged the defendant with the full value of this land, at $30 per acre, as shown by the testimony of the witnesses, which would amount to $1,350 for the 45 acres. If we add the amount of the outstanding mortgage of $1,500 to the total of the value of the 45 acres sold, and the amounts received in rents, the sum is about $4,438. Deduct from this the total of $3,304 paid on the mortgage, and the $500 given to plaintiff at the execution of the deed, and we have left $634. Of course, nothing should be allowed for the item of $1,260 paid by defendant for a strip of land adjoining the land in controversy. This strip is no portion of the land here in controversy, and has nothing to do with the case in hand. The court was also warranted in refusing to allow defendant anything for his personal services or expenses in connection with the land, for the reason that there is evidence tending to show that those services and expenses were voluntary acts of kindness, which plaintiff was led to believe were to be performed without compensation. There are some items of expenditure upon the property, such as insurance, taxes, abstracts, repairs, etc., amounting in the aggregate to less than $500, which the court may have offset against the balance of $634 mentioned above; and, if they were so offset, the appellant can find no ground of complaint therein. The defendant having obtained the conveyance by fraud, equity invests him with the character of a trustee, and he holds the property in trust for plaintiff; and a court of equity will do complete justice between the parties, and, to this end, will adjust the account between them in relation to the land, and will offset the claim of one against the other, and will not require the plaintiff to restore to defendant money received, when it is shown that the latter has already realized out of the trust estate more than the amount paid by him to the plaintiff in the original transaction. The valid claim for money by the one will be treated as extinguishing, so far as it will go, a similar claim by the other, leaving nothing to be returned or restored where the claim is thus fully extinguished. More v. More, 133 Cal. 489, 65 Pac. 1044. Nor is it material that plaintiff on one occasion tendered to defendant the $500 check, and in her complaint offers to restore the $500 represented by the check. From the evidence the court was warranted in finding that this offer was more than the defendant was entitled to receive, and, under the general prayer for relief, giving to plaintiff such decree as she was entitled to.

The contention of appellant that plaintiff should be refused relief because the purpose of the conveyance was to defraud her divorced husband is disposed of by the recent well-considered case of Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433. The defendant will not be permitted to validate his own fraudulent act by showing that the party he has defrauded intended to defraud some other person.

Some alleged errors of law occurring at the trial are referred to by appellant. We have examined these, and find that they are not of sufficient importance to warrant a discussion.

We advise that the order denying a new trial be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the order denying a new trial is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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145 Cal. 344

McADOO et al. v. SAYRE, Judge of Superior Court of Lake County. (S. F. 3,974.)

(Supreme Court of California. Nov. 12, 1904.)

TESTAMENTARY TRUSTS—SETTLEMENT OF TRUSTEE—DETERMINATION OF BENEFICIARY—JURISDICTION OF SUPERIOR COURT.

1. Code Civ. Proc. § 1699, provides that where any trust has been created by will, to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the settlement of accounts under the trusts, and that the testamentary trustee may during the continuance of the trust, or at its termination, pray for the settlement of his accounts as such trustee before the superior court. *Held*, that the statute confers on the superior court jurisdiction to ascertain who is entitled to the trust estate already delivered by the trustee, and also that which remains to be delivered, and make such orders as may be necessary to enable the trustee to make final settlement.

2. Code Civ. Proc. § 1699, provides that the report accompanying the account of a testamentary trustee in the superior court on an accounting therein must give the names and post-office addresses of cestuis que trust. *Held*, that a failure to give such names and addresses is not sufficient cause for a writ of prohibition to prevent further action, since an appeal lies from any order that may be made.

Beatty, C. J., and Angellotti, J., dissenting.

In Bank. Application by Mary Floyd McAdoo and others to restrain M. S. Sayre, as judge of the superior court of Lake county, from making an order declaring a certain trust terminated, and directing testamentary trustees to pay over the trust property. Application denied.

Maguire, Lindsay & Wyckoff, for petitioners. John F. Davis, Chas. S. Wheeler, and Bishop, Wheeler & Hoefler, for respondent.

SHAW, J. This is an application for a writ of prohibition to prevent the defendant, as judge of the superior court of Lake county, from making an order declaring the trust terminated, and directing certain testamentary trustees to pay over, convey, and deliver the trust property to the beneficiaries. The facts are substantially as follows: Upon the final settlement of the estate of Cora Lyons Floyd, a large amount of property was distributed to certain trustees in trust to hold the same during the lifetime of the daughter of deceased, to maintain and support the daughter during her life out of the income, and upon her death to pay over and deliver the same to the descendants of the daughter, or, if there were no descendants, to such person as the daughter should by will appoint, or, failing such appointment, to the petitioners herein. The daughter died on February 11, 1904, leaving no descendants. A document purporting to be her last will, whereby she bequeathed and devised all her estate to her husband, Milos Mitrov Gopcevic, was admitted to probate in the superior court of San Francisco county on March 9, 1904. In April, 1904, the trustees filed an account and report of the trust in the superior court of Lake county, entitled, "In the Matter of the Estate of Cora Lyons Floyd, Deceased," in which, in addition to a statement of their account and an inventory of the trust property, they alleged the marriage of the daughter to Gopcevic on October 6, 1903, her subsequent residence in San Francisco, her death there without issue, and that she left a will, which had been admitted to probate. The account—due notice having been given in the meantime—came on for hearing on May 13, 1904. On that day the executors of the will of the daughter, and Gopcevic, the surviving husband, filed an answer to the account and report of the trustees. The answer states the bequest and devise by the daughter to Gopcevic, her husband; alleges that by virtue thereof all the property of the trust vested in said Gopcevic (Civ. Code, § 1330); and asks an order declaring the trust at an end, and directing the trustees to pay over, convey, and deliver the property to him. The cause thus presented was submitted to the court, and the respondent, as judge of said superior court, was about to determine the matters involved in the account and declare the balance due, and was considering whether or not the court had jurisdiction in that proceeding to determine who was entitled to the property, and to order the trustees to pay over, convey, and deliver the trust property to the person or persons entitled thereto. The purpose of the proceeding in this court is to prevent the lower court from proceeding to do anything more than to settle and declare the balance due on the account.

There is thus presented the question whether or not section 1699 of the Code of Civil Procedure confers upon the superior court, in the settlement of a trustee's account in the proceeding there established for that purpose, jurisdiction to ascertain and determine who are the persons entitled to the trust property, and, upon the final account, to direct the trustees to deliver the property to such persons in settlement of the trust, or to approve and confirm such delivery if already made by the trustee. The respondent contends that the court may in that proceeding do all these things. The petitioners claim that the power of the court is exhausted when it has adjusted all disputes as to the correctness of any items of the account, and has allowed compensation and expenses to the trustee, and declared the balance due.

Upon a consideration of the questions usually involved in the settlement of the accounts of trustees of any class of trusts, it is apparent that the court having jurisdiction of the matter of such settlement, even if its functions be limited to the mere ascertainment of a balance, must frequently be called on to determine who is entitled to the property. One who has no interest in the trust has no standing in court to assail the account presented by the trustees, nor to move the court to require an account of them. The section in question gives the right to apply for an order on the trustees for an account exclusively to the beneficiary or his guardian. Even if this provision were omitted, such right would still be limited to those having some interest in the trust or in the trust property. The trustee, then, has the right, when an account presented by him is attacked by objections at the hearing, or when he is cited to appear and render an account, to make the preliminary objection that the person who thus invokes the action of the court with respect to the trust has himself no interest in the property, and hence cannot be heard to make his objection or demand an accounting. This objection of the trustee may be disputed, and thereupon the court must determine whether or not such party is the beneficiary, or is interested in the trust. So, also, there may be, as in this case, two or more parties, each claiming to be beneficiaries. In such a case the trustee may be justly entitled to credits if one of these parties is the real beneficiary, which he could not have if the other was the party interested. The account cannot be settled without a determination of the question which party is entitled. Considered as a mere matter of power, therefore, the court must have the authority in such a proceeding, whenever the necessity properly arises, to determine who are the persons entitled as beneficiaries.

But the precise question here involved is whether or not, independent of any necessity arising from a dispute over specific items of the account, or over the right to contest the same, the court has a general power, upon final settlement at the termination of the trust, to dispose of the entire matter of the trust by determining who, by the terms of the trust, is entitled to the property, and directing the trustees to turn over the same to such person. The decision of this question depends on the effect to be given to the language of section 1699, Code Civ. Proc. That section declares that "where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trusts." It also provides that such testamentary trustee may during the continuance of the trust, or at its termination, "render and pray for the settlement of his accounts as such trustee, before the superior court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators." Further provision is made for notice to be given of the hearing, and for citation to compel the trustee to account, but these provisions are not important to the present question.

Jurisdiction for a certain purpose necessarily includes authority to do all things necessary to accomplish that purpose, which can be done by the means afforded. Every trustee who, by the terms of the instrument creating the trust, has possession or control of the trust property, is chargeable in his accounts with the whole of the estate thus committed to his hands. Aside from his allowances for compensation and expenses, he cannot in his account obtain credit against this charge, except as he may dispose of the trust property to a beneficiary in the lawful execution of the trust, in which case he is entitled to credit thereon for the property so disposed of; and, when he has thus disposed of it all, his account then stands balanced, and then only has he fully accounted and become entitled to his discharge. He may, if he chooses, exercise his own judgment as to the beneficiary, and, upon the termination of the trust, deliver the property to such person before presenting his accounts for settlement, or he may present his account for compensation and expenses, and obtain settlement to that extent before proceeding to make settlement with the beneficiary, and then present for settlement a supplementary account for the balance. But in either case he has not fully accounted until he has thus disposed of the entire estate, and he will remain subject to be called on to account until this is done, and until the court having jurisdiction of the accounts has, upon a hearing, declared the account correct and the trust fully executed. The object of the section under consideration was to provide a convenient and effectual method of procedure by which to secure a judicial determination, binding on all persons interested, that the estate is all accounted for, the accounts fully settled, and the trust executed. It follows from these propositions that the settlement of the final account of a testamentary trustee in accordance with the provisions of this section will necessarily involve a decision as to the effect of the instrument by which the trust was created, in order to ascertain who is entitled to the trust estate, and determine whether or not the trustee has properly disposed of it in the execution of the trust. In many cases, as above stated, a determination of this question will be necessary upon the settlement of the current accounts; but in the case of a final account, showing a complete execution of the trust, it will be necessary in every case. The necessity of this is shown in the provisions of the Code respecting the settlement of the accounts of executors and administrators. They are made chargeable in their accounts with all the estate which comes to their hands. Code Civ. Proc. § 1613. Upon the settlement of an account allowing compensation and expenses, the court must thereupon make an order for the payment of the debts; that is, it must determine, to that extent, who are the beneficiaries, and order the execution of the trust to that extent by payment to them. Code Civ. Proc. § 1647. If this exhausts the estate the account is final, but a supplementary accounting must be made, showing the payments made under the order. Id. And when, after the debts have been paid, the balance still remaining has been ordered distributed by the court, the executor or administrator is not entitled to a discharge until he has further accounted to the court for this balance by showing that he has paid or delivered the property to the parties entitled thereto. Code Civ. Proc. § 1697. This latter is not usually styled an account, but it has all the essential attributes thereof; and, although the Code does not require notice to be given thereof, there can be no doubt that the court would have power, if occasion arose, to require a notice to the distributees, in order to facilitate a determination of the question whether or not the delivery had been made at all, and, if made, whether it was to the proper parties. It is true that in this state the distribution of estates has been made, to some extent, a matter distinct from the settlement of the accounts. But it is clearly made so merely for convenience. If those provisions of the Code were omitted, the court would still be compelled to ascertain and declare the interests of the successors, in order to adjudge whether or not the accounts were correctly rendered. Furthermore, in the case of bills for an accounting in equity, the proceeding has always been to ascertain who was entitled to the balance found on hand, and give judgment accordingly in his favor against the trustee. The forms of interlocutory decrees in such cases include a judgment of this character, to become effective on the approval of the account. 3 Dan. Chan. Prac. *2193, *2238; 2 Lind. on Part. *516; 22 Encyc. Pl. & Pr. 107; 1 Cyclo. Law & Proc. 448; Keogh v. Noble, 136 Cal. 153, 68 Pac. 579. The question as to who were entitled to the trust estate was usually settled in a preliminary inquiry concerning the necessary parties. 1 Dan. Chan. Prac. *216, *217; 1 Pom. Eq. Jur. § 112, p. 119; Alison v. Goldtree, 117 Cal. 547, 49 Pac. 571. And either party was entitled to a judgment if a balance was ultimately found in his favor, although the party entitled was a defendant who had not filed a cross-bill. 1 Story, Eq. Jur. § 522; Beach, Eq. Pr. § 429; Story, Eq. Pl. § 106; Pars. on Part. § 208.

These methods of procedure in probate and in equity were obviously not adopted arbitrarily, but from the necessities of the case, and because there could be no complete accounting without establishing the right of the parties entitled to the property accounted for when it was passed from the control of the trustee. And it is difficult to perceive how any good end could be accomplished by arresting a proceeding of this character midway, and relegating the parties to another action in the same court, or another court of concurrent jurisdiction, for a second determination of questions which the court in the proceeding had been compelled to determine —an action in which no new questions could well arise, and the only effect of which would be further delay and uncertainty, and possibly further complications arising from conflicting decisions in the different courts. We conclude, therefore, that in a proceeding of this character the court has the power, and it is its duty whenever the power is invoked, to ascertain who is entitled to the trust estate already delivered by the trustee, and also that which yet remains to be delivered, and make such orders as may be necessary to enable the trustee to make final settlement with the beneficiary in safety, and secure a final settlement of his account, which will entitle him to a discharge.

It is further provided in section 1699, Code Civil Proc., that the report accompanying the account must give the names and post-office addresses, if known, of the cestuis que trust. This the report in question failed to give, and it is claimed that for that reason the proceeding is void, and that prohibition will lie to prevent further action therein. This, however, would not be sufficient cause for a writ of prohibition. An appeal lies from any order that may be made in the proceeding, and it will furnish a sufficient remedy to any person aggrieved by the action of the court in attempting to proceed without jurisdiction.

It is further urged that the court will be premature in its action if it should proceed at the present time to direct the delivery of the property to Gopsevic, the husband, claiming under the will of the deceased daughter. It is claimed that, as less than a year has elapsed since that will was probated, it is still subject to contest, and that therefore the probate is not final, and the property should not be turned over to the appointee until the time for contest has expired, or, if a contest is instituted, until it is finally decided. It is not necessary here to determine whether this contingency would be sufficient to abate the proceeding as for a final settlement, or would be good cause for a postponement of the settlement of the trust until after the probate of the will had become final. We cannot anticipate the action of the court below, and assume that it would be erroneous on this point; and in any case its decision would be subject to appeal, and an ample remedy is thereby provided.

The application for writ of prohibition is denied.

We concur: McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.

We dissent: BEATTY, C. J.; ANGELLOTTI, J.

145 Cal. 394

KOWALSKY v. KOWALSKY. (S. F. 3,884.)

(Supreme Court of California. Nov. 16, 1904.)

DIVORCE — TEMPORARY ALIMONY — DEFENSES AGAINST ALLOWANCE—CONSIDERATION OF MERITS — INACCURACY OF ORDER.

1. Where there is no issue as to the marriage in divorce proceedings, the merits of the case will not be considered on an application for temporary alimony further than is necessary to determine that the wife is proceeding in good faith.

2. An order awarding counsel fees "to the plaintiff or to her counsel" in a suit for divorce, while inaccurate in directing payment to be made to plaintiff's counsel, is not sufficiently irregular to justify a reversal.

3. In a suit for divorce, where plaintiff, in her affidavit for alimony, alleged that defendant owned property worth $100,000, and was in the receipt of an income of $600 per month, and defendant did not deny this allegation, further than to say that his property was not worth $100,000, and that his monthly income was not $600, the fact that it also appeared that plaintiff was the owner of property of the value of $700, or thereabout, did not preclude the court from awarding plaintiff temporary alimony and counsel fees.

4. In an action for divorce for cruelty, the fact that defendant had a home, in which he was willing plaintiff should live during the pendency of the action, was not material on the question of plaintiff's right to temporary alimony and counsel fees.

Department 1. Appeal from Superior Court of City and County of San Francisco; J. M. Seawell, Judge.

Action by Ettie Kowalsky against Joseph N. Kowalsky. From an order awarding temporary alimony and counsel fees to plaintiff, defendant appeals. Affirmed.

H. I. Kowalsky and T. J. Crowley, for appellant. Campbell, Metson & Campbell and C. H. Oatman, for respondent.

SHAW, J. In this action for divorce the defendant appeals from an order requiring him to pay to the plaintiff the sum of $100 a month for her support during the pendency of the action, and the further sum of $250 for counsel fees.

If we were hearing an appeal on the merits, we might be disposed to scan carefully the allegations of cruelty, to determine whether a cause of action is well stated. But the marriage is admitted in the answer, and a cause of action for extreme cruelty is sufficiently stated to make out a prima facie case. The purpose of allowing alimony to the wife during the pendency of the action is to enable her to live in the meantime, and to employ counsel who can properly present her case to the court, both in the pleadings and in the introduction of evidence. The merits of the case, where there is no issue as to the marriage, will not be considered on an application for such alimony further than is necessary to determine that the wife is proceeding in good faith, and not for the mere purpose of obtaining money from the husband. Storke v. Storke, 99 Cal. 622, 34 Pac. 339; Langan v. Langan, 91 Cal. 654, 27 Pac. 1092; Poole v. Wilber, 95 Cal. 339, 30 Pac. 548; Hite v. Hite, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82.

The direction that the counsel fees allowed be paid "to the plaintiff or to her counsel," while inaccurate in expression, is not a sufficient irregularity to justify the interference of this court. The addition of the words "or to her counsel" does not change the character of the order as an allowance to the plaintiff, and was probably intended only to indicate that her counsel should have authority to receive the money. Counsel would have the authority although the order was silent in regard to the matter, and hence the addition was unnecessary, but we cannot see how its insertion could in the least injure the appellant.

It was within the discretion of the court to award the plaintiff temporary alimony and counsel fees, notwithstanding the fact that it appeared that the wife was the owner of some corporation stocks of the value of $700 or thereabout. The plaintiff alleged in her affidavit that the defendant owned property worth $100,000, and was in the receipt of an income of $650 per month. The defendant made no denial of this allegation, further than to say that his property was not worth $100,000, and that his monthly income was not $600. This was equivalent to an admission that the value of his property and the amount of his income, respectively, were $1 less than these sums. The court might well conclude that, with such abilities on the part of the husband, it would not be fair to the wife to compel her to sell all that she had in order to raise money wherewith to live and prosecute her action.

The fact that the defendant had a home in which he was willing that the plaintiff should live during the pendency of the action was not material. It involved the merits of the action. The plaintiff alleged that she had been driven from that home by the cruelty of the husband. It would be deciding the case in advance of the trial to offer evidence to show that she was not justified in living apart from him.

The order is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

145 Cal. 397

ALFERITZ et al. v. CAHEN et al. (S. F. 3,093.)

(Supreme Court of California. Nov. 17, 1904.)

JUDGMENTS—DEFAULT—VACATION—NEGLIGENCE OF ATTORNEY—DISCRETION.

1. Where, by the negligence of defendant's attorney in not ascertaining or appreciating that an action for conversion was against both members of a firm, he did not attend the trial, whereupon judgment was recovered against both of such members, and no affidavit of merits or defense other than a general denial was filed, and one of them intended to contest the suit, the court's refusal to vacate the judgment was not an abuse of discretion.

Department 2. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by George C. Alferitz and others against A. Cahen and another. From an order denying an application of defendant H. Cahen to set aside a judgment by default, he appeals. Affirmed.

M. S. Eisner and Reinstein & Eisner, for appellant. Lyman I. Mowry, for respondents.

HENSHAW, J. This is an appeal by H. Cahen, one of the defendants, from an order denying his motion to vacate a judgment against himself. The motion was made under section 473, Code Civ. Proc., and reliance was had principally upon the ground of the mistake of his attorney.

The action was commenced in 1894, against the defendants as copartners under the firm name of A. Cahen & Son, for the conversion of 17 bales of wool. The defendants answered by general denial. The case slumbered for some six years, during which time plaintiff had died, and his personal representatives had been substituted. Defendants' attorney, not having had occasion during this time to refresh his memory as to the facts, had forgotten that the action was against A. Cahen and H. Cahen, and assumed that it was against A. Cahen alone. His mistaken belief in this regard was promoted, if not prompted, by the fact, as appears from his affidavit, that the partnership had been dissolved before the date of the alleged conversion, and that, as a consequence, if there had been a conversion of plaintiff's goods, the defendant H. Cahen was not responsible therefor. The attorney for the plaintiff came to the attorney for the defendant, stating that the estate of Alferitz was ready for settlement, and said that the pending litigation should either be compromised, or that the case must be tried. Defendants' attorney, still in the mistaken belief that the sole defendant was A. Cahen, said that he would communicate with his client touching the compromise. He did so communicate with A. Cahen, who expressed his inability to pay anything, and instructed his attorney not to defend the litigation. Plaintiffs' attorney, being notified that a compromise was impossible, proceeded to have the cause set for trial, and served proper notices upon defendants' attorney. These notices disclosed the fact that the action was against the two Cahens, but they were actually received by the managing clerk of defendants' attorney, and were not seen by defendants' attorney himself. Defendants' attorney, being instructed by A. Cahen not to defend the action, and still entertaining the mistaken belief that A. Cahen was the only defendant, failed to appear at the time of the trial. At that time plaintiffs made their proofs and recovered judgment against both of the defendants. H. Cahen was doing business under the name of the California Fruit Evaporating Company. Execution was issued and levied upon his property in that company, whereupon his attorney with due diligence moved for a vacation of the judgment against H. Cahen, which motion was denied.

The sole question presented to this court upon an appeal such as this is whether or not there has been an abuse of the discretion vested in the trial court, either in granting or in refusing the motion. Where such abuse has been plainly shown, this court has lent its aid in correction of it, but in all other cases relief has been denied. The whole consideration has been well summed up by Mr. Justice Harrison in Ingrim v. Epperson, 137 Cal. 370, 70 Pac. 165, where it is said: "The rule has been so often declared as not to need the citation of authorities that the action of the superior court upon an application to set aside a default or grant relief therefrom rests so largely in its discretion that it will not be disturbed on appeal unless it shall be made clearly to appear that there was an abuse of this discretion. While it has been said in some cases that this discretion is better exercised when it tends to bring about a decision of the cause upon its merits, the rule itself has never been relaxed. This observation has been in the nature of advice to the superior court, and not for the purpose of compelling it to decide in that mode. Unless the record clearly shows that the court has abused its discretion, its order, whether it be to grant or deny the application, will be

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¶ 1. See Judgment, vol. 30, Cent. Dig. § 281.

affirmed." While it may be conceded that if the trial court in this case had reached the opposite determination, and had vacated its judgment, to the end that H. Cahen might be permitted to defend the litigation upon its merits, this court would not have disturbed the conclusion, upon the other hand that is very far from a declaration that the decision which the court actually reached was unwarranted, and therefore an abuse of its discretion; for, while conceding that the attorney for defendant was laboring under a mistake, there was still to be considered whether or not the mistake was one entertained under such circumstances as to entitle the party to relief. Herein are to be considered the circumstances that the answer of H. Cahen nowhere discloses a special defense, but rests merely upon general denial; further, that plaintiffs' attorney, in his conversations with defendants' attorney, always spoke of the defendants in the plural, and that there was nothing in the language of defendants' attorney to lead plaintiffs' attorney to believe that defendants' attorney was laboring under any mistake. Still further, that the notices served upon defendants' attorney showed plainly and properly who the defendants were, and even if those notices did not come under the eye of defendants' attorney, they were received by the managing clerk of defendants' attorney. Where such questions of negligence and mistake arise, there must always come a time when, notwithstanding the hardship to the client, he must be bound by the errors and omissions of his attorney. It may not be said that it was an abuse of the discretion of the trial court to hold in this instance that he was so bound.

The order appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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145 Cal. 380

DODGE STATIONERY CO. v. DODGE et al.
(S. F. 2,917.)*

(Supreme Court of California. Nov. 15, 1904.)

TRADE-NAMES—NAME OF INDIVIDUAL—USE BY CORPORATIONS—USE BY INDIVIDUAL HIMSELF—UNFAIR TRADE—INJUNCTION—SCOPE—CONTRACTS—RESTRAINING TRADE—SALES OF GOOD WILL.

1. The vendor of stock in a corporation has no vendible interest in the good will of the business carried on by the corporation, and cannot transfer any part thereof, but such good will is the property of the corporation alone.

2. Under Civ. Code, §§ 1673, 1674, declaring contracts by which one is restrained from exercising a lawful profession or business, except where one sells the good will of a business, void, a contract by the vendor of stock in a corporation, binding him not to engage in the line of business conducted by the corporation, is void.

3. Where one tradesman resorts to any artifice to represent his goods or his business as the goods or business of a rival, thereby deceiving the public, a fraud is committed, which will be restrained on the ground of unfair competition, although the rival tradesman has no proprietary interest in the words or device imitated.

4. A trading corporation may, equally with a private person, acquire the good will of a business, which is defined by Civ. Code, § 992, as a well-founded expectation of continued public patronage, and procure the protection of that good will against the unfair trade of rivals.

5. While a private person may engage in a business in his own name, although his name is used in the same business by a corporation of which he was at one time a leading stockholder, so long as he does not resort to any artifice to produce the impression that the place of business conducted by him and that conducted by the corporation are identical, yet he cannot, by becoming a stockholder in a new corporation, confer on it the right to adopt a name similar to that used by the former corporation to palm off the business of the new corporation as that of the old.

6. Where a name adopted by a corporation is so similar to that of another corporation as to create confusion and enable the later corporation to obtain the business of the prior one, injunction will lie to restrain the simulation, so far as necessary to protect the rights of the prior corporation.

7. The names "The Dodge Stationery Company" and the "J. S. Dodge Company," when taking into consideration the fact that the business conducted by the latter is the same as that conducted by the former, are sufficiently similar to warrant an injunction restraining the latter from conducting its business under the name adopted by it.

8. Where a corporation by using the term "Dodge's" became well known to the public, and built up a large business under that name, another corporation engaging in the same business would be enjoined from using the term "Dodge's" on its signs, thereby conveying the impression that its was the business conducted by the former corporation, although a man named Dodge was the manager of the latter corporation, and although the term was not used on its signs with any actual fraudulent intent.

9. One who had been the president of a corporation to which he had given his name, and which used his surname possessively as a popular name, under which it had built up a profitable business, would be enjoined from engaging in the same business with a new corporation bearing his name and also making use of his surname alone as a popular name.

10. The use by a corporation of the name of an individual, who at one time had been its president, as its corporate name, and his surname, used possessively, under which it had built up its reputation, as its popular name, does not import a declaration that a person of the name used is now connected with it, so as to render such use fraudulent.

11. The use by one corporation or individual of a name similar to that of another corporation engaged in the same business will be enjoined only so far as is necessary to protect against fraudulent representations.

12. A corporation engaging in business under a name similar to that of another corporation engaged in the same business should be enjoined from making use of that name only in the business in which both corporations were engaged, and not from making use thereof in any other business.

13. A person whose name was used as the corporate name of a corporation of which he was at one time president, and whose surname was used as the popular name of that corporation, who engaged in the same business, after the

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*Rehearing denied December 14, 1904.

¶ 6. See Corporations, vol. 12, Cent. Dig. § 137; Trade-Marks and Trade-Names, vol. 46, Cent. Dig. § 86.

termination of his connection with the corporation, in a new corporation making use of his name as a corporate name and of his surname standing alone as a popular name, was properly enjoined from engaging in the business at the place in the same city where the new corporation had established itself, and had used misleading signs similar to those used by the old corporation, and from causing any business similar to that of the old corporation to be carried on by the new corporation in the city under the designation of his surname without a qualifying statement that the business so carried on was not the business theretofore carried on by the old corporation under that name, and from in any manner representing that such business was the same business as that carried on by the old corporation; but a further provision of the injunction restraining him from using his own name in the carrying on of the business at any other place in the city unless qualifying that name by explanatory statements making its use burdensome was unauthorized.

Department 1. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by the Dodge Stationery Company, a corporation, against J. S. Dodge and another. There was a judgment for plaintiff, and defendants appeal. Modified.

A. E. Shaw and J. F. Riley, for appellants. Mastick, Van Fleet & Mastick, for respondent.

ANGELLOTTI, J. This action was brought to obtain a decree enjoining the defendants from maintaining certain signs, doing business under certain names and designations, or using the same in the conduct of their business, using or exhibiting certain samples, and enjoining the defendant corporation from using its corporate name, or any other name in colorable imitation of plaintiff's corporate name, in the conduct of its business. Plaintiff had judgment substantially in accord with the prayer of its complaint, and defendants have appealed from such judgment.

The findings of the trial court, and allegations of the complaint which are not denied by the answer, show the following facts:

Plaintiff was incorporated in August, 1894, for the purpose of buying, selling and dealing in books, periodicals, and stationery, and carrying on a general engraving, typographing and printing business, and has ever since been engaged in said business in the city and county of San Francisco. Defendant J. S. Dodge was one of the incorporators, its first president, and its general manager until September 17, 1900, when he sold and transferred all his stock to another, since which time he has not been a stockholder in the corporation, in any way interested therein, an officer thereof, or in its employ. In March, 1896, plaintiff moved its place of business to No. 112 Post street, and in March, 1899, to No. 123 Grant avenue, where the business has ever since been conducted. During the period that the business was being conducted at these places, with defendant J. S. Dodge as manager, said defendant Dodge usually advertised and conducted the business of plaintiff under the name of "Dodge's," that being the only name or device placed in a conspicuous manner on the signs used, and the signs used at 123 Grant avenue containing simply the word "Dodge's," and no other word or designation whatever; and these conditions have ever since continued to exist. It was always the custom of plaintiff to stamp on the back of envelopes sold by it the word "Dodge's," with a designation of the street and number of its place of business. During the time that the business of plaintiff has been conducted at these two places it has become well and favorably known to its customers as "Dodge's," and under that name plaintiff has built up and is now carrying on a large and profitable business, the corporate name being used only on billheads and correspondence. Within a few months after parting with his stock in plaintiff corporation and ceasing to be interested therein, viz., on January 2, 1901, defendant J. S. Dodge, with four others, organized defendant corporation, the "J. S. Dodge Company," for the purpose of engaging in the same character of business as that followed by plaintiff. Said J. S. Dodge Company and J. S. Dodge hired a store at No. 209 Post street, in the same block in which plaintiff's place of business is situated, and only 100 feet distant therefrom, and placed thereon a conspicuous sign, as follows: "Dodge will occupy these premises on his return from New York with a complete stock of up to date stationery, etc., about March 1st." The word "Dodge" thereon was displayed in very large and conspicuous letters. On April 1, 1901, they opened their stationery business therein, and have ever since maintained the same, the only signs displayed being several containing simply the word "Dodge" in large letters, and a large marble slab in the sidewalk in front of the store, containing simply the words "Dodge, Stationer." They have also stamped the envelopes sold by them with the words "Dodge's, 209 Post St., S. F.," and have done other things calculated to convey the impression that their establishment and that of plaintiff are identical. There is not now, and has not been since September 17, 1900, any person by the name of Dodge connected in any way with plaintiff corporation.

The court also found that J. S. Dodge and his fellow incorporators caused the name "J. S. Dodge Company" to be adopted as the name of defendant corporation, with the intent and for the purpose of defrauding the plaintiff, appropriating to their own benefit the good will of plaintiff's business, and deluding and deceiving the customers of plaintiff and the public into the belief that the business theretofore conducted by plaintiff was being conducted by defendants; that the store at 209 Post street was hired by the defendants, and the announcement by sign was made by them that Dodge would occupy the premises, for the same purpose and with the same intent; and that, "if said defendants are permitted to continue to carry on said business at the place aforesaid, with the sign aforesaid, and under said corporate name, the customers of plaintiff and the public generally will be deceived and misled into believing that the store where the defendants are so conducting business is the store of plaintiff," to the great damage of plaintiff.

The court further found that J. S. Dodge had been engaged in the stationery, etc., business in San Francisco for more than 25 years, either individually, in partnership, or as stockholder in corporations; that in all firms or corporations with which he has been connected the name "Dodge" has been used by him in the title of the firm or corporation; that he has during said time built up a large trade by his personal endeavor, "and has used said name 'Dodge' or 'Dodge's' for the purpose of notifying the public * * * and his patrons generally of the fact that he was connected with said partnership or corporation, and giving his personal attention and supervision to the business by them carried on." There was no finding that there was any fraudulent intent on the part of the defendants in so far as the use of the signs "Dodge" and "Dodge, Stationer," on and about the store at 209 Post street, after the commencement of business therein, was concerned, and the complaint contained no allegation as to any fraudulent intent in this respect.

The trial court, by its decree, enjoined defendants and each of them from maintaining in connection with their business at 209 Post street, or at any other place where they may conduct a similar business, the signs now maintained, or any sign containing the name "Dodge" or "Dodge's," with or without initials or other words or devices, unless accompanied by an express and conspicuous statement that the business carried on under such sign is not the business heretofore carried on by plaintiff, and is not the business heretofore carried on under the name of "Dodge's," and is not the business heretofore carried on at No. 112 Post street and No. 123 Grant avenue; from in any way carrying on such business under such names, or any designation containing such names, without such accompanying statement; from using such names, or any description in any way containing such names, in the conduct of such business, without such an accompanying statement; and also enjoined defendant corporation from using its corporate name, "J. S. Dodge Co.," as its corporate name, and from doing any business under said name, or any name in colorable imitation of the corporate name of plaintiff.

We cannot say that the findings of the court as to the intent with which the defendant Dodge used his name in the title of the firms and corporations with which he had been connected are necessarily inconsistent. An intent to show his connection with the defendant corporation, J. S. Dodge Company, may have coexisted with an intent of himself and fellow incorporators therein to adopt a certain corporate name for the purpose of misleading and deceiving the customers and patrons of plaintiff in the manner alleged and found. Nor can we hold that the findings of the court are not in all respects either sustained by sufficient testimony or admitted by the pleadings. As is usually the case, the intent must be determined from the acts and the circumstances attending their commission, and here the acts and circumstances were such as to sustain the conclusions of the trial court as evidenced by the findings. Under the circumstances appearing, there can be no doubt as to the correctness of the conclusion of the trial court as to the effect upon plaintiff's business of allowing defendants to continue their business at 209 Post street, with the signs now there, and under said corporate name.

The question, then, is as to whether, upon these facts, plaintiff was entitled to any relief, and, if so, the extent thereof. This action is not based upon the theory that by the sale of his stock in plaintiff corporation there was any transfer by defendant Dodge of the good will of the business or of any good will. The vendor of stock in a corporation has no vendible interest in the good will of the business carried on by the corporation, and cannot transfer any part thereof. The good will of a business conducted by a corporation is the property of the corporation alone, and can be transferred only by it. It is not claimed, therefore, that Dodge, by the sale of his stock, contracted not to engage in the stationery business, for, had he so purported to do—which he did not—his contract would have been void under the provisions of sections 1673 and 1674, Civ. Code, there having been no transfer of the good will of the business. Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 57 Pac. 468, 46 L. R. A. 142, 71 Am. St. Rep. 94. Admittedly, defendant Dodge, having terminated his connection with plaintiff, had the right to engage, whenever and wherever he saw fit so to do, in the same character of business as that carried on by plaintiff. Nor is the action based upon the claim of any proprietary interest in the name "Dodge's" or "Dodge." The basis of plaintiff's action is that defendants are attempting by fraudulent representations to the effect that plaintiff's business is defendants' business to appropriate the benefit of the good will of plaintiff's established business. The rule upon which a judgment in favor of plaintiff must rest was well stated in Weinstock, etc., v. Marks, 109 Cal. 529, 539, 42 Pac. 142, 145, 30 L. R. A. 182, 50 Am. St. Rep. 57, where this court, speaking through Mr. Justice Garoutte, said: "The fundamental principle underlying this entire branch of the law is that no man has the right to sell his goods as the goods of a rival trader. * * * We think the principle may be broadly stated that, when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed—a fraud which a court of equity will not allow to thrive." This doctrine has been repeatedly stated in different forms by the courts, and is universally recognized, and we do not understand it to be disputed here. As pointed out in Shaver v. Heller, 108 Fed. 821, 48 C. C. A. 48, there is a distinction between a suit for the infringement of a trademark and an action to restrain unfair competition in trade. In the latter case—to which this action belongs—no proprietary interest in the words or device imitated is requisite. It is sufficient that the plaintiff is entitled to the good will of a business, and that this good will is injured, or is about to be injured, by the palming off of the business or goods of another as his. In passing, it may be said, in response to a contention of defendants, that it appears clear to us that a trading corporation may, equally with a private person, have a well-founded expectation of continued public patronage, and this constitutes the good will of its business (Civ. Code, § 992), which may be protected by a court of equity against acts of the character complained of (Weinstock, etc., a Corporation, v. Marks, supra).

Coming to the application of the principle under discussion, it is obvious that there is a very material distinction between the rights of the defendant Dodge and the defendant corporation, the J. S. Dodge Company. Dodge himself, being entitled to engage in the stationery business, had the unquestionable right to engage in that business in his own name, so long as he did not resort to any artifice or contrivance for the purpose of producing the impression that the place of business conducted by him and that conducted by plaintiff were identical. It does not follow, however, that he could confer the right to use his name upon a corporation for the purpose of enabling that corporation to engage in a business which had been conducted by another corporation under a similar name, and it is well settled that he could not so do. This must be especially true where he himself caused the use of his name by the prior corporation. The distinction has been made in several cases. As has been said by the courts, a person comes naturally by his name from his parents, and it is a thing personal to himself, which in truth and in justice he has the right to use, provided he does not resort to artifices calculated to produce deception or confusion in the public mind between him and some other person, to the injury of the latter; while the name given to a corporation is an artificial and impersonal thing, selected arbitrarily by the corporators themselves, and which can be selected from an entire vocabulary of names. "To say that one has the right to select his own name as the designation of a corporation is but another way of stating that he has a right to select any title from among the whole range of names; but it is not equivalent to a statement that he can give his own name to a corporation with a view to making it similar to that employed by other persons in the same business, to their or the public's injury." De Long v. De Long Hook & Eye Co. (Sup.) 32 N. Y. Supp. 203, 89 Hun, 399, 35 N. Y. Supp. 509. See, also, Rogers, etc., v. Rogers, etc. (C. C.) 11 Fed. 495, 499. The defendant corporation is a distinct person in law from J. S. Dodge, and its legal rights in the matter of the selection and use of a corporate name are precisely the same as if J. S. Dodge had never been connected with it. Whoever its incorporators might be, they had no right to fraudulently adopt a name similar to plaintiff's name for the purpose of palming off the business to be conducted by the new corporation as plaintiff's business, and thus invade the rights of the prior corporation. If the name so adopted was so similar to the name of the prior corporation as "to create confusion, and enable the later corporation to obtain, by reason of the similarity of names, the business of the prior one," injunction will lie to restrain the simulation so far as may be necessary to protect the rights of the prior corporation, even to the extent of prohibiting the use of the name at all; the courts interfering in such cases solely for the purpose of preventing fraud, actual or constructive. See Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; De Long v. De Long H. & E. Co., supra; Garrett v. T. H. Garrett & Co., 78 Fed. 472, 24 C. C. A. 173; Penberthy Injector Co. v. Lee, 120 Mich. 174, 78 N. W. 1074; Schmid v. De Grauw (Sup.) 59 N. Y. Supp. 569.

As to the similarity of the corporate names in this case, when the surrounding circumstances are taken into consideration, it is only necessary to refer to the opinion of the New York Court of Appeals in Chas. S. Higgins Co. v. Higgins Soap Co., supra. While the names are not identical, and, standing alone, without taking into consideration the business conducted by defendant corporation, and for which it was formed, are not, perhaps, so similar as to justify a court from interfering, when we take into consideration the fact that defendant corporation was organized for and is conducting a stationery business, the similarity is apparent at once. As in the Higgins Case, so here, as between these parties the case is precisely the same as if defendant's corporate name contained a designation of its business, and the word "stationery" had been placed therein, making it the "J. C. Dodge Stationery Company."

As to the rights of the courts to restrain such a company from using on its signs the term "Dodge's," a name under which plaintiff's business has become well and favorably known to the public, and under which plaintiff has built up a large and profitable business, or any term so similar thereto as to mislead the public into believing that the defendant's place of business is the same establishment that has been maintained by plaintiff under that name, there can be no question. The term "Dodge" is of this character. It is not defendant's corporate name, and defendant corporation had no right to conduct its business under that name in such a way as to convey the impression that it is the business conducted by plaintiff as "Dodge's." The fact that a man named Dodge is a stockholder therein or the manager thereof cannot, as we have already seen, affect this question. If the defendant corporation had desired simply to show that the J. S. Dodge, who had formerly been connected with plaintiff, had severed his connection therewith, and was now the manager of defendant, it could have done it in such a way as to invade no right of plaintiff.

It appears also to be immaterial, in this connection, whether or not such term "Dodge" was used on the signs with actual fraudulent intent. If the natural and necessary consequence of said defendant's conduct in this respect was such as to cause deception, said defendant, knowing the facts, must be held to the same responsibility as if it acted under the honest impression that no right of the plaintiff was invaded. Higgins, etc., Co. v. Higgins, etc., Co., supra.

As to the defendant J. S. Dodge the plaintiff was also entitled to an injunction. While it is undoubtedly true that he has the right to engage in business in his own name, the books are full of cases to the effect that one will not be allowed to resort to any artifice or contrivance in the use of his own name for the purpose of deceiving the public as to the identity of his business or products. The cases generally, including several of those cited by learned counsel for defendants, recognize this qualification of the right to use one's own name. In Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, the first case cited by defendants upon this point, it is declared by the United States Supreme Court that, though one may so use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or the articles produced by him. It is the manner of the use, rather than the use of the name itself, that is prohibited in such cases. In the case at bar the defendant Dodge adopted a method of indicating the new business carried on by him and the new corporation practically identical with that which he had previously caused the plaintiff to adopt, and under which its business had been built up, and was well and favorably known. That method was the placing on the signs the surname "Dodge" alone, indicating that the business theretofore carried on by plaintiff as "Dodge's" was being carried on at the new place. The natural and necessary consequence of using this name in this manner would be to mislead plaintiff's customers and divert plaintiff's trade, and Dodge must have known this. Each case of this character must depend upon its own circumstances, and we are of the opinion that the circumstances of this case are such as to justify a court in restraining defendant Dodge from the use of his own surname in such a manner as to cause the public to believe that a stationery business conducted by him is the same stationery business as that conducted by the plaintiff. The use of such surname in the manner indicated was entirely unnecessary to the exercise of the right of Dodge to do business in his own name, and was an artifice or contrivance which the law will not tolerate to another's detriment.

It is urged that plaintiff's complaint is devoid of equity, in that by the use of the word "Dodge's" it is attempting to trade upon the reputation of J. S. Dodge, who is no longer connected with it. Its use of the signs "Dodge's" without qualifying words, it is said, is a representation that J. S. Dodge is still connected therewith. The soundness of the principle invoked by defendants in support of their contention cannot be disputed. If the plaintiff had made any false representation in the respect stated, we would have a different case. There has certainly been no misrepresentation in the matter of plaintiff's corporate name, and we do not understand that any such is claimed. It bears the name "The Dodge Stationery Company," the name selected by the defendant J. S. Dodge for it. That name does not import any declaration that there is any Dodge now connected with it. Upon this point it is sufficient to refer to the opinion in the case of Holmes, etc., v. Holmes, etc., 37 Conn. 278, 9 Am. Rep. 324. As to the use of the word "Dodge's" by plaintiff, the business conducted by plaintiff corporation has become well and favorably known under that name. It may be that the skill and management of J. S. Dodge contributed in some degree to the favorable reputation of plaintiff, but it is immaterial what contributed thereto. The name "Dodge's," through J. S. Dodge's own acts, became so bound up with plaintiff's business as to indicate the business itself carried on by it, the Dodge Stationery Company, and the mere continuance of the use of that name after the retirement of Dodge indicated nothing more.

We have examined such rulings of the trial court in the matter of the admission of evidence as are complained of, and find nothing that could have prejudicially affected defendants' case.

The court below was justified in granting an injunction as against both defendants. We are, however, of the opinion that in some respects the injunction granted was, as is urged by defendants, too broad, and unnecessary to a proper protection of plaintiff's legal rights. Some cases have been cited by plaintiff in which the decree has absolutely enjoined the use of the name of the person or corporation, but an examination of these cases will develop the fact that in those cases, generally, such extreme relief was absolutely essential to prevent a continuance of the fraud and the ensuing damage. Each case must necessarily stand upon its own facts. The only object of a court of equity in such cases being to protect against the fraudulent representations, it will go no further than is necessary to accomplish that result. Any further step is an encroachment upon the legal rights of the defendant.

So far as the defendant corporation is concerned, the decree of the court is fully warranted, except in so far as it is enjoined from using its corporate name in any class of business different from that of plaintiff, or from using in such different class of business any other name in colorable imitation of plaintiff's corporate name. So long as the defendant corporation does not trench upon plaintiff's line of business, it should be at liberty to use its corporate name, or any other name, as it pleases.

As to the defendant Dodge, we do not see how it can be essential to the protection of the public or of the legal rights of plaintiff that he should be restrained from using his own name in the carrying on of the stationery business, if he chooses to engage therein, at some other place than No. 209 Post street, unless he so qualifies that name by explanatory statements as to make the use extremely burdensome. It may well be, as claimed by plaintiff, that as to the store at No. 209 Post street, such an impression has been created by the misleading signs and statements, which will continue unless removed by defendants themselves, as justifies the relief granted against Dodge as to that place. So far as the decree enjoins Dodge from doing any of the acts specified therein at No. 209 Post street, it was warranted by the case presented, and will not be disturbed. So far, too, as the decree prohibits him from causing any business similar to plaintiff's to be carried on in the city and county of San Francisco under the simple designation "Dodge" or "Dodge's," or with signs containing those words alone, without a qualifying statement to the effect that the business so carried on is not the business heretofore carried on by plaintiff under the name "Dodge's" at No. 112 Post street and No. 123 Grant avenue, and from in any manner representing that any such business carried on by him is the same business heretofore carried on by plaintiff, or from in any way designating such business simply "Dodge" or "Dodge's," it was warranted by the case presented. The decree should, in our opinion, so far as the defendant Dodge is personally concerned, go no further than this, and must be modified accordingly.

The cause is remanded to the superior court, with directions to modify the judgment in the respects indicated herein, and, when so modified, said judgment shall stand affirmed. Defendants shall not recover their costs on this appeal.

We concur: SHAW, J.; VAN DYKE, J.

145 Cal. 315

TREANOR v. WILLIAMS. (S. F. 3,880.)*

(Supreme Court of California. Nov. 12, 1904.)

ELECTIONS—CONTESTS—STATEMENT—SUFFICIENCY — ILLEGAL BALLOTS — DISTINGUISHING MARKS — DEFENSES — NONCOMPLIANCE WITH PURITY LAW—APPEAL—QUESTIONS PRESENTED.

1. Where an appealing contestee in an election contest did not bring up any of the ballots the counting or rejection of which was complained of by him, the Supreme Court could not reverse the judgment on any point arising out of the rulings on particular ballots.

2. Under Code Civ. Proc. § 1117, providing that a statement of contest is sufficient if the grounds of contest are alleged so as to advise defendant of the particular cause for which the election is contested, a statement alleging various acts of misconduct by the election boards, by which votes were counted for contestee which should not have been counted for him, and votes which should have been counted for contestant were not so counted, and averring that contestant actually received the more and that contestee actually received the less legal votes, was sufficient to present the question as to which of the parties actually received the greater number of legal votes, and a further averment that a tabulated list attached thereto showed the votes actually cast for the contestee, did not preclude the contestant from claiming or the court from finding that the contestee received less than the number of legal votes stated in such list.

3. Ballots having crosses after "No Nomination" are properly rejected in an election contest, although there are a large number of such ballots.

4. The intent of a voter in making a distinguishing mark on his ballot cannot be shown other than by what appears upon the face of the ballot.

5. Whether or not a contestant has complied with the purity of election law is a matter irrelevant to an election contest.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Election contest by C. R. Williams against Thomas W. Treanor. From a judgment for the contestant, the contestee appeals. Affirmed.

J. H. Campbell, Dist. Atty., and S. F. Lieb, for appellant. Upton & Conkey, for respondent.

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*Rehearing denied December 12, 1904.

¶ 3. See Elections, vol. 18, Cent. Dig. § 167.

McFARLAND, J. This is a contest over the office of county recorder of the county of Santa Clara, arising out of an election for that office held in November, 1902. Upon the returns of the election boards the board of election canvassers declared that Thomas W. Treanor had received the highest number of votes for said office, and was elected, and a certificate of his election was issued and delivered to him. Thereupon C. R. Williams, who had been a candidate for said office at said election, duly instituted this contest. The court below found that Williams had received 4,004 legal votes, and Treanor only 4,001 legal votes, and rendered judgment for Williams. From this judgment Treanor appeals.

It appears from the record that the court examined all the votes that had been received at the election, and rejected a great many that had been counted by the election boards for the contestee, Treanor, and also rejected a large number of votes which had been so counted for contestant, Williams. It was stipulated that none of the ballots offered in evidence need be copied into a bill of exceptions or statement, but that all of the ballots objected to by either of the parties should be withdrawn from the clerk's office "by the party who should appeal to the Supreme Court from the judgment that might be rendered in the action to which he is a party, and be deposited with the clerk of the Supreme Court upon filing his transcript on appeal," and that they might be used on the hearing here as though they had been copied into the bill of exceptions. Under this stipulation appellant has deposited with the clerk of this court, and thus brought to our attention, only 28 of such ballots. But these ballots so brought here are of no materiality whatever, because they all contain votes for contestant which were rejected by the court. The record shows that "the court, upon objection of the contestee, rejected 251 of said ballots on the grounds [naming several specific objections]; said ballots having been counted for contestant by the boards of judges and election officers of the respective precincts." The record further shows that "the said contestee, Treanor, specially objected to each of the following ballots containing a vote for said contestant Williams, said ballots being a portion of the 251 ballots above mentioned"; and then follows a reference to each of the said 28 ballots deposited with the clerk of this court, and certain specific objections to each. We can see no purpose in this, unless it be that the contestee was fearful that the grounds on which the court rejected said ballots might turn out to be untenable, and he desired to add further grounds; but as 251 ballots, including the said 28 ballots, which had been counted for contestant by the election boards were actually rejected by the court, the contestee has nothing to complain of on this point. And as none of the other ballots—amounting to several thousands—are here, we have nothing before us to show whether or not the court committed any error in counting or rejecting any one of those ballots. The judgment must therefore be affirmed, unless appellant has some valid objection to its validity which goes to some point other than the ruling of the court on particular ballots; and we do not think there is any such valid objection.

The main objection is that the court found that contestee received only 4,001 legal votes, and that this finding is at variance and in conflict with an alleged averment in the complaint or "statement of contest" that contestee received 4,862 legal votes. But there is no specific averment that contestee received 4,862 legal votes. There is an averment that the election boards counted for the contestee, Treanor, "ballots which were not cast or voted for said contestee, but were cast and voted for this contestant, for said office"; and there is an averment that in a tabulated statement attached to the complaint designated as "Exhibit A," column G thereof, which foots up 4,862, shows the votes actually cast in said respective precincts for said Thomas W. Treanor; and appellant's contention is that this last averment as to column G precluded respondent from claiming, and the court from finding that appellant had less than 4,862 legal votes. But, taking the two averments above mentioned together, the phrase "actually cast" in the latter averment is apparently used in the same sense as in the former averment, where it clearly means that ballots containing the name of contestant were "counted and tallied or caused to be read" for contestee. And this would be a warrantable construction even if the rules applicable to ordinary civil actions applied here; while under the provisions of the Code relating to election contests a "statement of contest" is sufficient if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which said election is contested. Code Civ. Proc. § 1117. And see Abbott v. Hartley (Cal.) 77 Pac. 410. The statement in the case at bar alleges various acts of misconduct by the election boards by which votes were counted for contestee which should not have been counted for him, and votes which should have been counted for contestant which were not so counted, and then avers that contestant actually received 5,083 or more "legal votes," and that the contestee "actually received a less number of legal votes than the contestant at such election." These averments fully present the real question which the court was called upon to decide, namely, who of the two parties actually received the greater number of legal votes. The case was tried on this theory without objection, and the attention of the court was not in any way called to what is now claimed to be a variance; and it is quite clear that appellant was in no way prejudiced by the alleged variance, even if it could be held that there was such a variance.

It is contended that the court erred in rejecting ballots because they had crosses after "No Nomination"; but this point has been definitely settled against appellant's contention, and the fact that there were a large number of such ballots does not affect the rule (McMenomy v. Ruch [Cal.] 75 Pac. 661; Merkley v. Trainor [Cal.] 75 Pac. 656); and the intent of the voter in making the distinguishing mark "cannot be shown other than by what appears upon the face of the ballot" (Maddux v. Walthall, 141 Cal. 412, 74 Pac. 1026).

The objection to the opening of the ballot pouches was without merit. They came from the clerk's office in the same condition as when received there, and there was no circumstance whatever to raise the slightest suspicion of their integrity.

The objections to contestant's want of compliance with the purity of election law, and the fact that the court did not find on that subject, need not be considered. Whether or not a contestant had complied with that law is a matter irrelevant to an election contest. Maddux v. Walthall, supra.

As to the matter of voters who were illegally assisted we cannot say, upon the evidence in the record, that the court erred in holding that not more than four of them voted for contestant. There is not even a fair doubt of the correctness of the ruling of more than one, or at the utmost two, of the other votes, and a different ruling as to them would not change the result.

There is no other point make by appellant that is tenable or that calls for special notice.

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.

SHAW, J. I concur in the judgment on the ground that, the case having been tried and submitted to the court below on the theory that the pleadings did not contain a conclusive admission that the contestee, Trainor, received 4,862 legal votes, it is too late in this court to present a different construction of the pleadings, and claim here, for the first time, that the contestant is bound by the admission. King v. Davis, 34 Cal. 106; Lee v. Figg, 37 Cal. 336, 99 Am. Dec. 271; Hutchings v. Castle, 48 Cal. 156; Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386; Sukeforth v. Lord, 87 Cal. 403, 25 Pac. 497; Willey v. Crocker, etc., Bank, 141 Cal. 518, 75 Pac. 106. I do not agree with the construction put upon the pleadings in this respect in the principal opinion. I concur in all other points.

BEATTY, C. J. I dissent. The finding that Treanor received only 4,001 votes is in conflict with the fact clearly established by the pleadings that he received 4,862 votes. If the evidence established the fact as found, the pleadings might have been amended to conform to the proofs; but they were not amended, and must prevail. I cannot see any grounds for holding that the case was tried upon any theory as to the effect of the pleadings which precludes the contestee from raising this objection to the findings. No doubt it is technical, but the whole contest is based upon grounds equally technical.

145 Cal. 436

MERCED BANK et al. v. PRICE et al.

(S. F. 3,213.)

(Supreme Court of California. Nov. 23, 1904.)

TRIAL—DISMISSAL—LACHES.

1. A complaint in a suit to foreclose a mortgage was filed in 1898, and defendants answered in 1899. In June, 1900, the complaint was amended by stipulation. In July, 1901, defendants moved to dismiss for want of prosecution. In opposition to the motion, it was shown by affidavits that pending the suit negotiations for a settlement were entered into, and continued from time to time until October, 1900; that it was necessary to obtain the consent of a pledgee to a settlement; that in October, 1900, the pledgee became the absolute owner of the mortgage, and thereafter sought to procure a settlement; that defendants never asked that the action be tried. The answer of defendants did not deny the execution of the mortgage, nor aver payment, but alleged that the mortgage had been transferred. *Held*, that it was error to dismiss the cause for laches; defendants having shown no defense to the action.

In Bank. Appeal from Superior Court, Mariposa County; John M. Corcoran, Judge.

Action by the Merced Bank and another against James D. Price and others. From a judgment of dismissal entered on motion of defendants, plaintiffs appeal. Reversed.

J. W. Knox and F. H. Gould, for appellants. J. F. Peck and J. F. McSwain, for respondents.

VAN DYKE, J. This is an appeal from the judgment dismissing the action upon the application of the defendants. The ground upon which the dismissal was made, as stated in the notice of motion, and also in the order of the court granting the same, was that the plaintiff Merced Bank had neglected to prosecute the same with diligence, and that it had abandoned said cause. The action is upon a promissory note, and to foreclose a mortgage securing the same. The note was executed by defendants James D. Price, Jeff D. Price, Thomas Price, and George Price, in the sum of $6,500, and made payable to the Merced Bank or order; and the mortgage to secure the same was executed by the makers of the note, and, in addition thereto, Nettie L. Price and Mary Wilson, also part owners of the real estate covered by the mortgage. The complaint in the action was filed September 30, 1898, and summons thereon issued and returned within a year, and all the defendants answered September 25, 1899. June 8, 1900, by stipulation of all parties, the complaint was amended as to the description of the property embraced in the mortgage, and it was also stipulated that the answer of defendants to the original complaint might stand as an answer to the amended complaint. This stipulation was filed and an order made accordingly June 11, 1900. The notice of motion to dismiss for failure to prosecute was made, and filed July 26, 1901. Monday, August 12th, was noticed as the day set for hearing said motion; and in the meantime, on August 7th, a stipulation was prepared on the part of plaintiff's attorney, who was also the attorney of Sophie A. Ivett, who was then the owner and holder of the note and mortgage, to have said Ivett substituted in place of the original plaintiff, and to allow the action to proceed in her name, and that the said action might be tried on September 3d following, or as soon thereafter as counsel and the court could hear the same. Defendants' attorneys declined to sign this stipulation. The hearing of the motion to dismiss, however, was continued until October 1st. On the hearing J. W. Knox submitted his affidavit on behalf of the Merced Bank and Sophie A. Ivett. In his affidavit it is set forth that the note and mortgage were pledged by said bank to Sophie A. Ivett as collateral security for certain moneys due from said bank to her, which said pledge was in writing, but not recorded; that said note and mortgage remained so pledged until October 2, 1900, at which time, upon full settlement between said bank and said Sophie A. Ivett, and as part payment of the sum then due her from said bank, the bank sold, assigned, and transferred absolutely to her the said note and mortgage in suit; and that the same had then become the property of said Sophie A. Ivett. He further states in said affidavit that, after the answer of the defendants was filed, negotiations were entered into between the parties to the action for settlement of the same, which continued, off and on, until October 2, 1900, and that, by reason of the fact that the said note and mortgage sued on were pledged to said Sophie A. Ivett, it became necessary on the part of the original plaintiff to get her consent to a settlement of said suit for any less sum than the full amount due on said note and mortgage. It is further stated in said affidavit that the defendants never at any time asked that said action be set down for trial, or attempted to have said action set down for trial. The affidavit of said Sophie A. Ivett was also filed on said hearing. In this affidavit the affiant states that she has been anxious at all times since October 2, 1900, to have said suit compromised, settled, or tried, and disposed of, and has used every reasonable effort in her power to accomplish the same without sacrificing her rights in the matter, and is now anxious to have the said suit tried and disposed of at once, and hereby asks that an order be made by this court allowing said suit to continue in the name of the plaintiff for the use and benefit of said affiant, Sophie A. Ivett, she now being the owner and holder of the note and mortgage sued on in said action, or that said Sophie A. Ivett may be substituted as plaintiff in said action, and that prior to said October 2, 1900, she simply held said note and mortgage as a pledge.

The facts set forth in these affidavits with reference to the assignment of the note and mortgage by the Merced Bank by way of pledge, merely, in the first instance, and that the same were not assigned absolutely until a short time before the motion on the part of the defendants to dismiss the action, are not controverted on the part of the defendants. It is claimed, however, by defendants' counsel, that these facts merely raise an issue with the answer filed by defendants, and it is contended that such issue raised by the pleadings cannot be tried upon affidavits. The answer, however, entirely fails to raise any issue in reference to the merits of the action. It does not deny the execution of the note and mortgage, or aver payment thereof, or question the amount alleged to be due thereon, as set forth in the complaint. It merely denies that the amount claimed as attorney's fee is a reasonable sum to be allowed, but alleges, on the contrary, that $100 is a sufficient sum to be allowed as attorney's fee. It also avers that, before the action was brought, the plaintiff Merced Bank had assigned and delivered the note and mortgage to one S. A. Ivett, as administrator of the estate of J. L. Ivett, deceased, and alleges that certain probate proceedings in said estate resulted in vesting the absolute ownership of the note and mortgage in said S. A. Ivett. It further avers that prior to the filing of the complaint the note and mortgage had been indorsed, assigned, and transferred to the Bank of British Columbia, and that thereafter the same had been assigned and transferred to S. A. Ivett. None of the material allegations of the complaint having been controverted by the answer, for the purpose of the action they are deemed to be true, and the allegations in reference to the assignment are in the nature of new matter in avoidance of the action, and are deemed controverted by the opposite party. Code Civ. Proc. § 462. The burden of proving these matters in avoidance, therefore, was on the defendants. At the hearing of the motion to dismiss, there was an affirmative showing on the part of the plaintiff, which was not controverted, that the action was properly brought and continued up to that time, and that, upon the application of Sophie A. Ivett, who had become the absolute owner of the note and mortgage, a substitution of the party plaintiffs should have been granted, and the action allowed to proceed as requested.

The order dismissing the action was based solely upon the ground of failure to prosecute, and not for any of the causes enumerated in the Code. Nor could it well have been, as the service and return and appearance of the defendants, and other proceedings, were all within the time required by the Code. Conceding the power of the court in a proper case to dismiss a cause for laches, there was an abuse of discretion in the case at bar in exercising that power in favor of these defendants, who, as shown, had no defense whatever to the action upon the merits. Herman v. Pacific Mfg. Co., 131 Cal. 210, 63 Pac. 344.

The judgment appealed from is reversed, and the cause remanded, with directions to the court below to proceed in the case as herein suggested.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

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145 Cal. 468

WALL v. BOARD OF DIRECTORS OF DEAF, DUMB, AND BLIND ASYLUM et al. (S. F. 3,109.)

(Supreme Court of California. Nov. 26, 1904.)

ASYLUM—POWERS—REMOVAL OF PHYSICIAN—STATUTES—CONSTRUCTION—"TEACHER OR EMPLOYÉ"—EJUSDEM GENERIS—PRESUMPTIONS.

1. The by-laws of a state asylum can confer no greater power on the institution than the statute under which it is organized gives it.

2. In a proceeding to test the validity of an order of the board of directors of the State Deaf, Dumb, and Blind Asylum to declare the office of physician thereof vacant before the expiration of plaintiff's term, a finding that the by-laws of the institution had been repealed previous to plaintiff's election makes the fact that plaintiff's election did not take place on the day prescribed in the by-laws immaterial on the question of the legality of plaintiff's election.

3. Under Code Civ. Proc. § 1963, subd. 15, declaring it to be a disputable presumption that official duty has been regularly performed, the fact that an order of repeal of the by-laws of a state institution was not passed by unanimous vote does not interfere with the correctness of a finding that the repeal was regular, in the absence of evidence to the contrary.

4. Pol. Code, § 2255, provides that the board of directors of the State Deaf, Dumb, and Blind Asylum shall have power: "(2) To elect the principal teacher; (3) to elect a treasurer; * * * (4) to elect a physician for the asylum for the term of two years, who shall not be a member of the board of directors; (5) to remove at pleasure any teacher or employee; (6) to fix the compensation of teachers and employees." *Held*, that the board has no power, notwithstanding subdivision 5, to remove the physician before the end of the term for which he has been elected.

5. Under direct provisions of Pen. Code, § 772, an officer neglecting or refusing to perform his official duties may be deprived of his office; and hence a contention that unless the physician of the State Deaf, Dumb, and Blind Asylum is included in Pol. Code, § 2255, subd. 5, empowering the board of directors of the State Deaf, Dumb, and Blind Asylum to remove at pleasure any teacher or employé, there is no provision for his removal, is untenable.

Commissioners' Decision. Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by B. P. Wall against the board of directors of the Deaf, Dumb, and Blind Asylum of the State of California and others. From a judgment for plaintiff, defendants appeal. Affirmed.

A. A. Moore and E. Nusbaumer, for appellants. Whitworth & Shurtleff and Charles A. Shurtleff, for respondent.

SMITH, C. The plaintiff was elected by the defendant, June 2, 1899, to serve as physician of the institution for a term of two years from and after April 2, 1899, at a salary of $1,200 per year; but by an order of the board of date September 29, 1899, the office was declared vacant, and another physician appointed. This proceeding was commenced to test the validity of the latter order, which in the court below was adjudged to be void. The appeal is from the judgment. There is a bill of exceptions in the record, on which it is claimed that, in certain particulars to be adverted to, the evidence was insufficient to justify the findings. The points urged by the appellant are (1) that, under the by-laws of the board, it had the power to remove any officer or employé at will; (2) that it had the power to remove the plaintiff under the provisions of section 2255 of the Political Code, prescribing the powers and duties of the board; and (3) that the plaintiff was not legally elected. But of these, the first is manifestly untenable, for if, under the statute, the board had no power to remove the plaintiff, it could not confer such power on itself by its by-laws. And with regard to the third, it is equally clear that, on the evidence produced, the court was justified in finding that the plaintiff was legally elected. The record of his election is set out in defendant's answer, and if it be true that the election did not take place on the day prescribed by the by-laws, as is claimed by appellant, the fact would be immaterial, if the by-laws had been previously repealed; and that such is the case is expressly found by the court, and we think on sufficient evidence. It is, indeed, objected that the order of repeal was not passed by unanimous vote, which is true, and that it does not appear that the month's notice of intention to repeal, otherwise required by the by-laws, had been given. But the presumption is that the proceedings were regular (Code Civ. Proc. § 1963, subd. 15), and, in the absence of evidence to the contrary, the court was justified in so finding. Another objection urged is that the board had no power to elect the plaintiff retrospectively, for the period which had elapsed at the time of the election, which is perhaps true. But if this be so, the result would be merely that his term of two years would either commence at date of election, or would be proportionately shortened. Whether the one or the other need not now be determined.

It remains, therefore, to consider only "the powers of the board" under the statute, which, so far as material, are as follows: "(2) to elect the principal teacher; (3) to elect a treasurer, who shall not be a member of the board of directors; (4) to elect a physician for the asylum for the term of two years, who shall not be a member of the board of directors; (5) to remove, at pleasure, any teacher or employee; (6) to fix the compensation of teachers and employees." Pol. Code, § 2255. And by section 2268 it is provided that the "principal teacher is the chief executive officer of the asylum, with powers and duties as follows: * * * (2) With the consent of the board of directors, to fix the number of, and appoint and remove the assistant teachers and employees; (3) to prescribe and enforce the performance of the duties of the assistant teachers and employees," etc. Here the express provision is that the physician shall be elected "for the term of two years," which implies that he is not to be removed by the board or otherwise during the term prescribed; and this implication is strengthened by the failure to provide for a fixed term in the case of the "principal teacher" and "treasurer," who under section 16, art. 20, of the Constitution—if public officers, and otherwise, upon general principles—will hold only "during the pleasure of the board."

But this can be said only with the qualification that there be no other provision in the act indicating such intention; and such a provision, it is claimed by the appellant, is to be found in subdivision 5 of the section, empowering the board "to remove, at pleasure, any teacher or employee." But notwithstanding the generality of the term "employé," which includes officers (U. S. v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747, cited Patton v. Board of Health, 127 Cal. 394, 59 Pac. 702, 78 Am. St. Rep. 66), the claim is, we think, untenable. For, upon familiar principles, the coupling of the term "employé" with the antecedent term "teacher" indicates that the former is used in a restricted sense, as applying only to employés "of like kind" with "teachers," or, as otherwise expressed by the author, employés ejusdem generis (Broom's Max. 565–7, 570), by which is meant some kind or class of employés in which teachers are included; thus excluding classes of employés which do not include them. The terms used by the author, "kind" and "genus," refer to the familiar logical distinction between genus and species; and the principle may be technically expressed by saying that—to apply the maxim—the general class or genus of employés is to be regarded as divided into two species or kinds, the one excluding and the other including teachers, and that the term "employés" is to be construed as referring to the latter class only. Thus, for example, if we regard the genus employés as divided into the two species of officers and employés not officers, the rule would require that the expression "any teacher or employee" should be construed as excluding the former and applying only to the latter.

This is, in fact, assumed by both parties; and accordingly the question principally discussed in the briefs is whether the physician provided for in the act is or is not an officer, by which is meant a public officer, for that he is an officer cannot be doubted. This is an interesting question, and while, perhaps, not material to the principal question involved, is yet so connected with it as to require discussion. In considering it, it is to be observed, the election of principal teacher, treasurer, and physician is provided for, in identical terms, in three consecutive subdivisions; and from this, and the essential similarity of their employments, these must be regarded as constituting a class apart from other employés, and each as coming within the application of the maxim, "Noscitur a sociis." It will be proper, therefore, first to consider the question with reference to the class generally, and afterwards to refer to their differences. Pursuing this course, it is to be observed that all these officers are of a permanent nature; that they involve the performance of public functions; and that they are created, and the election of the officers provided for, by the sovereign Legislature. Such offices are therefore essentially distinguished from employments existing only in the discretion of the board, and involving the performance of duties more or less casual and temporary; and hence, under any definition of the term, their incumbents may well be regarded as public officers. Patton v. Board of Health, 127 Cal. 388, 59 Pac. 702, 78 Am. St. Rep. 66; People v. Harrington, 63 Cal. 257; People v. Wheeler, 136 Cal. 652, 69 Pac. 435. This is sufficiently manifest with regard to the principal teacher and treasurer; and, indeed, the former is expressly designated in the act as the "chief executive officer" of the asylum. Nor can the case of the physician be distinguished in any essential particular. He therefore comes clearly within the application of the maxim cited. But whether or not we call the officers named public officers, the same reasons which lead us to distinguish officers from employés, and consequently the same rule, equally applies to them. They must therefore be regarded, with reference to the question before us, if not as public officers, at least as quasi such. Having regard, therefore, to the intention of the act, it would seem unreasonable to suppose that such officers or quasi officers come within the purview of the provision in the fifth subdivision of the section. Or at least, if such a construction be admissible, or even if it be probable, it is not so clearly so as to warrant us in disregarding the express terms of the fourth subdivision of the section, or the intention of the Legislature thus clearly manifested that the term of the physician shall be for two years.

It is, indeed, urged by the appellant that, upon this restricted construction of the term "employé" in this and in the sixth subdivision of the section, there would be no provision in the act either for the removal or for the compensation of the officer in question. But as to his removal, that is provided for by the general law. Pen. Code, § 772. Otherwise there would be a defect in the law, which is but an additional reason for regarding him as such. As to compensation, assuming that the term "employés" is used in the sixth subdivision in the larger sense, so as to include the officers or quasi officers of the institution, yet it would not follow that it is to be so construed in other parts of the act. Such would be the common rule, but, where the occasion demands it, "the same words may have different constructions to effectuate the intention" of the act. Potter's Dwarris on Stat. 194–6. Nor, giving the term in question the restricted construction we have assigned to it, is it clear that the power to elect does not, in the absence of statutory provision, include the power to provide for the compensation of the elected officer (Civ. Code, § 3522; Broom's Max. 463); and, if it be otherwise, all that can be said is that there is a defect in the law. On the other hand, giving to the appellant's argument all the force that can be possibly given it, it is more than counteracted by the use of the same term in the second and third subdivisions of section 2268, Pol. Code, where the principal teacher is authorized "to appoint and remove the assistant teachers and employees," and to prescribe and enforce their duties; and where the term "employés" cannot be construed as applying to the permanent officers or quasi officers of the institution without making these provisions repugnant to other provisions of the act.

We advise that the judgment be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion the judgment is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

145 Cal. 454

GIBSON et al. v. ANDERSON. (S. F. 3,020.)

(Supreme Court of California. Nov. 25, 1904.)

REAL ACTIONS—COSTS.

1. Code Civ. Proc. § 1022, provides that costs are allowed of course to the plaintiff upon a judgment in his favor in an action for the recovery of real property, and in an action which involves the title or possession of real property; and section 1025 declares that, in an action other than those mentioned in section 1022, costs may be allowed, or not, in the discretion of the court. *Held*, that where plaintiffs, in an action between heirs to set aside certain conveyances of real estate by deceased to defendants, were successful, they were entitled to costs as of right.

Commissioners' Decision. Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Henry Gibson and others against Manetta Anderson. From that part of a judgment in favor of plaintiffs denying costs, they appeal. Reversed.

Will M. Beggs and W. C. Kennedy, for appellants. W. A. Bowden, for respondent.

CHIPMAN, C. Action to annul a deed to certain lands. Plaintiffs had judgment. They appeal from the part of the judgment which denied them their costs of suit.

Respondent's contention is that "in this class of cases the allowance of costs is a matter of discretion to be exercised by the trial court." Citing Code Civ. Proc. § 1025; Abram v. Stuart, 96 Cal. 235, 31 Pac. 44; Irvine v. Perry, 119 Cal. 352, 51 Pac. 544, 949; Bathgate v. Irvine, 126 Cal. 149, 58 Pac. 442, 77 Am. St. Rep. 158; Senior v. Anderson, 130 Cal. 290, 62 Pac. 563; and other cases. Appellants claim that the action involved the title or possession to real estate, and that plaintiffs were entitled to their costs as matter of right, under section 1022, Code Civ. Proc.

Plaintiffs and defendant are children of Sarah Gibson, now deceased, who in her lifetime, in April, 1896, conveyed certain real property situated in Los Gatos, Cal., and certain other real property situated in the city of Omaha, Neb., to defendant by two separate deeds of gift. It is alleged in the complaint and found by the court that at the time of these conveyances Mrs. Gibson was advanced in years, and that her mental and physical powers were somewhat impaired; that she was under the care and control of defendant, who had great influence over her; and that the conveyances of said real property were upon the understanding that their purpose was to prevent any of the children of Mrs. Gibson from procuring a conveyance from her of said lands, and that the defendant should hold the title to said property for the use of her mother, and that she should reconvey to her the title whenever requested so to do; and that defendant would support her mother during her natural life. It also appeared that Mrs. Gibson died testate in April, 1897, and the plaintiffs and defendant were her heirs at law and the devisees of her will, and that her will was admitted to probate April 30, 1897; that prior to her death, and not long after making said conveyances, she demanded of defendant that she reconvey said lands to her, but defendant refused to do so. The title to the property was alleged and found to be in defendant by virtue of said conveyances, but the conclusion of law from the findings was that "plaintiffs are entitled to judgment to the effect that the said deed of conveyance of the Los Gatos property be annulled and adjudged to be void, but without their costs of suit in this action expended." The conveyance of the Omaha property was not referred to in the judgment.

The foregoing is sufficient to illustrate the character of the action. Section 1022, Code Civ. Proc., provides that: "Costs are allowed, of course, to the plaintiff, upon a judgment in his favor in the following cases: (1) In an action for the recovery of real property. * * * (5) In an action which involves the title or possession of real property." In an action other than those mentioned in section 1022, costs may be allowed, or not, in the discretion of the court. Id. § 1025. The pleadings, findings, and judgment all go to show that the action involved the title to the land in question, and, although plaintiffs recovered as to part of the land only, they were entitled to their costs as matter of right. In the recent case of Sierra Water & M. Co. v. Wolff (Cal.) 77 Pac. 1038, which was an action to quiet title, it was held that the question of costs does not depend upon the form or nature of the action—whether legal or equitable—but depends rather upon the fact whether the case comes within the terms of the statute relating to costs, namely, section 1022, supra. It was also held that because plaintiffs in that action recovered judgment for part only of the land in controversy did not change the fact that they had judgment in their favor.

Plaintiffs moved the court, under section 663, Code Civ. Proc., to amend the conclusions of law, and to vacate that part of the judgment disallowing their costs of suit, and to enter judgment for their costs. Such motion is authorized by the Code provision supra. Shafer v. Lacy, 121 Cal. 574, 54 Pac. 72.

It is advised that the case be remanded, with directions to set aside that part of the judgment relating to costs; to correct the conclusion of law, conforming to the foregoing opinion; and to amend the judgment by awarding costs to plaintiffs; and, as thus amended, the judgment to stand affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the case is remanded, with directions to set aside that part of the judgment relating to costs; to correct the conclusions of law, conforming to the foregoing opinion; and to amend the judgment by awarding costs to plaintiffs; and, as thus amended, the judgment will stand affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

145 Cal. 457

HOLMES v. WARREN. (S. F. 3,096.)

(Supreme Court of California. Nov. 26, 1904.)

APPEAL FROM ORDER DENYING NEW TRIAL—QUESTIONS REVIEWABLE—OVERRULING DEMURRER—INSUFFICIENCY OF FINDINGS—SUFFICIENCY OF COMPLAINT—PLEADING—PROOF OF NEGATIVE ALLEGATIONS—DEEDS—DEED AS MORTGAGE—EVIDENCE—COMPETENCY.

1. The overruling of a demurrer cannot be reviewed on appeal from an order denying a motion for a new trial.

2. The sufficiency of the complaint to support the judgment cannot be reviewed on appeal from an order denying a new trial.

3. The sufficiency of the findings to sustain the judgment cannot be reviewed on appeal from an order denying a new trial.

4. Where, in a suit to recover land, the complaint alleged that the premises were not agricultural land, and the answer denied it, the land being a little over an acre in a city and having a dwelling house on it, the burden of showing that it was agricultural land, within the meaning of the Code, was on defendant; Code Civ. Proc. § 1869, providing that every party must prove his own affirmative allegations, and that evidence need not be given in support of a negative allegation.

5. On appeal from an order denying a new trial, the only questions reviewable are those relating to alleged errors of law, and whether the findings are supported by the evidence.

6. On an issue as to whether a deed absolute in form was an absolute conveyance or a mortgage, it was proper to admit in evidence a receipt given by the grantor to the grantee for money, which stated that it was a final payment in purchase of land as per the deed in question.

7. On an issue as to whether a deed absolute in form was an absolute conveyance or a mortgage, it was proper to admit in evidence a contract between the parties whereby the grantee agreed to sell the land to the grantor for a certain price before a specified date.

8. On an issue as to whether a deed absolute in form was intended as an absolute conveyance or as a mortgage, the test is whether there was a subsisting debt after the conveyance.

¶ 8. See Mortgages, vol. 35, Cent. Dig. §§ 61, 63, 109.

Department 1. Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Suit by Henry T. Holmes against Joseph M. Warren. Judgment in favor of plaintiff, and defendant appeals from an order denying a new trial. Affirmed.

Welles Whitmore and Howard J. Peirsol, for appellant. Lincoln Sonntag, and R. E. Hewitt, for respondent.

VAN DYKE, J. This is an appeal by the defendant from an order denying his motion for a new trial, and comes up on a bill of exceptions used on the hearing of said motion. The action is for the recovery of a lot or tract of land on the east shore of Lake Merritt, in the city of Oakland. It is alleged in the complaint that the defendant entered into possession of the premises in question under a lease for the term of two years, and thereafter remained in possession, without the consent of the plaintiff, after the expiration of the two years' term, and refused to surrender possession of said premises after demand therefor duly made. It is averred in the answer that a deed executed by the defendant and wife of the premises in controversy, bearing date August 19, 1895, was not intended as an absolute conveyance, but was a mortgage, and that defendant did not enter into possession under the lease, but had been in possession as owner for years, and continued in possession after the execution of the deed, and up to the time of the commencement of the action, as the real owner. The court found that on the 19th day of August, 1895, the defendant, Joseph M. Warren, and his wife made, executed, acknowledged, and delivered to the plaintiff a deed of grant, bargain, and sale of the land and premises in question, for the consideration of $3,000, with the intent that the said instrument should be an absolute conveyance; that the same was not executed and delivered as security for the payment to the plaintiff of the sum of $3,000, or the performance of any other act or obligation, and that the same was not in fact a mortgage, and did convey the title and ownership of said real property to the plaintiff, and released the claim of ownership of the parties who executed said deed as aforesaid; that on the 20th day of August, 1895, the plaintiff executed and delivered to the defendant a lease in writing, whereby he leased to the defendant, and the defendant hired and leased from the plaintiff, the real property in question for the term of two years from the 19th day of August, 1895; that the defendant possessed and occupied the said premises under the said lease to the 19th day of August, 1897, and the term expired on that date; that upon the expiration of the term of said lease the defendant remained in possession and occupation of said real property without the consent of the plaintiff, and withheld the possession of said premises from the plaintiff, and excluded him therefrom; that on the 25th day of May, 1899, the plaintiff demanded the possession of said premises from the defendant, and he then and there refused to surrender them to the plaintiff.

The first point made by the appellant is that the demurrer to the second amended complaint was improperly overruled. The appeal being only from the order denying the motion for a new trial, and not from the judgment, this question cannot be considered. And whether the complaint is sufficient to support the judgment, or whether the court erred in overruling the demurrer to the complaint, can be considered only upon an appeal from the judgment. Neither of these matters is involved in the re-examination of an issue of fact after the trial and decision. An appeal from an order denying a new trial does not involve any consideration of the correctness of the judgment. The motion for a new trial is an issue of a distinct proceeding, and is to be heard upon an independent record, distinct from the record upon which the judgment depends. Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Taylor v. Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922; Hall v. Susskind, 120 Cal. 560, 53 Pac. 46; Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758; Byxbee v. Dewey, 128 Cal. 322, 60 Pac. 847.

The appellant also makes the point that a nonsuit should have been granted, and his counsel urges, as a reason therefor, insufficiency of the complaint to state a cause of action, saying, "There was not a sufficient complaint to which any evidence offered by the plaintiff could be applied;" and, further, "Even if the complaint was sufficient, the evidence adduced failed to support it." As to the first branch under this point, that the complaint was insufficient, what has been said with reference to the demurrer will apply also to this. On the other branch of the point, that the evidence is insufficient, an inspection of the record satisfies us that the court was warranted in refusing the motion for a nonsuit.

Appellant also makes the point that the findings are insufficient to sustain the judgment; but, for the reasons already given in reference to the demurrer to the complaint, and upon the authorities cited under that head, the appellant is precluded from raising this question, there being no appeal from the judgment.

The complaint alleges that the premises in question are not agricultural land. The answer denies this. There was no evidence offered on this subject, and the findings are silent with reference thereto. It does "not devolve upon the plaintiff to prove his negative allegations." Code Civ. Proc. § 1869; Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426. The tract of land or lot was only an acre and one-twelfth, and situate, as already stated, in the city of Oakland. It had a dwelling house and other improvements. Therefore it could not well be presumed to be a country farm or agricultural land, and the burden of showing that it was agricultural land, within the meaning of the Code, was upon the defendant, and no evidence was introduced upon that subject. Hence the decision is not against law.

On this appeal the only questions discussed by counsel that we are at liberty to consider are those relating to alleged errors of law, and also as to whether the findings are supported by the evidence. Schroeder v. Pissis, supra; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Riverside Water Co. v. Gage, 108 Cal. 240, 41 Pac. 299. The alleged errors in law occurring at the trial, as urged by appellant's counsel, consist in the admission in evidence of certain documents to which objection was made and exception taken. These are as follows: As a part of the evidence in behalf of the plaintiff in reference to the transaction resulting in the conveyance to the plaintiff of the property in question, a receipt from the Union Savings Bank of Oakland to the plaintiff for $2,118.25 was offered in evidence, and objected to on the ground that it was immaterial, irrelevant, and incompetent, which objection was overruled by the court, and the receipt was read in evidence. The plaintiff continued, testifying: "That represents $2,118.25. It has been in my possession ever since the 19th of August, 1895. I paid Mrs. Muller $318 on the note secured by the second mortgage on the property described in the complaint." (Receipt shown and offered in evidence, which was objected to on the same grounds as the preceding; objection overruled and exception taken, and read in evidence.) This receipt reads as follows: "August 20, 1895. Received of H. T. Holmes, Two Hundred and Ninety-one 25-100 Dollars, being final payment in purchase of land City of Oakland, Alameda Co., as per deed dated August 19, 1895 (Jos. M. Warren and wife to H. T. Holmes). 291.55. Joseph M. Warren." It is also contended that the court erred in admitting in evidence the agreement between the plaintiff and defendant for the sale and purchase of the land. By this agreement the plaintiff agreed to sell to the defendant, clear of incumbrances, the land in question, on or before the 20th day of August, 1897, for the sum of $3,000, with 8 per cent. on that amount to the date of sale. Appended to this agreement is the following: "And the said Joseph M. Warren and Lizzie F. Warren hereby agree that should we not have paid the amount heretofore stated to H. T. Holmes in purchase of said land on or before the 20th day of August, 1897, then and in that case this agreement shall lapse and become of no effect, and we shall have no claim whatever thereunder against said H. T. Holmes or against the said land." Signed and acknowledged by Jos. M. Warren and Lizzie F. Warren. These several instruments objected to by defendant were introduced as a part of the evidence in support of the contention of the plaintiff that the instrument of August 19, 1895, executed by defendant and his wife to the plaintiff, was a conveyance in fee instead of a mortgage, and, as such, were properly admitted for that purpose.

Appellant contends that the evidence is insufficient to justify the decision. The facts and circumstances disclosed by the record, if true, are sufficient to support the findings, and even if there were a substantial conflict in the evidence, which we do not think is the case here, the findings and decision of the court below would be conclusive.

The case seemingly most relied upon by the appellant, as it appears to be cited in his brief several times, is that of De Carrion v. De Aguayo (decided by this court in June, 1901) 65 Pac. 618, but not carried into the California Reports. In that case the court found the deed, although purporting to be a conveyance in fee, to be a mortgage. It is said in the decision: "After the deed was made, defendants continued in possession of the premises as before. They never paid any rent or leased the premises. They continued to make small improvements as before. Nothing appears as to any agreement of sale having been made, or any price being named for the deed. * * * There was testimony on the part of the plaintiff tending to contradict some of the matters above set forth. But, in case of a substantial conflict in the evidence, the finding of the court below is conclusive here. Not only this, but we think the finding is supported by the great preponderance of the evidence. If Saturnino Carrion took the deed from defendants in June, 1892, as an absolute conveyance of the property, it is strange that nothing was said in the negotiations as to the price thereof. * * * If Carrion had in fact purchased the property, it would seem that in the ordinary course of business he would have entered into possession of it, or, if he allowed defendant to remain in possession, it would have been under a lease of some kind." Here, as already shown, the plaintiff paid $3,000 for the property, and thereafter gave the defendant a lease of the premises for a definite period, and also entered into an agreement to convey the land at a stipulated price within a certain period, making the case altogether different from the one relied upon by appellant.

In this case there is no pretense that Holmes, after the transaction in question, could have maintained an action against Warren to recover the $3,000 mentioned as the consideration of the deed in question, and the test in all this class of cases is, was there a subsisting debt after the conveyance? for, to be a mortgage, there must necessarily be a debt for which the conveyance is security. As said in Henley v. Hotaling, 41 Cal. 22, "If there is no debt, there is no mortgage." And in Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92, it is said: "A deed of conveyance absolute on its face is certainly some evidence that the transaction is what it purports to be, viz., a sale. To establish an equity superior to the deed, and authorize a determination that the deed was given as security for an existing debt, the testimony, if parol in character, should establish a clear case"—citing Hopper v. Jones, 29 Cal. 19, and Henley v. Hotaling, supra. In Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33, in the opinion, it is said: "Defendant's claim that the deed was in fact executed as a mortgage finds considerable support in the evidence, but there was evidence contrary thereto sufficient to sustain the finding. It must be borne in mind in this connection that, if a deed purports on its face to grant real property, the burden is on the party claiming it to be only a mortgage to establish that fact." Here that was not done.

The order appealed from is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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145 Cal. 410

BELL v. PLEASANT et al. (S. F. 2,940.)*

(Supreme Court of California. Nov. 19, 1904.)

DEEDS—RECORD—BONA FIDE PURCHASER—MORTGAGES—BURDEN OF PROOF—PLEADING—EVIDENCE—DECLARATIONS OF GRANTOR—TRANSCRIPT—COSTS.

1. Under Civ. Code, § 1214, providing that every conveyance, other than a lease for a term not exceeding one year, is void, as against a subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded, and section 1217, providing that an unrecorded instrument is valid as between the parties thereto and those who have notice thereof, where a subsequent purchaser of real estate, whose deed is recorded, claims title against a prior grantee under an unrecorded deed, the burden is upon the former to prove that he is a purchaser in good faith and for a valuable consideration.

2. In an action to recover real estate by one claiming under a prior unrecorded deed, as against defendants, claiming under a subsequent recorded deed, the fact that plaintiff alleged in his petition that defendants had notice of plaintiff's title at the time they took their conveyance, and that such allegation was traversed, did not shift the burden of proof on the issue of notice to plaintiff.

3. In an action to recover real estate between parties holding under different deeds from a common grantor, it was immaterial that, prior to their conveyance, legal title to the property had been vested in trustees to secure an outstanding debt, which had been renewed, the rights of all of the parties being subject to such lien.

4. Where, in an action to recover real estate between parties claiming under different deeds from a common source, plaintiff claimed that defendants' claim was, in legal effect, a mere mortgage to secure a debt, declarations made by the grantor of such deed at the time of the transaction and subsequent thereto were admissible on such issue.

5. Where, in an action to recover land, the court, before the transcript of the testimony was written up, ordered that the same should be prepared at the equal expense of both parties, the successful party, having paid one-half of such cost, was entitled to have the amount thereof allowed as a part of the costs in the case.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Teresa Bell against Mary E. Pleasant and others. From a judgment in favor of defendants, and from an order denying plaintiff's motion for a new trial, she appeals. Reversed.

T. J. Butts and T. Z. Blakeman, for appellant. Edmund Tauszky, Wallace A. Wise, and Black & Leaming, for respondents.

SHAW, J. This is an action by the plaintiff against the defendants to cancel a deed executed by the defendant Mary E. Pleasant to the defendant Solomons on February 4, 1897, and certain other deeds thereafter executed by the defendant Solomons and his successors, whereby the title acquired by Solomons was vested in the defendant Leo Block. The defendants appeared and answered, and, after trial, findings were made in favor of the defendants, and judgment was entered accordingly. The plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

The complaint, in substance, alleges that prior to September 27, 1891, the defendant Mary E. Pleasant held the legal title to the property as trustee for the use and benefit of the plaintiff; that on that day she executed a deed to the plaintiff, conveying to her the property in question, but that said deed had never been recorded; that afterwards, on February 4, 1897, with the intention to cheat and defraud the plaintiff, the said Mary E. Pleasant executed another deed, purporting to convey the same property to the defendant Solomons, which deed was duly recorded; and that subsequently, by mesne conveyances, the title acquired by Solomons under said deed became vested in the defendant Leo Block. It is further alleged that the defendant Solomons and each of his successors, including the defendant Leo Block, took their respective deeds with knowledge of the fact that the land was the property of plaintiff. The court found that Solomons and each of his grantees took their respective conveyances without any notice, knowledge, or information whatever as to the claim, right, title, or interest of the plaintiff. It is contended by the plaintiff that this finding is not supported by the evidence.

It is not seriously contended by the defendants that there is any affirmative evidence to the effect that they, or either of them, received their respective deeds without notice of the rights of the plaintiff, and upon an examination of the evidence we find nothing in support of such finding. The claim of the defendants is that the burden of proof to show notice of plaintiff's right on the part of Solomons and his successive grantees rests on the plaintiff, and that, in the absence of evidence on the subject, the court necessarily made the finding that they took without such notice. In this we think the defendants are mistaken, and the court erred. It has been repeatedly decided by this court that where one holding under an unrecorded deed brings an action involving the respective titles to the land against a subsequent grantee under a deed which is first recorded, the first grantee will prevail, unless the second grantee not only shows the making and recording of his deed, but also that he made his purchase and paid the price in good faith, and without knowledge of the rights of the previous grantee. The question depends on the effect of the rule embodied in sections 1214 and 1217 of the Civil Code, which are as follows:

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*Rehearing denied December 19, 1904.

"Sec. 1214. Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."

"Sec. 1217. An unrecorded instrument is valid as between the parties thereto and those who have notice thereof."

The first case on the subject is Long v. Dollarhide, 24 Cal. 218, which was decided before the enactment of the Code. It is there held that where a subsequent buyer, whose deed is recorded, claims title against a previous grantee under an unrecorded deed, the burden is upon the subsequent buyer to prove that he "is a purchaser in good faith and for a valuable consideration." The rule was laid down thus in Eversdon v. Mayhew, 65 Cal. 167, 3 Pac. 644: "To entitle a party to protection as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment." The same doctrine has been approved and followed by this court in the following cases: Landers v. Bolton, 26 Cal. 419; Isenhoot v. Chamberlain, 59 Cal. 639; Wilhoit v. Lyons, 98 Cal. 413, 33 Pac. 325; County Bank of San Luis Obispo v. Fox, 119 Cal. 64, 51 Pac. 11; Beattie v. Crewdson, 124 Cal. 579, 57 Pac. 463; Alcorn v. Buschke, 133 Cal. 658, 66 Pac. 15; Kenniff v. Caulfield, 140 Cal. 45, 73 Pac. 803; Cal. C. F. Ass'n v. Stelling, 141 Cal. 719, 75 Pac. 320. It also prevails in the United States courts. Boone v. Chiles, 35 U. S. (10 Pet.) 211, 9 L. Ed. 388. In view of these numerous decisions, it must be conceded that the rule contended for by the plaintiff is firmly established, notwithstanding one or two cases which seem to state the opposite rule. In Fair v. Stevenot, 29 Cal. 487, the opinion seems to be written upon the assumption that the burden in such cases was on the claimant under the prior unrecorded deed to show notice of his right to the second grantee, but there is nothing in the decision upon that exact point, and it cannot be taken as a statement of the doctrine. In Smith v. Yule, 31 Cal. 184, 89 Am. Dec. 167, it is said that notice, either actual or constructive, to the second grantee, must be clearly shown, before the claimant under an unrecorded deed can prevail against a subsequent grantee for a valuable consideration. The ground of this position, as stated, is that if a second grantee, knowing of the previous conveyance, should nevertheless purchase the property and attempt to assert title thereto, such conduct would constitute fraud on his part, and that the case comes under the rule that fraud is never presumed, but must always be proven. This is the only case which states the rule contrary to the numerous decisions above cited, and it must be considered as overruled. There is a line of cases which the defendants contend establish a contrary rule, but upon examination it will be seen that there is a clear distinction between them and the case at bar. Thus it has been invariably held that in a suit by a beneficiary to enforce a resulting or constructive trust against a grantee of the trustee, in cases where the trustee held under a deed purporting to convey the legal title, without terms indicating the trust, it was incumbent upon plaintiff not only to prove the facts establishing a trust, but also to prove that the grantee of the trustee took his conveyance with notice of the equities of the plaintiff. In Wyrick v. Weck, 68 Cal. 8, 8 Pac. 522, which was a case of this character, the court said: "It is said that the defense of a bona fide purchaser without notice is in the nature of new matter, the burden of proving which is upon the defendant. Ordinarily this is so." And the court proceeds to show that in that particular kind of cases the rule is different. The same proposition is stated and the distinction noted in Tillaux v. Tillaux, 115 Cal. 674, 47 Pac. 691, and in Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209. This principle is also applied in cases of suits by a purchaser under a judgment and execution sale against a grantee of the judgment debtor, where the plaintiff claims that the conveyance by the debtor to the grantee was fraudulent and void as against creditors. Casey v. Leggett, 125 Cal. 666, 58 Pac. 264. In such cases the burden is on the creditor to prove the fraudulent intent of the debtor in executing the deed. If thereupon the grantee proves that he paid a valuable consideration, the burden is then imposed on the creditor to prove notice of such fraudulent intent to the grantee at the time of his purchase, or before payment of the price. The underlying reason for this rule in these cases is that as the debtor or trustee, as the case may be, holds the legal title at the time of the conveyance, the legal effect of his deed is to convey that title to his grantee, and thus there is established a legal condition which inures to the benefit of the grantee, and cannot be changed in equity, except by proof of circumstances to show a superior equity in the party who disputes it. Equity follows the law, and, a legal condition or status being once established, the burden of proof of facts necessary in equity to change the status is upon him who asserts the equitable right. A similar proposition was involved in Garber v. Gianella, 98 Cal. 527, 33 Pac. 458, and the same rule was applied. In Wyrick v. Weck, supra, it is said: "If there were matters in pais tending to show notice of plaintiffs' rights at the time of such purchase, * * * it was necessary for the plaintiffs to make the proofs, for without such proof the title must remain where plaintiffs have alleged it to be—in defendants." And in Casey v. Leggett, supra, it was said concerning the deed by the debtor to his grantee: "The deed having been made for a valuable consideration and delivered to the grantee, the law presumes that the grantee rightfully acquired a title to the property." In the case at bar and other similar cases, however, the conditions are precisely the reverse, and the principle operates against the defendant. A subsequent deed by the grantor to another person does not of its own force convey any title, for the grantor, having previously parted with his title, has left in himself nothing to convey, and his deed alone can therefore convey nothing. It can only be effective, as against the first grantee, when supplemented by proof that it was first recorded, and that the grantee therein named purchased for value, and without notice of the prior deed, or of the rights of the first grantee. This, also, is an attempt to change a legal condition. The necessary facts cannot be presumed in favor of the second grantee, and hence the burden is on him to make the supplementary proof. The case of Hart v. Church, 126 Cal. 480, 58 Pac. 910, 77 Am. St. Rep. 195, is cited by the defendants in support of their contention on this point. In that case it was held that a purchaser of a negotiable instrument having shown that he bought it for a valuable consideration before maturity, the plaintiff, in an action against him to cancel the note on account of fraud in procuring its execution, must prove that the purchaser at the time he bought had notice of the fraud. The same proposition is decided in Jordan v. Grover, 99 Cal. 194, 33 Pac. 889; Eames v. Crosier, 101 Cal. 263, 35 Pac. 873; and Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024. These cases, however, manifestly rest upon the same ground as Casey v. Leggett, Wyrick v. Weck, and similar cases, above cited. The indorsement of a note carries the legal title to the note and vests it in the indorsee, and, if it is shown by him that he bought for a valuable consideration before maturity, his legal title cannot be divested, nor his right to recover defeated, without the proof which shows his purchase to have been fraudulent, namely, that he had notice of the lack of consideration or of the fraud, or other defense of the maker. They in fact apply the same principle as the many decisions above cited holding that, in a suit between a prior grantee under an unrecorded deed, and a second grantee whose deed is first recorded, the burden is upon the second grantee to prove that he purchased without notice of the other's rights, and for a valuable consideration. It follows that, in the absence of any evidence on the subject, the finding should have been in favor of plaintiff on this point.

Defendants claim that plaintiff must prove that defendants had notice, because it is one of the facts alleged in her complaint and denied in the answer. This, however, is not the test. The plaintiff was obliged to prove only those facts which were necessary to constitute her cause of action. If she has alleged some fact not necessary to her case, but which is, in effect, a traverse of some fact which might have been alleged in defense to her action, and the defendant denies such allegation, this does not change the burden of proof, nor require the plaintiff to introduce any evidence upon that subject until the defendant has produced evidence thereon which makes rebuttal evidence on her part necessary. She is not obliged thus to anticipate a possible defense.

The court found that at the time of the execution of the deed by Mary E. Pleasant to Solomons the plaintiff was the owner of the property. Hence the further finding that the deed to Solomons and his deed to his successors in interest were executed for a valuable consideration was not alone sufficient to defeat the title of the plaintiff and authorize a judgment for the defendants. It required the aid of the other finding that Solomons, or some one of the successive grantees under him, took without notice of plaintiff's rights. As this latter finding is not sustained by the evidence, it follows that a new trial should have been granted.

We do not consider as important the facts which are undisputed, that ever since the year 1883 the technical legal title to the premises has been vested in certain trustees to secure an outstanding debt of $15,000 to the savings and loan society, and that this trust has been kept in force by renewals from time to time. Since 1891 the plaintiff has been the owner of the property subject to the trust, and the rules we have been considering are as much applicable to her estate therein as they would be if the trust deed had not existed. None of the defendants claim any rights under the trust, but all rights of both plaintiff and defendants are alike subject thereto.

The plaintiff asserts that the court erred in admitting in evidence certain declarations of Mary E. Pleasant to the plaintiff at and subsequent to the execution of the deed from Pleasant to Solomons. The plaintiff's point is that, at the time the plaintiff was the owner of the property in controversy, Mary E. Pleasant occupied the position of a previous owner, and that the declarations of a previous owner affecting title to the property, made after such owner has parted with the title, and not in the presence of the grantee, are not admissible against a grantee. There can be no dispute concerning the correctness of this rule, but we do not think it is applicable in this particular instance. The defendants claimed title as innocent purchasers for a valuable consideration under a subsequent deed from the plaintiff's grantor. The plaintiff claimed that the deed from Mary E. Pleasant to Solomons, under which the defendants claimed, was in legal effect a mere mortgage to secure a debt, and hence that it did not convey any title whatever. The defendants were therefore required to meet both propositions: First, they had a right to show that Solomons or any of his successors was a purchaser for a valuable consideration, without notice of the plaintiff's rights; and, secondly, they had to meet the contention that the deed under which they claimed did not convey the legal title, but was in effect a mortgage. On the latter proposition it was competent to show the declarations made by Mary E. Pleasant at the time of the transaction and subsequent thereto with respect to that particular question. As we understand the record, these declarations were admitted solely for that purpose.

Plaintiff further alleges that the court erred in denying her motion to strike from the cost bill the item of $122.50 for one-half of the cost of transcribing the testimony. The item was properly allowed. Before the transcript was written up, the court made an order that it should be done; the expense to be borne equally by both sides. Upon the making of this order, the prevailing party, having paid one-half of the cost of writing up the testimony, was entitled to have it included in the cost bill, and allowed as part of the costs of the case. Barkly v. Copeland, 86 Cal. 493, 25 Pac. 3. If the judgment and order had been affirmed upon this appeal, this item of cost would remain as a part of the costs properly chargeable against the plaintiff. It is necessary, however, to reverse the order denying a motion for a new trial, and the effect is that this item of costs is again set at large, to be determined by the court upon a subsequent trial of the case.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

145 Cal. 464

In re MURPHY'S ESTATE. (S. F. 3,972.)

MURPHY v. O'CONNOR et al.*

(Supreme Court of California. Nov. 26, 1904.)

EXECUTORS AND ADMINISTRATORS — PARTIAL DISTRIBUTION—PETITION—RIGHTS OF EXECUTRIX—DEVISEES — DEFENSES — JUDGMENT — APPEAL—PERSONS INTERESTED.

1. Where, on an application by legatees for a partial distribution, the executrix raised an issue as to the sufficiency of the petition to show sufficient assets to pay the legacies without loss to creditors, both the power of the executrix to comply with an order directing such distribution and the petitioners' right to an immediate distribution were involved, on both of which questions the executrix was interested, personally and on behalf of creditors, and hence was entitled to appeal therefrom.

2. A petition by legatees for the partial distribution of an estate, in the exact language of Code Civ. Proc. § 1661, declaring "that said estate is but little indebted, and that the shares and legacies of petitioners may now be allowed to them without loss to creditors of the estate," was sufficient as against the executrix.

3. An executrix in her representative capacity is not entitled to object to the payment of legatees on the ground that they had forfeited their right to the legacies by an alleged violation of a provision in the will that, if any one therein named should contest the will, he or she should take nothing under it.

4. Where, on a petition for partial distribution to legatees, the other legatees and devisees did not appear at the hearing, or in any manner object to the order in favor of petitioners, but an appeal was taken by the executrix in her representative capacity only on the ground that the petition was insufficient in respect to its statements as to the condition and value of the estate and the amount of the debts, the order of distribution became final in so far as it allowed the legacies.

5. Where an executrix appeared and contested a petition by legatees for partial distribution in her capacity as executrix only, such appearance did not entitle her to claim rights in such proceeding which she possessed only as devisee, as to which she should be considered as having made default.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Application by Margaret M. O'Connor and another for a partial distribution of the estate of John Murphy, deceased. From an order in favor of petitioners, Anna J. Murphy, as executrix, appeals. Affirmed.

J. C. Bates, for appellant. William E. White and Edward C. Harrison, for respondents.

SHAW, J. This is an appeal by Anna J. Murphy, in her capacity as executrix of the estate of John Murphy, deceased, from an order of partial distribution directing her, as such executrix, to pay to each of the two respondents a legacy of $500 bequeathed to them, respectively, by the will of the deceased.

The respondents claim that, under the facts shown in the record, the only effect of the partial distribution is to reduce the residue of the estate to the extent of the legacies distributed; that it affects the interests of the residuary devisees only, and hence, they say, the executrix, as such, has no interest in the controversy, is not a "party aggrieved" by the order, and has no right of appeal therefrom. It may be conceded that this would be the case if the facts showed no other grounds of appeal than above stated. But the appellant presents for review an issue at law as to the sufficiency of the petition to show that there were sufficient assets to pay the legacies without loss to the creditors. In such a case both the power of the executrix to comply with the order and the right to an immediate distribution are involved, and upon these question the executrix is, both personally and on behalf of the creditors, interested, and has a clear right to appeal. In re Welch's Estate, 106 Cal. 429, 39 Pac. 805; Est. of Kelley, 63 Cal. 106; Est. of Mitchell, 121 Cal. 391, 53 Pac. 810.

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*Rehearing denied December 22, 1904.

This issue is presented by demurrer to the petition for partial distribution. The grounds of the demurrer are that the facts stated do not entitle the petitioner to the relief asked for, and that the petition was uncertain in that it failed to state the value or nature of the estate, or whether it was in money, chattels, or land, or the amount of incumbrances, if any. The only statement on the subject contained in the petition is as follows: "That said estate is but little indebted, and that the shares and legacies of your petitioners may now be allowed to them without loss to the creditors of the estate of said deceased." This is in the exact language of that part of section 1661, Code Civ. Proc., declaring what must be made to appear at the hearing before the order can be granted. Without determining whether or not this would be a sufficient statement of facts if the objection were made by an heir or by another legatee, we are satisfied that it is sufficient as against the executrix, who generally must have greater knowledge of the value and character of the property, the amount of money on hand, and the amount of the indebtedness than any other person. The Code does not attempt to prescribe the form or contents of the petition. It is clear that elaborate pleadings are not required or contemplated in the proceeding, and, so far as the executrix is concerned, they are not necessary. On the subject of pleadings in probate courts generally, the author of Woerner on Administration says: "Their procedure is generally summary, requiring no pleading in the technical sense, nor adherence to artificial rules in the statement of a cause of action or defense. An intelligible statement of an existing substantial right, which the court has jurisdiction to enforce, is a sufficient allegation of all matters necessary to sustain a judgment." 1 Woerner on Adm. page *339. The authorities on which this statement is founded are, for the most part, decisions of states having a less formal probate procedure than our own, and hence it is doubtful if the rule stated can be considered universally, or even generally, applicable to probate proceedings under our system. But even if a more rigid rule is applied, as may be inferred from the provisions of section 1713, Code Civ. Proc., we think a statement of the ultimate facts concerning the nature of the estate and the amount of the debts which, according to the Code, the court must find to exist before making the order, will afford sufficient information of the grounds on which the application will be made to enable the executrix, at least, to make any proper opposition or defense. If it accomplishes this, it serves the purposes for which pleadings are required. The demurrer of the executrix was properly overruled.

The appellant further claims that the petitioners had forfeited their right to the legacies because of an alleged violation of a provision in the will that, if any one named therein should contest the same, he or she should take nothing under it. This is a question in which, as executrix, the appellant has no interest, and which she cannot have decided on this appeal. It does not affect the executrix in her representative capacity. It concerns only the rights of the residuary devisees. In such cases the executrix "cannot litigate the claims of one set of legatees against the others at the expense of the estate" (Bates v. Ryberg, 40 Cal. 465); nor maintain an appeal (Est. of Wright, 49 Cal. 551; Est. of Marrey, 65 Cal. 287, 3 Pac. 896; Merrifield v. Longmire, 66 Cal. 180, 4 Pac. 1176; Jones v. Lamont, 118 Cal. 503, 50 Pac. 766, 62 Am. St. Rep. 251; Est. of Healy, 137 Cal. 474, 70 Pac. 455; McCabe v. Healy, 138 Cal. 90, 70 Pac. 1008). The distinction is thus stated in Re Welch's Estate, 106 Cal. 429, 39 Pac. 805: "It is a sound proposition that administrators, general or special, like receivers and other trustees or custodians of funds for designated purposes, are not ordinarily affected by orders in reference to their disposition, and therefore will not be heard on appeal from such orders. But this rule has its well-defined limitations. Wherever an order or decree involves a construction of the proper exercise of the duties of the officer, wherever it presents a question as to the right or power of the trustee to comply with it, wherever obedience to it might subject him to liability, the rule does not operate. Even where the order is one merely for the payment of funds, if any of these questions arise under it and personal liability may attach, the right of the officer to appeal is recognized and upheld." Moreover, a decision of the question on this appeal would be of no avail, even to the real parties interested. The legatees and devisees did not appear at the hearing, or in any manner object to the order, and as to them it has become final and conclusive so far as it allows the legacies of the petitioners. The only matter which can be the subject of further action in the court below, if the order should be reversed on this appeal, is that in which alone the executrix, in her representative capacity, is interested, namely, the sufficiency of the petition in respect to its statement of the condition and value of the estate, and the amount of the debts. Although the executrix is also a residuary devisee, yet, as she neither objected nor appeared as devisee, she is as fully concluded with respect to her rights as devisee as are the other devisees. Her appearance as executrix gives her no standing to claim rights which she possesses solely as devisee. As such devisee she must be considered as one who has suffered default.

No other questions are presented. The order is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

145 Cal. 431

CURTIN v. KOWALSKY. (S. F. 3,071.)*

(Supreme Court of California. Nov. 22, 1904.)

JUDGMENTS — ASSIGNMENT — VALIDITY — CONSIDERATION — NECESSITY OF FILING—EFFECT AS AGAINST BONA FIDE PURCHASERS—ACTION —PLEADING—EVIDENCE.

1. In an action by an assignee on a money judgment, where the complaint alleges the assignment, it is not necessary for it to further state that plaintiff was the owner of the judgment at the commencement of the action.

2. In an action on a judgment, evidence of a contract whereby the original judgment creditor transferred to plaintiff all judgments standing of record in his name, in connection with the admitted fact that the judgment sued on was entered prior to the date of the assignment in favor of the original judgment creditor, and the absence of evidence of any previous assignment or transfer, was sufficient to support a judgment for plaintiff.

3. Under Civ. Code, § 1044, providing that property of any kind, except a possibility not coupled with an interest, may be transferred, a judgment may be assigned.

4. Under Civ. Code, §§ 1039, 1040, 1083, 1084 defining a transfer, and providing that a consideration is not necessary to its validity, and that it vests in the transferee all the actual title which the transferror then has, to the thing transferred and its incidents, an assignment of a judgment vests in the assignee all the assignor's title, regardless of whether any consideration is paid for the assignment or not; and the assignor has nothing which he can subsequently assign, unless there be left in him some equitable interest by reason of a trust existing in his favor.

5. In an action on an assigned judgment the question whether any equitable interest was left in the assignor after the assignment could not be litigated under a denial of the fact of the assignment.

6. An assignee of the legal title to a judgment is, as to the judgment debtor, the real party in interest, and entitled to sue notwithstanding the existence of a trust between the assignee and the assignor.

7. It is not necessary for the assignee of a judgment to file an assignment or give notice of it to other persons who may be about to take a second assignment, and subsequent assignees, although bona fide purchasers for value, acquire no title as against the original assignee.

Department 1. Appeal from Superior Court, City and County of San Francisco J. H. Dougherty, Judge.

Action by D. A. Curtin against H. J. Kowalsky. From an order granting a new trial, plaintiff appeals. Reversed.

Vincent Neale, for appellant. T. J. Crowley, for respondent.

SHAW, J. The plaintiff appeals from an order granting defendant's motion for a new trial. The action is to recover the sum due upon a money judgment. The complaint alleges that on January 4, 1894, one Joseph E. Shain recovered judgment in the superior court of the city and county of San Francisco against the defendant for a sum of money stated; that the judgment was duly entered on January 4, 1895; that on August 15, 1895, said Shain assigned the judgment to plaintiff, and that it has not been paid, either in whole or in part. The action was begun on December 20, 1899, nearly five years after the entry of the judgment. The answer denies that Shain at the time alleged, or at all, assigned the judgment to the plaintiff. This was the only issue presented for trial. The complaint further avers that the plaintiff "is now the owner and holder" of the judgment, and this is denied by the answer. But it was not necessary for the complaint to state that the plaintiff was the owner or holder of the judgment. Such ownership and holding was the legal result of the assignment, and, that fact having been alleged, it follows as a matter of law that plaintiff thereby became the owner and holder thereof. This condition of ownership is presumed to continue, and it was not necessary to allege that plaintiff was the owner at the time the action was begun. Such an allegation, or its equivalent, is required in actions to recover the possession of specific property, but not in actions to recover on money demands. Pryce v. Jordan, 69 Cal. 571, 11 Pac. 185; Poorman v. Mills, 35 Cal. 121, 95 Am. Dec. 90; Wedderspoon v. Rogers, 32 Cal. 572; Hook v. White, 36 Cal. 302; Monroe v. Fohl, 72 Cal. 570, 14 Pac. 514; Clemens v. Luce, 101 Cal. 436, 35 Pac. 1032.

We think the court erred in granting the motion for a new trial. The plaintiff, upon due proof of its execution, introduced in evidence a contract of assignment bearing date August —, 1895, whereby the original judgment creditor, Joseph E. Shain, "sold, assigned, transferred, and set over" to the plaintiff all the right, title, and interest of Joseph E. Shain "in each and every judgment standing of record in his name." It being admitted by the pleadings that the judgment sued on was given and entered in favor of Joseph E. Shain as alleged, and there being no evidence of any previous assignment or transfer, it necessarily stood of record in his name in August, 1895. It therefore came within the description contained in the contract of assignment, and it follows that the title to the judgment was thereby assigned and transferred to the plaintiff. On the issue presented, this evidence was sufficient to support the finding and judgment.

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*Rehearing denied December 22, 1904.

¶ 3. See Judgment, vol. 30, Cent. Dig. § 1526.

The defendant introduced evidence to prove that after the assignment to the plaintiff Shain had, for a valuable consideration, executed another assignment, purporting to transfer the judgment to H. S. Shain, who had in turn assigned it to R. T. Harding, also for a valuable consideration; and that there was no consideration for the assignment of the judgment by Shain to plaintiff, other than an agreement that plaintiff was to hold and manage this and other judgments as trustee for Shain for certain purposes. The plaintiff did not admit that the assignment to him was not for a valuable consideration, and he introduced some evidence to the contrary. In considering the relevancy and materiality of this evidence it is to be observed that the defendant presented no issue except as to the fact of the assignment; that he did not plead in abatement that another action was pending against him by the other claimant, nor present a cross-complaint asking that the other claimant be required to interplead, nor even to ask that the other claimant be made a party; and he does not claim that he has paid any part of the judgment to any person. The rights of the second assignee are not involved and cannot be adjudged. The simple questions of law are presented whether or not a consideration is necessary to support an assignment, and whether or not such an assignment, if without a valuable consideration, can be revoked, or is annulled by a subsequent assignment to another. Prior to the adoption of the Codes it was held that, inasmuch as a judgment was not assignable at common law, the effect of such assignment was to transfer an equitable totle only, but that such title vested in the assignee all the beneficial interest in the judgment, and gave him the right to enforce it by process in the name of the judgment plaintiff. Wright v. Levy, 12 Cal. 262, 263. It was said to be property, however, which could be purchased, the same as any other species of property. Id. Under the Code there is no limitation upon the power to assign choses in action, including judgments, and it is clear from its provisions that such an assignment carries the legal title to the judgment, and that the transfer of the title does not depend upon the fact of there being a valuable consideration. It is provided that "property of any kind may be transferred, except as otherwise provided by this article" (Civ. Code, § 1044), and the only exception made in the article is that of a possibility not coupled with an interest. A judgment is therefore property which can be transferred. A transfer is declared to be "an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." Civ. Code, § 1039. It is further provided that "a voluntary transfer is an executed contract, subject to all the rules of law concerning contracts in general; except that a consideration is not necessary to its validity" (Civ. Code, § 1040), and that "a transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has" (Civ. Code, § 1083), and also all of its incidents (Civ. Code, § 1084). The effect of these rules, as applied to the facts of this case, is that the assignment vested in the plaintiff all of the title of Joseph E. Shain to the judgment. Nothing remained in him which could be the subject of a subsequent assignment, excepting such equitable interest, if any, as he might have by reason of any trust that may have existed in his favor. The subsequent assignment would carry such equitable interest, if there was any, otherwise it would be ineffectual. But the question whether or not there was any such equitable interest or trust could not be litigated in this action under the denial of the fact of assignment, if, indeed, it could be litigated at all in the name of the defendant. The plaintiff had the legal right to sue for the amount due upon the judgment, although he held the title as trustee. He held the legal title, and was the real party in interest so far as the defendant was concerned. It was not necessary for the plaintiff to put his assignment on file, or to give notice of it to other persons who might be about to take a second assignment. The other claimant, although a bona fide purchaser for value, did not acquire a title superior to that of the plaintiff. With respect to judgments this court has said: "The rule of caveat emptor—so far as any interest acquired as against third parties is concerned—applies to them in the same manner as in the purchase of any other personal property. If the assignor has no title, they will take none, whether they have notice or not." Mitchell v. Hockett, 25 Cal. 544, 85 Am. Dec. 151. See, also, Southard v. McBrown, 63 Cal. 545; Fore v. Manlove, 18 Cal. 437. The title having passed from Shain to the plaintiff by the assignment, it being an executed contract, there could be no revocation or retransfer effected by the act of Shain alone. His subsequent purported transfer of the same judgment did not affect the title of the plaintiff. It follows that all the testimony relative to the want of consideration and the subsequent transfer was irrelevant and immaterial.

There were some errors assigned in the statement on motion for new trial upon rulings of the court adverse to the defendant with respect to this evidence. As we have reached the conclusion that this entire inquiry was immaterial and irrelevant to the issue as to the fact of the assignment, it will not be necessary to consider these alleged errors, for they could not, in any event, be sufficient to justify the granting of a new trial.

The only other error assigned was the action of the court in overruling an objection to the introduction of the assignment to the plaintiff. The ground of the objection was that it was immaterial and incompetent, that no foundation had been laid, and that no particular judgment was described. There was sufficient proof of its execution. It was manifestly material and competent, and the want of a specific description was supplied by the admitted facts which showed that it came within the terms of the general description. There was no error in the ruling on the objection. We find no ground upon which to support a motion for a new trial.

The order granting a new trial is reversed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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145 Cal. 407

In re CLISBY'S ESTATE. (S. F. 3,929.)*

(Supreme Court of California. Nov. 19, 1904.)

OLOGRAPHIC WILL—CONTEST—DATE—COMPLAINT—CONTINUOUS DOCUMENT.

1. An olographic will was merely a memorandum of testator's property, dated at the top, and followed by a clause disposing of the same. *Held*, that it was immaterial whether the date at the top was the date of the will, or the date on which testator was the owner of the specified property.

2. On the contest of an olographic will, containing merely a memorandum of testator's property, concluding with a clause giving the same to his wife, where the complaint alleges only that the concluding part of the will was written on a day subsequent to the memorandum, contestant cannot assume on the argument that the memorandum was made with "no thought of making a will, and that the intention of using it as a part of the will was an afterthought."

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Petition of Anne Clisby, contesting the will of Seth W. Clisby, deceased. From an adverse judgment, contestant appeals. Affirmed.

Van Ness & Redman, for appellant. Edwin L. Forster and Robert R. Moody, for respondent.

SMITH, C. This is an appeal from an order refusing to revoke the probate of a will. The appellant is Mrs. Anne Clisby, the mother of deceased, and contestant of the will; the respondents, Mrs. Ethel Clisby, widow of deceased, and sole beneficiary under the will, and Hulme, administrator with the will annexed. The will is olographic, and is in the words and figures following:

"Property of S. W. Clisby, October 1, 1902.

Deposit Union Trust Company.......	~~22755.29~~
" Cal. Safe Dep. Co............	~~32.50~~
	~~630.00~~
J. K. Meyers Acct. Truck & Team....	~~[illegible]~~
J. D. Gove, Note....................	~~[illegible]~~
Louis Volmer Acct. Buggy...........	~~40.00~~
C. H. Lehmers, Acct. I. O. U. tag....	~~50.00~~
Con Roman, Acct. I. O. U. tag......	~~50.00~~
L. A. Blasingame..................	~~44.15~~
James Lawrence Acct. Note (?)....	~~20.00~~
	$23,852.63
Merchants' Exchange	500.00
Buggy	300.00
Cash in Business.................	......

"At my death all the above property and any other property that may be found to belong to me is to go to my wife and to her alone, and I omit intentionally all other members of my family. S. W. Clisby."

The only facts alleged in the appellant's petition as grounds for revoking the probate are, in effect, that one of the numbers appearing in the document was altered, all of the numbers then erased, and the last paragraph written, on a day subsequent to the writing of the first part of the will; but all of this, it is alleged, was done by Clisby himself. A demurrer to the petition was interposed and sustained, without leave to amend, and thereupon the judgment or order appealed from was entered.

Upon the facts stated, which are confessed by the demurrer, it is claimed by the appellant (1) that, on the face of the document, it appears not to have been dated; and (2) that the concluding paragraph was written on a subsequent day.

In support of the former proposition it is urged "that the words and figures 'October 1, 1902,' were not intended by the testator to express the date of the instrument, but merely the date upon which he was the owner of the specified property." But this contention is untenable. There is, indeed, a certain ambiguity in the instrument. For, grammatically, the date used may be regarded either as the date of the memorandum, or as the date of the will. But the difference is immaterial. For, on the former construction, the memorandum being part of the will, its date would be the date of the will also. Nor do we doubt the right of the testator to adopt as the date of his will the date previously written by him. (See Estate of Fay, 28 Cal. Dec. 585.)

Nor is the case affected by the fact alleged that the concluding part of the will was not written on the day the will was commenced. It is a very common thing for men to commence a letter or other document on one day, and to finish it on the next or some subsequent day; and in such case the date, whether written at the beginning, as is usually the case, or at the end, as is sometimes done, is, according to the common and received usage of language, the proper date of the writing; and this is equally true of legal documents, though these do not take effect until completed and delivered. We do not doubt, therefore, that the case comes within the meaning and intention of the enactments concerning olographic wills (Civ. Code, §§ 1276, 1277; Code Civ. Proc. § 1309), which, it is provided, are to be construed according to "the approved usage of the language" (Civ. Code, § 13).

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*Rehearing denied December 19, 1904.

In the argument on this point it is assumed by the appellant's counsel that it appears from the allegations of the petition that the memorandum of property was written by the testator on the date given with "no thought of making a will," and, in effect, that the intention of using it as part of a will was an afterthought. But this, assuming it to be material, is not alleged. All that is alleged is simply that the writing of the concluding part of the will was on a day subsequent to its commencement. Nor is there anything in the petition to indicate that the document probated as a will was not, in intention, "one continuous instrument." Estate of Taylor, 126 Cal. 98, 99, 58 Pac. 454. Whether, were it otherwise, the fact would be material, is another question, which, as in the case cited, we leave undetermined.

Respondent's counsel are also in error in supposing that "it did not appear in the Skerrett Case, 67 Cal. 585, 8 Pac. 181, that the letter annexed to the deed was written at a date other than the date when the deed was made." The contrary appeared from the records before the court. The deed was dated "April 26, 1881," and was acknowledged April 27, and the letter, as appears from its recitals, was written subsequently.

We advise that the judgment appealed from be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: ANGELLOTTI, J.; SHAW, J.

I concur in the judgment: VAN DYKE, J.

145 Cal. 529

HARRIER v. BASSFORD et al. (Sac. 1,270.)

(Supreme Court of California. Dec. 3, 1904.)

EXECUTION — ISSUANCE — MOTION—NECESSITY OF NOTICE—DUE PROCESS OF LAW—LIMITATIONS—PRINCIPAL AND SURETY—DISCHARGE OF SURETY — HOMESTEAD — APPOINTMENT OF APPRAISERS—NOTICE.

1. As a foundation for a cause of action, a judgment does not become final until six months from the date of its entry, and is not barred until after five years from the date that it becomes final.

2. Code Civ. Proc. § 685, providing that a judgment may be enforced or carried into execution after the lapse of five years from the date of its entry by leave of the court, although it permits the issuance of the order for execution ex parte, and without notice to defendant, is not repugnant to the constitutional guaranty of due process of law.

3. Under Code Civ. Proc. § 685, providing that a judgment may be enforced after the lapse of five years from its entry by leave of court upon motion, the issuance of an order for execution is not invalid because made without notice of motion, in the absence of circumstances making the issuance of such order without notice an abuse of discretion, or making it imperative to vacate or reverse the order.

4. Under Civ. Code, § 1543, providing that a release of one joint debtor does not extinguish the obligations of any of the others, the release of a judgment debtor, who was in fact the principal in the obligation for which the judgment was rendered, does not release his joint debtor, who was only a surety, where by the face of the obligation both were ostensibly principals, and the creditor had no notice of the actual relationship existing between them.

5. Under Civ. Code, §§ 1248, 1249, authorizing the court to appoint homestead appraisers upon proof of service upon defendants of a copy of the petition and notice of the time and place of hearing, the court may appoint another appraiser in the event of a vacancy caused by the absence of one of the appraisers originally appointed, without any further notice, and either party may, in case the appointee is unfit, incompetent, or disqualified, move the court to vacate the appointment or set aside the report of the appraisers.

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by D. W. Harrier against H. A. Bassford, executor of the estate of J. M. Bassford, deceased, Ida C. Bassford, and another. From an order giving leave to issue an execution on a deficiency judgment, defendant Ida C. Bassford appeals. Affirmed.

Wm. M. Sims, Raleigh Barcar, and E. E. McFarland, for appellant. L. G. Harrier, Jno. M. Gregory, and T. T. C. Gregory, for respondent.

SHAW, J. The defendant Ida C. Bassford appeals from an order of the superior court giving leave to issue an execution on a deficiency judgment entered against her in the action; also from an order denying her motion to set aside the first-mentioned order, and the proceedings taken thereunder; also from an order approving the report of the appraisers appointed to appraise her homestead in proceedings, in accordance with the Civil Code, to sell the same on the execution, and from an order confirming the report of said appraisers setting apart such homestead.

On July 5, 1898, the plaintiff recovered a judgment of foreclosure against certain defendants, including the appellant, Ida C. Bassford. The judgment provided that, if the proceeds of the sale should not be sufficient to satisfy the judgment, a deficiency judgment should thereupon be entered against certain of the defendants, including the said Ida C. Bassford, for the amount remaining unpaid. Thereafter a sale was had, and, there being a balance of $3,280.06 unpaid, a deficiency judgment was entered, as provided in the judgment of foreclosure. On October 12, 1903, upon motion of the judgment plaintiff, and without notice to any of the defendants, the court ordered that an execution issue upon the deficiency judgment for the amount due thereon, less the sum of $400 previously paid. Thereafter an execution was issued in pursuance of the order, and the orders appealed from thereupon followed.

The order directing the execution to be issued was made under the provisions of section 685 of the Code of Civil Procedure, which reads as follows: "In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court upon motion, or by judgment for that purpose, founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act."

This section was enacted in its present form, so as to make it applicable to judgments for the recovery of money, on March 9, 1895. The proviso to the effect that it was not to be construed to revive a judgment for the recovery of money is inapplicable to this case, inasmuch as the judgment herein was rendered after the enactment of the section as amended, and therefore it could not have been barred by limitation at the time of the passage of the amended section. Moreover, at the time this execution was issued, the judgment in question was not barred by the statute of limitations. As a foundation for a cause of action it did not become final until six months from the date of its entry. In the case of Feeney v. Hinckley, 134 Cal. 470, 66 Pac. 580, 86 Am. St. Rep. 290, it was held that an action upon a judgment is not barred until five years have elapsed from the time at which it became final. Adding to the five years provided in the statute of limitations the six months in which an appeal may be taken, and which must elapse before the judgment becomes final, it will be seen that the judgment of foreclosure would not be barred by limitation until the period of five years and six months after its entry. This period had not expired at the time the execution in question was issued.

The principal contention of the appellant is that section 685, in so far as it may be construed to permit an order to be made for the issuance of an execution, upon motion without notice to the defendants, is unconstitutional. We think there is no merit in this contention. The Legislature has the undoubted power to provide that an execution may issue on a judgment at any time after its entry or rendition. It may make the period 5 years, 20 years, or any other definite time, or it may make the right to an execution unconditional for 5 years, and leave it optional with the court to make it upon motion for an indefinite period thereafter. The latter is the course which has been pursued by our Legislature. If this be within the legislative power, it must be equally competent for it to declare that such motion may be made without notice. If it could have fixed the time at 20 years in the first instance, or left it without limitation, it is certainly no greater exercise of power to make the right, after the first 5 years, dependent upon the permission or ex parte order of the court.

There is nothing in the terms of section 685, Code Civ. Proc., which expressly requires the service upon the defendant of a notice of the time and place of making the motion for leave to issue the execution. Ordinarily, process of any kind may be issued without any notice to the opposite party, and the general rule is that notice of application therefor need be given only where there is some statute expressly prescribing it. Such notice is not necessary to constitute that due process of law which is guarantied by the Constitution of the United States. The due process of law there guarantied is obtained by the service of summons on the defendants or their subsequent appearance in the action before judgment. Perhaps in some cases circumstances may appear which would make it an abuse of discretion to make such an order without notice, or which would make it imperative to vacate the order on motion, or reverse it on appeal. But no such conditions are shown. We cannot say that the order for the execution is invalid for want of previous notice of the motion.

It is claimed that the court abused its discretion in ordering the execution, and that the motion of the defendants to set aside the order should have been granted, upon the statement made in the affidavit filed by the appellants in support of the motion, to the effect that the appellant, Ida C. Bassford, was a surety on the original obligation, and that J. M. Bassford, Sr., was the principal therein, and that subsequent to the entry of the deficiency judgment the estate of J. M. Bassford, Sr., then deceased, was released from said deficiency judgment in consideration of the sum of $400. It is claimed that this operates to release the judgment as against the sureties also. The affidavit, however, does not show that the obligee had any notice whatever of the alleged fact that J. M. Bassford, Sr., was the principal, and Ida C. Bassford a surety, on the note upon which the judgment is founded. So far as appears, as to the obligee the note was a joint obligation, and the deficiency judgment must bear the same character. Under the provisions of section 1543 of the Civil Code, a release of one of two or more joint debtors does not extinguish the obligations of any of the others. Conceding, but not deciding, that in any case where a joint, or joint and several, obligation is reduced to judgment, and it is subsequently made to appear that one of the judgment debtors was only a surety as to the other in the original obligation, a release of the principal will discharge the obligation as to the surety, we are satisfied that the principle cannot be applied in cases where it is not shown that the obligee was aware of the relations between the debtors.

Objection is made to the confirmation of the report of the appraisers and to the subsequent proceedings, on the ground that, it having been shown that one of the appraisers first appointed was not present in the county, another appraiser was substituted in his place, without additional notice to the defendants. The court was authorized to appoint the appraisers, in the first instance, upon the proof made of service upon the defendants of a copy of the petition and notice of the time and place of hearing, as provided in sections 1248 and 1249 of the Civil Code. The absence of one of the appraisers from the county caused a vacancy in the board of appraisers. We think the court had authority to appoint another person without further notice. Either party would, of course, have the right to move the court to vacate such appointment, or set aside the report of appraisers, upon a reasonable showing that such appointee was unfit, incompetent, or disqualified. The appellant does not claim that he was in any respect an unfit or improper person, nor that he did not possess the qualifications required by the Code. Upon the showing made, therefore, we do not think the point has substantial merit.

We find no error apparent in the proceedings appealed from. The orders are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; McFARLAND, J.

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145 Cal. 514

MASON v. LIEVRE. (S. F. 2,894.)

(Supreme Court of California. Dec. 1, 1904.)

SALE — CORPORATION STOCK — OFFER AND ACCEPTANCE—DELIVERY OF CERTIFICATES—REVOCATION—LIABILITY FOR PURCHASE PRICE—STATUTE.

1. Under Civ. Code, § 1140, providing that the title to personal property sold or exchanged passes whenever the parties agree on a present transfer and the thing is identified, it is not essential to a valid sale of corporate stock that the stock certificates be delivered simultaneously with payment; and where there was an offer to buy without a specific requirement that the certificates should accompany the acceptance, and an acceptance was had with draft for the price, but unaccompanied by the certificates, the buyer could not defeat his liability for the price by a revocation of the sale prior to a tender of the certificates, which was made within a reasonable time.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by J. W. Mason against Isidore Lievre. From a judgment for plaintiff, defendant appeals. Affirmed.

M. S. Eisner and Reinstein & Eisner, for appellant. Oliver Ellsworth, for respondent.

CHIPMAN, C. Plaintiff sues to recover the sum of $1,040, the alleged purchase price of 500 shares of the Olaa Sugar Company stock, which he claims to have sold to defendant. The cause was tried by the court without a jury, and plaintiff had the judgment. The appeal is from the judgment and from the order denying defendant's motion for a new trial.

The alleged contract of sale is found in certain letters passing between plaintiff and defendant which, with some explanatory circumstances and facts, constitute the evidence in the case. Plaintiff resided at Hilo, Hawaiian Islands, and defendant resided at San Francisco. Both were merchants, and had had some previous dealings in sugar stock on an occasion when plaintiff was in San Francisco. Plaintiff testified that "the particular transaction involved in this suit was carried on altogether through correspondence." On May 19, 1899, plaintiff wrote defendant the following letter:

"Hilo, H. I., May 19, 1899.

"Mr. Isidore Lievre, 215 Market Street, San Francisco, Cal. My Dear Sir:—I have not yet had time to write you fully as I would like, and to-day being mail-day, you can readily understand my having so much to attend to after a long absence, and will not be able to write you about anything by this mail, except the Sugar Company.

"Before this stock was issued in Honolulu on last Monday, I saw it selling at $1.00 premium, which was 50 per cent. on the amount paid in. I was very sorry that I could not do better by you than I did, consequently feel disposed to assist you in any way that I can. On my arrival at Hilo, I found that the subscribers here had not paid up their assessments for the allotment at Hilo, and that it has been subscribed for three times over, but we are compelled to send the assessments down by this steamer at the latest, and already I find that some of the subscribers are not able to pay up for as much as they subscribed for, and we have no discretion but to have them pay up or cut off their subscription, so there will be some stock left unpaid for. In which event, although it is at a premium, under the circumstances as above described, I will be willing to let you have what I can of it under exactly the same conditions as I took it over, for I shall pay up the assessment of ten per cent. and the stamp duty myself to-day for whatever may be left over, and will allot you some of it if you write me you desire it. The only additional cost to you will be another four cents per share additional for the transfer. In other words you will pay ten per cent. on the par value, and eight cents per share stamp duty, which includes the stamp duty I paid and the one that will be on your stock. Let me hear from you by next mail, as I cannot hold it very long for you, as there are many people here now who want to subscribe, but who have not their names on the list, and they will be glad enough to pay even a premium on the stock.

"[Signed] J. W. Mason."

The par value of the stock was $20 per share. On May 31, 1899, defendant wrote plaintiff in reply as follows:

"San Francisco, May 31, '99.

"J. W. Mason, Esq., Hilo, H. I. Dear Sir:—Confirming my letter of even date, I am now in receipt of your favor of the 19th inst., and would state that I appreciate your kindness in the matter. I will take up to five hundred shares of the assessable stock on the basis mentioned by you, namely, payment of first assessment plus eight cents stamp duty per share. As to the amount of same, you can draw on me at one day's sight for the amount.

"Respectfully yours, Isidore Lievre."

Subsequently plaintiff received a letter from defendant dated June 13, 1899, reading as follows: "I confirm my previous letter concerning the amount of assessable stock I am willing to take, namely, five hundred shares (500.) I would like to ask you to kindly give me information as to what the Olaa Sugar Company is doing."

On June 21, 1899, plaintiff wrote defendant in reply to his letter of May 31 as follows:

"June 21, 1899.

"Mr. Isidore Lievre, 215 Market Street, San Francisco, Cal. Dear Sir:—I have your two favors of the 31st ult., which seem to have been delayed in some way, and note the enclosed copy of your letters to Messrs. Bishop & Co. and B. F. Dillingham.

"I note that you will take up to five hundred shares of assessable stock on the basis mentioned in my letter of the 19th of May, so I am making draft on you as per your request, through our agents, Messrs. Alexander & Baldwin, at one day's sight, for the sum of $1,040.00, which is the first assessment, and eight cents per share stamp duty. Write me how you want the stock issued, and I will have it sent to you by the company.

"[Signed] J. W. Mason."

No other letters were written by plaintiff in reply to the above letters of defendant. It takes about nine or ten days, as testified, for a letter to go from San Francisco to Hilo; delays of three or four days sometimes occur at Honolulu.

Plaintiff testified that immediately upon receiving defendant's letter of May 31st (which was about June 13th) he set aside 500 shares of the sugar company stock for defendant, and on June 21st drew on defendant for the amount mentioned in the correspondence. His agents, Alexander & Baldwin, through whom he drew, were at Honolulu. The draft was presented about July 5th, and payment refused, but for what reason was not stated at the time of refusal, so far as appears. Plaintiff testified: "I allotted and set aside that amount of stock to him. I had a certain amount of stock that I had subscribed for as Mason, trustee, for the benefit of my San Francisco friends, and Mr. Lievre was one of them, and others I can name, to whom I wrote just such letters. I heard from Mr. Lievre as to how many he would take, and I set aside that amount for him. I awaited a reply from him as to how I should have the stock made out. That is the only reason I did not have that (referring to the certificate of stock) sent to him, attached to the draft." Further explaining this omission to send the certificate with the draft, he testified that it was "because he did not tell me how it was to be allotted. In my previous transactions with him he had taken stock in their names" —presumably other persons. At the time plaintiff received defendant's letter of May 31st he held over 4,000 shares, some in his own name and others in his name as trustee. On July 3, 1899, defendant wrote plaintiff as follows: "I hereby revoke my offer to take five hundred shares of assessable stock. I have this day written to my agent at Honolulu, J. C. Cohen, full instructions as to same, and if you go to Honolulu you can interview him, and he will fully explain the matter to you, or if you do not go he will communicate with you direct as to the same."

After defendant had refused to accept the first draft he wrote plaintiff on July 8th, in which he stated that the stock was for a friend who would have taken it, notwithstanding it had fallen off in value, if it had been attached to the draft; "for," defendant wrote, "I would have been in a position to show him that the order for cancellation did not reach in time, and that in the meantime the stock had been delivered, and he would be bound to pay for same."

The court found on sufficient evidence that defendant's letter of July 3d "was mailed and received by plaintiff subsequent to the writing, mailing, and receipt of the aforesaid letters of May 19 and May 31, 1899 (plaintiff's letter and defendant's reply), and subsequently to the writing and mailing of the letter of June 21, 1899" (plaintiff's letter drawing on defendant). After receiving this July 3d letter plaintiff wrote his agents at their Honolulu office, July 20th, sending them 500 shares of the sugar company stock, with directions to have it reissued in the name of defendant, and this certificate bearing the date July 25th, accompanied by a second draft on defendant for the amount first drawn for, was sent forward to the San Francisco office of Alexander & Baldwin, and there is evidence that, upon its being received, the draft, with the certificate attached, was presented to defendant and acceptance refused.

Upon these facts, some of which are specifically found, the court, as conclusions of law, found that plaintiff's letter of May 19th was an offer to sell 500 shares of the stock in question, at the price stated therein; that defendant's letter of May 31st was an acceptance of the offer, and an agreement to buy this number of shares at said price; that by plaintiff's letter of June 21st he only notified defendant that he (plaintiff) had made a draft on defendant for the purchase price; "that the writing, mailing, and receipt of the said letters of May 19th, May 31st, and June 21st constituted a written executed contract of sale by plaintiff to defendant" of said shares for the sum named; and "that on the presentation of plaintiff's said draft on defendant, * * * and the refusal by defendant to accept the said draft, the said sum of $1,040 became thereupon due and owing by defendant to plaintiff"; and, as a further conclusion of law, that plaintiff is entitled to judgment against defendant for the sum named, with interest and costs of suit.

Defendant claims that plaintiff's letter of May 19th was not a sufficient offer to sell 500 or any other number of shares of stock, owing to its indefiniteness, and that the only definite offer in the entire transaction was defendant's letter of May 31st, which could be and was withdrawn before the plaintiff legally accepted it. By legal acceptance defendant means and insists that there must have been delivery of the shares at the time the first draft was presented for acceptance, and, as it is conceded that the shares were not then tendered, he had a right to refuse acceptance. Furthermore, that as defendant withdrew his offer, of which plaintiff had notice, before sending his second draft, accompanied by the shares, the transaction was at an end, and he rightly refused acceptance of the shares.

It may be conceded that the letter of May 19th alone lacks in some respects the element of distinctness and certainty essential to a complete offer to sell. But whatever of uncertainty there may be on the face of this letter as to the company referred to or as to the number of shares offered, its meaning was well understood by defendant, as shown by his letter of May 31st, in which he definitely offered to take 500 shares, and by plaintiff's letter of June 21st in reply. By these several letters the minds of the parties were brought into perfect agreement. It is noticeable, and defendant comments on the fact, that the name of the company is not mentioned in the May 19th letter. This is true of defendant's letter of May 31st, and also plaintiff's letter of June 21st; but defendant does not deny, nor can it be doubted, that both parties knew what stock was referred to, for in defendant's letter confirming his letter of May 31st he asks for "information as to what Olaa Sugar Company is doing."

It seems to us too obvious to call for discussion that when defendant made his offer to take 500 shares in response to plaintiff's letter, also authorizing plaintiff to draw on him for the money, and plaintiff thereupon advised defendant that he had drawn on him as requested by defendant, an executed written contract resulted from the correspondence. If the parties had been strangers to each other defendant might with greater reason claim that the stock should have accompanied the draft, and might also have assumed that the shares would come with the draft. On the other hand, as friends, between whom at least one similar deal had occurred, as well as some others, plaintiff might well have assumed that defendant did not expect the stock to be sent with the draft, especially as defendant did not request it to be so sent. There must have been some understanding outside the letters or defendant would not have known to what plaintiff referred in his letter of May 19th; and this would seem quite probable from the fact that plaintiff in writing defendant desired to know how he wanted the stock issued. Plaintiff had paid for the stock just what he was getting for it, although it was then worth a premium. There was no profit to him in the transaction, but it was rather a matter of accommodation to defendant. We do not think that plaintiff failed to send the stock because he intended to reserve, as defendant urges, the jus disponendi, or that the transaction had that effect. In our opinion, plaintiff's letter of June 21st was such a closing of the sale as to have given defendant a right of action for the stock. Indeed, as we understand defendant's position, he does not rely on his retraction of July 3d so much as on the fact that the stock should, in any event, have been tendered with the presentation of the draft. Undoubtedly this would be true if defendant had so directed, for it would then have been one of the express provisions of the contract. But he did not so direct, and the question arises whether it was necessary to a completed sale. Apart from the consideration that, in view of all the facts, plaintiff was not required to send the stock with his draft as might under some circumstances have been the case, we do not think delivery of the shares was essential to the completed sale. This was not the ordinary sale of goods for cash or "cash on delivery," in which payment of the purchase price and the delivery of the goods are conditions precedent to vesting title, nor does it come within the class of cases known as a "trade offer," and may readily be distinguished from Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080, cited by defendant. Such is the rule generally as to executory contracts, but there was here no condition that the price should be paid before delivery; on the contrary, plaintiff set aside the stock to defendant's use on receipt of his letter and drew on him precisely as directed. It was then too late for either party to retract; the sale was complete and the contract executed. The intention to sell and the intention to buy are both clear and unmistakable from the written expressions of the parties, and whatever significance might attach to the acts of payment and delivery would be in the nature of evidence, and not as of the essence of the contract. But if there remained some doubt on the question of intent from evidence conflicting in its nature, which we do not think there was, the finding of the court must stand. Even where there has been a manifestation of intention, Mr. Benjamin states the rule to be that "the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery." Benjamin on Sales (7th Ed.) § 311. Where the goods have not been specified, or if, when specified, something remains to be done to them by the vendor, either to put them into deliverable shape or to ascertain the price, the contract is executory. In this latter case it is presumed that the parties intended to make the transfer dependent upon the performance of the thing yet to be done, as a condition precedent. Id. But it is added that "of course these presumptions yield to proof of a contrary intent." Id. Here there was nothing remaining to be done by the vendor. He had shares in his own name and as trustee which could have been delivered. The thing remaining to be done was for the defendant to designate how he wanted the shares issued. The cases in which the contracts were held to be incomplete because something remained to be done by the seller before delivery could be made according to the contract "are those where that which remains to be done is something in order to the ascertainment of the price, or to the identification of the property sold, or where the contract is executory, as where the article sold has yet to be manufactured, such a contract being more strictly an agreement to sell than a contract of sale." Tyson v. Wells, 2 Cal. 122.

It was said in Hatch v. Oil Co., 100 U. S. 124, 25 L. Ed. 554: "Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of the sale, the presumption is, if the thing to be sold is specified and it is ready for the immediate delivery, that the contract is an actual sale, unless there is something in the subject-matter or attendant circumstances to indicate a different intention."

Mr. Cook states the law thus: "Generally a sale of stock is attended with an immediate delivery of the certificate therefor, or it is agreed that the certificate shall be delivered at some specified time in the future. If, however, the vendor offers to sell his stock and the vendee accepts the offer, the contract is complete, and binds both parties, although nothing has been said as to the time when the certificate of stock shall be delivered. The law implies that the contract will be performed by a delivery of the certificates immediately or within a reasonable time, and either party may insist upon carrying out the contract." Cook on Stock, etc., § 334.

The office of the sugar company was Honolulu, and had plaintiff sent defendant the shares with the draft it would have been necessary for defendant to return them to Honolulu for reissue in his name if he had desired them to so issue. The rule of our Code is that "the title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing is identified, whether it is separated from other things or not." Civ. Code, § 1140. If title passes in such a case, it cannot be that delivery of the thing, simultaneously with payment, is necessarily of the essence of the transfer. See the subject discussed somewhat in Lassing v. James, 107 Cal. 348, 40 Pac. 534.

It is contended that the findings are not responsive to the issues; that there is a failure to find on material issues; and that the ultimate facts pleaded in the complaint do not necessarily follow from the probative facts found. After what has been said as to the transaction and the liability under what is undisputedly the contract between the parties, we do not deem it necessary to examine at length the objections to the character of the findings or as to whether they conform to the issues. They are findings in part of probative facts and in part ultimate facts, and the conclusions of law are in part more findings of ultimate facts than conclusions of law. We may look to all these to determine whether they are supported by sufficient evidence and are sufficiently responsive to the issues made by the pleadings and support the judgment.

We have examined appellant's points on the objections raised, and his argument in support thereof and respondent's reply thereto, and we find no prejudicial error in respect of any of the objections made.

It is advised that the judgment and order be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

145 Cal. 526

KREDO v. PHELPS et al. (S. F. 2,899.)

(Supreme Court of California. Dec. 2, 1904.)

INJUNCTION—GROUNDS—THREATENED TRESPASS—JUDGMENT—CONFORMITY TO PLEADINGS.

1. An injunction will not issue primarily to prevent a threatened ouster of one in the possession of real estate, or to prevent a threatened destruction of his furniture. [1]

2. Where a complaint alleged that plaintiff was in the peaceful possession of premises, and that defendants threatened to oust plaintiff therefrom and to destroy and remove plaintiff's furniture, and prayed for an injunction, a finding that defendants locked the door leading to plaintiff's premises, and refused to permit him to enter them, and a judgment enjoining defendants from interfering with plaintiff's occupancy of the premises, and ordering plaintiff to pay defendants certain rent, which was not claimed by defendants in their pleadings, were outside of the issues made by the complaint, and could not be sustained.

Commissioner's Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by H. F. Kredo against O. B. Phelps and others. From a judgment for plaintiff, defendants appeal. Reversed.

D. E. Alexander and E. Myron Wolfe, for appellants. P. B. Nagle and Nagle & Nagle, for respondent.

COOPER, C. Appeal from judgment in favor of plaintiff. Appellants contend that the complaint does not state facts sufficient to constitute a cause of action, and that the findings are outside of the issues stated in the pleadings. Both contentions will have to be sustained.

The substance of the complaint is that at all times therein named the plaintiff "was in the quiet and peaceable enjoyment of a certain two rooms in a certain house known and designated as No. 937 Post street, in the city and county of San Francisco"; "that while plaintiff was in the possession of said rooms the said defendants wrongfully and unlawfully threatened, and do now threaten, to oust plaintiff therefrom"; "that plaintiff is informed and believes, and therefore alleges, that the said defendants threatened to prevent the said plaintiff from entering said premises by locking the doors of said house, and by barricading the same, so that it will be impossible for the said plaintiff to enter said rooms, and to unlawfully and wrongfully use force and violence against the said plaintiff if he shall attempt to enter said premises; and plaintiff further alleges upon his information and belief, that the said defendants threatened to cause his said furniture to be unlawfully and wrongfully destroyed and removed from said premises, and otherwise injure said plaintiff and his said property, in violation of said lease and the terms thereof; that plaintiff believes that said defendants will commit said acts hereinbefore set forth unless they are restrained by this court."

The complaint concludes with a prayer for an injunction restraining the threatened acts, and restraining the defendants "from interfering with the plaintiff in the quiet and peaceable enjoyment of said premises." It is evident that the object of the complaint is to enjoin the threatened ouster of plaintiff from his rooms, and the threatened destruction of his furniture. It is alleged that defendants threatened to oust plaintiff from the said rooms, and to cause his furniture to be destroyed and removed from the said premises. It is not even alleged that defendants will, unless restrained by the court, commit the threatened acts, but it is alleged that plaintiff believes "that defendants will commit said acts." If we regard the "two certain rooms" as being real estate, and sufficiently described, yet it is alleged that plaintiff is in the quiet and peaceable possession of them. Courts will not issue an injunction to prevent a threatened ouster of one in the possession of real estate when that is the main question before the court. If the party should be ousted, he would have his remedy at law, but the aid of a court of equity cannot be invoked to prevent a mere threatened ouster. If such were the rule, the time of the courts would be taken up in the investigation of imaginary wrongs and idle threats. And so of the threatened destruction of plaintiff's furniture. We know of no case in which the court has enjoined the threatened injury or removal of ordinary personal property simply upon allegation or proof of a mere threat to injure or remove it. There are cases of continued trespass, or of trespasses of such a nature that they will ripen into an easement, or of threatened destruction of property of peculiar value, and other cases where the facts show that the threatened injury will be irreparable, in which courts will grant injunctions, but not in a case of the threatened destruction of furniture. If an injunction could be granted in this case, there is no reason why it should not be granted in case of every threatened trespass either to person or property. We see no reason to depart from the old and well-established rule that an injunction will not lie to prevent a threatened trespass.

In the findings there is much immaterial matter as to the plaintiff's lease of the rooms, the tender of rent by him, and other matters; but it is found that defendants locked the front door leading to plaintiff's room, and, "with great force, refused to permit plaintiff to enter said premises." The court gave judgment that plaintiff is entitled to be restored to the possession of the said premises, and that defendants be "enjoined from in any way interfering with the said plaintiff in the occupancy of the said premises," and that "plaintiff should pay defendants $10 for the rent of said premises." The court thus, in effect, found that plaintiff had been ousted from the possession of the premises, and that he be restored to the possession; and this in face of the complaint, alleging that he was in the quiet and peaceable possession, and the absence of any demand in the complaint for possession. And the $10 rent is ordered to be paid by plaintiff to defendants in the absence of any cross-demand or claim as to any rent due. Courts have been very liberal in sustaining the findings of the trial court upon issues that were attempted to be made by the pleadings, and treated as so made during the trial, where they were of such a nature as to show some legitimate relation to the nature of the action as set forth in the pleadings. But they have not adopted a rule that would, in effect, do away with all pleadings. They have not held that a plaintiff could recover upon a different cause of action developed on the trial by the evidence, with no amendment of the pleadings. They have not held that a plaintiff could recover possession of real estate upon a complaint which alleged that he was in possession, and failed to allege any ouster. The rule is that the plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other which may be developed by the proofs. Schirmer v. Drexler, 134 Cal. 134, 66 Pac. 180, and cases cited therein.

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[1] 1. See Injunction, vol. 27, Cent. Dig. § 10.

The judgment should be reversed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

145 Cal. 477

HARLOW et ux. v. STANDARD IMP. CO.

(S. F. 3,104.)

(Supreme Court of California. Nov. 28, 1904.)

ACTION BY HUSBAND AND WIFE—JOINT OWNERSHIP—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

1. As a husband and wife may hold property as joint tenants, tenants in common, or as community property (Civ. Code, § 161), in an action by husband and wife for injuries to their house, evidence that plaintiffs had the house built for them, and that they occupied it, is sufficient evidence of their joint ownership to sustain the action.

2. Evidence that defendant's steam roller, used on the street in front of plaintiffs' residence, was run over their fence and lawn and against their house, is sufficient to sustain a finding by the jury that the injury was occasioned by the negligence of defendant.

Commissioners' Decision. Department 1. Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Lloyd C. Harlow and wife against the Standard Improvement Company. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

D. H. Whittemore, for appellant. W. H. O'Brien and Chapman & Cliff, for respondents.

HARRISON, C. The plaintiffs seek by this action to recover from the defendant damages sustained by them through its negligence. It is alleged in the complaint that on August 13, 1900, the defendant was engaged in doing certain street work on Kennedy street, in the city of Oakland, in front of the residence of the plaintiffs, making use therefor of a steam roller, and that while so engaged the roller, by reason of the negligence and carelessness of the persons managing the same, ran against the building of the plaintiffs and injured it, and the fences, sidewalk, shrubbery, and lawns surrounding it, to their damage in the sum of $2,000. The cause was tried by a jury, and a verdict rendered in favor of the plaintiffs for $1,000. From the judgment entered thereon, and from an order denying a new trial, the defendant has appealed.

At the close of the plaintiffs' case the defendant moved for a nonsuit upon the ground that they had failed to establish a joint ownership of the premises. The motion was denied, and this ruling is now assigned by the appellant as error. It is alleged in the complaint that at the time of the occurrence the plaintiffs were, and still are, husband and wife, and the owners of and possessed of the building and lot upon which it stood, and this allegation was denied in the answer. There was no evidence as to the record title of the property, or that it had ever been conveyed to the plaintiffs, or either of them; but there was testimony that the house was built by them, and that they had occupied it for about 10 years. The testimony of Mrs. Harlow that she and her husband had the house built was sufficient evidence of their joint ownership to justify the ruling of the court. Under section 161, Civ. Code, the husband and wife may hold property as joint tenants, tenants in common, or as community property; and, in the absence of any evidence of the source of the moneys with which the house was built, or of the manner in which the property was acquired, there is no presumption that it was community property, or the separate property of either spouse, rather than that it was held by them in joint tenancy or as tenants in common. See Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433. Under section 384, Code Civ. Proc., plaintiffs, as cotenants or tenants in common, are entitled to maintain the action.

The manner in which it appeared that the injury was caused sufficiently sustains the finding of the jury that it was through the negligence of the defendant. Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146. The case is one in which the maxim res ipsa loquitur is peculiarly applicable.

The offer on the part of the defendant to show that 48 hours after the injury it offered to put the building back in as good condition as it was before, or to defray the expense thereof, was properly refused. The only issues presented for trial by its answer were the plaintiffs' ownership of the property, the negligence of the defendant in causing the injury, and the amount of damage done to the property. The trial was chiefly occupied with the latter issue, upon which a large amount of testimony was given by each of the parties to the action, and the amount of the damage was determined by the verdict of the jury. The amount of the damage sustained by the property was the same, irrespective of the person by whom the repairs should be made; and there is no averment in the answer, nor did the defendant offer to show at the trial, nor does it now claim, that the repairs could have been made by it at any less cost than if made by the plaintiffs, or by whomsoever they might employ. The rule which obtains in an action for damages arising out of the breach of a contract, that it is the duty of the injured party, if within his power, to protect himself against any increase of damage that may accrue after the breach, has no application under the facts of the present case. Here the damage was complete at the time of the injury, and before the offer of defendant, and, in the absence of any showing to the contrary, the cost of the repairs would be the same whether made by the defendant or the plaintiffs. If for any reason the cost would have been less to the defendant, that was a matter for special defense, which should have been pleaded, as well as made known to the plaintiffs at the time of the offer. The jury were, moreover, instructed that, if it was shown that the plaintiffs could have prevented any part of the loss by prompt repairs, they were bound to do so.

The injury to the house was committed August 13th. Mrs. Harlow testified that they did not remove from the house until September 21st. The present action was commenced September 20th, and the court instructed the jury that the plaintiffs could only recover the actual damage suffered by them prior to the time that the action was commenced. This was, in effect, an instruction that they were not entitled to recover for any damage sustained by reason of being compelled to seek a new residence. Under these instructions, it is not to be assumed that the jury included in their verdict any damage sustained by reason of any delay in repairing the house.

It cannot be held that the verdict was excessive or unsustained by the evidence. It was shown that the cement walk had been broken up, the fence in front of the house demolished, the lawn and shrubbery destroyed, and the house itself struck by the roller with such force that it was displaced from its position upon its foundations, and permanently injured. Testimony was given by several experts that the amount of damage was greater than that awarded by the jury, and, although it was shown on the part of the defendant that a portion of this damage could be repaired for less than the amount of the verdict, the jury were at liberty to consider—what is apparent to any one—that the permanent injury to the building by displacing it from its foundations, breaking its chimneys, and destroying the plastering is a greater damage than the mere cost of patching it up so as to make it serviceable.

The judgment and order denying a new trial should be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

145 Cal. 523

JONES v. WALDEN. (S. F. 3,910.)*

(Supreme Court of California. Dec. 1, 1904.)

ACTION AGAINST ADMINISTRATOR—LIMITATION—STATUTE—CONSTRUCTION — DECEDENT'S ESTATE—REJECTION OF CLAIM IN PART—EFFECT.

1. The allowance of a claim against a decedent's estate for less than the full amount thereof is a rejection of the rest of the claim.

2. Under Code Civ. Proc. § 1498, providing that when a claim is rejected either by an executor or administrator or a judge of the superior court the holder must sue within three months from the rejection if it be then due, or within two months after it becomes due, the limitation begins to run from the date of rejection by an administrator.

Department 2. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Thomas G. Jones against J. B. Walden, administrator of the estate of James B. Chase, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Abe. Ruef and Fabius F. Finch, for appellant. Frisbie & White, for respondent.

McFARLAND, J. This is an action against the administrator of the estate of James B. Chase, deceased, to recover $12,180.75 alleged to have been owing from said Chase at the time of his death to plaintiff upon an open, mutual, and current account. Judgment went for defendant, and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The court below held that appellant's alleged cause of action was barred by section 1498 of the Code of Civil Procedure, and we do not see how this conclusion can be successfully assailed. That section is as follows: "When a claim is rejected either by the executor or administrator, or a judge of the superior court, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred." The facts which make this section applicable to the case at bar are these: Appellant's claim for the $12,180.75 having been presented to the administrator, the latter, on January 16, 1902, allowed the same for only $343.58, and on said day indorsed his allowance for that amount upon the claim. Afterwards, on February 20, 1902, the judge of the superior court indorsed on the claim a similar allowance for said sum of $343.58. This present action was commenced May 6, 1902, which was more than three months after the said indorsement of the claim by the administrator, but within three months after the said indorsement of the claim by the judge of the superior court.

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*Rehearing denied December 29, 1904.

The allowance of the claim by the administrator for $343.58 was clearly, in law, a rejection of all the rest of the claim. Consolidated Nat. Bank v. Hayes, 112 Cal. 75, 83, 44 Pac. 469. And as the rejection occurred on January 16, 1902, the three-months limitation prescribed by section 1498 commenced to run from that date. The contention that the action of the superior judge on February 20th was necessary to the completion of the rejection is not maintainable. The language of the section is that when a claim is rejected "either by the executor or administrator, or a judge of the superior court," suit must be commenced within three months after "the date of its rejection." When an administrator rejects a claim the rejection is complete and final, and cannot be changed or in any way affected by any future action of the judge. In such case there is no reason for presenting a claim to the judge at all, and it is only where a claim has been allowed by an administrator that there is a necessity of presenting it to the judge, for he may reject it notwithstanding its allowance by the administrator. But a claim may be conclusively rejected by either the administrator or the judge, and when there is a rejection by either the statute commences to run from the date of such rejection.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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145 Cal. 500

PEOPLE v. MEAD. (Cr. 1,157.)

(Supreme Court of California. Nov. 30, 1904.)

PROSTITUTION—CONNIVANCE OF PROSTITUTE'S HUSBAND—PROSECUTION—INDICTMENT—SUFFICIENCY—MOTION IN ARREST OF JUDGMENT—EVIDENCE—REMARKS OF COUNSEL—COMMENT ON DEFENDANT'S TESTIMONY.

1. St. 1891, p. 285, c. 206, makes it a felony for any man to connive at or permit the placing of his wife in a house of prostitution, or to allow the wife to remain there. Pen. Code, § 1185, declares that an objection to the sufficiency of an indictment which is waived by a failure to demur will not be sufficient to justify an order for arrest of judgment. Section 950, subd. 2, and section 959, subd. 6, provide that an indictment must contain the statement of the acts constituting the offense in ordinary language. By section 957 the words used in an indictment are to be construed in their usual acceptance in common language. By section 1012 an objection that an indictment is not certain as to the circumstances of the offense is waived by a failure to demur. Section 960 provides that no indictment is insufficient and that no judgment can be affected by reason of any defect in matter of form which does not prejudice a substantial right of the defendant, and by section 1258 the Supreme Court must give judgment without regard to technical errors or defects. *Held*, that a conviction under St. 1891, p. 285, c. 206, would not be reversed on appeal because the indictment did not charge that defendant, in permitting his wife to be placed in a house of prostitution, did so for the purpose of prostitution, where the objection was not made by demurrer, but by motion in arrest.

2. Where on a prosecution under St. 1891, p. 285, c. 206, making it a felony for one to permit his wife to remain in a house of prostitution, etc., defendant's wife testified that she had previously been in "quite a few" houses of prostitution, one of which was a house in M., it was not error for the court to exclude a question put to her as to whether she had been an inmate in a house of prostitution at M. conducted by her sister, since the question was immaterial.

3. On a prosecution under St. 1891, p. 285, c. 206, making it a felony for one to permit his wife to remain in a house of prostitution, etc., evidence that the house in question contained 12 rooms, commonly known as "cribs," each one of which was occupied by a different woman as a place of prostitution for herself alone, and that defendant's wife occupied one of them for that purpose, amounted to a showing that she was in a "house of prostitution," within the statute.

4. Pen. Code, § 1323, declares that the neglect or refusal of a defendant to be a witness cannot be used against him on the trial. On a prosecution under St. 1891, p. 285, c. 206, making it a felony for one to permit his wife to remain in a house of prostitution, etc., defendant did not testify as to whether he and his alleged wife had been actually married, but he testified that on going ashore from a man-of-war at one time he saw her in a saloon; that she said she had done wrong, and asked him to take her back again; that he saw her again some weeks later; that they met another man, and the three spent several hours drinking; that he promised to take her back; and engaged a room and stayed all night with her, and the next thing he knew she was in a house of prostitution. *Held*, that as the jury might have inferred that defendant was taking her back to live with him as a paramour, or that he was condoning her offense as a husband, it was not error for the district attorney to comment on the failure of defendant to deny that the woman in question was his wife.

5. On appeal in a criminal case a portion of appellant's brief, "The court erred in refusing defendant's proposed instructions, Nos. 3, 6, and 7 (folios 40–44, inclusive)," is not an argument, and does not justify any consideration of errors supposed to be presented thereby.

Department 1. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Fred Mead was convicted of conniving at, consenting to, and permitting his wife to be placed in a house of prostitution, and he appeals from a judgment of conviction and from an order denying a motion for a new trial. Affirmed.

Frank J. Murphy, for appellant. U. S. Webb, Atty. Gen., J. C. Daly and E. B. Power, Deputy Atty. Gens., and Lewis F. Byington, Dist. Atty., for the People.

SHAW, J. The defendant was convicted of the crime of conniving at, consenting to, and permitting his wife to be placed in a house of prostitution, as defined by the act of 1891 (St. 1891, p. 285, c. 206), and appeals from the judgment of conviction, and from the order denying his motion for a new trial.

1. The first error that is assigned is the denial of his motion in arrest of judgment made upon the ground that the information is defective. The provisions of the act defining the crime, so far as applicable, are as follows: "Any man who connives at, consents to, or permits the placing or leaving of his wife in a house of prostitution, or allows or permits his wife to remain therein, shall be guilty of a felony," etc. The information charges that the defendant at the time and place stated "did then and there willfully, unlawfully, and feloniously connive at, consent to, and permit the placing and leaving of one Gertie Raymond Mead, then and there and at all times herein mentioned the wife of said Fred Mead, in a house of prostitution, situate," etc. The contention of the defendant is that this statute is not to be construed literally so as to forbid a husband to place his wife in a house of prostitution, or permit her to remain therein, for an innocent purpose, as a cook or seamstress for instance, but only to forbid the placing or leaving her therein for the purposes of prostitution, and that when construed in this way the crime is not complete unless it is alleged and proven that the wife was left in the house of prostitution with the intention on the part of the husband that she shall herself act as a prostitute. It may be conceded for the purposes of this case that if the objection had been raised by demurrer for uncertainty the information would be fatally defective. But where there is no demurrer, and the defect is sought to be raised solely by motion in arrest of judgment, we think a different rule should prevail. Section 1185 of the Penal Code declares that an objection to the sufficiency of the information which is waived by failure to demur will not be sufficient to justify an order for the arrest of judgment. Under the provisions of the Code an information must state the acts constituting the offense "in such manner as to enable a person of common understanding to know what is intended" (section 950, subd. 2); and if it is sufficient to withstand this test it is not subject to attack either by general demurrer or by motion in arrest of judgment. See, also, section 959, Pen. Code, subd. 6. The words used are to be construed "in their usual acceptance in common language," except technical phrases defined by law. Section 957, Pen. Code. We think it must be admitted that a person of common understanding, construing words according to their usual acceptance in common language, would understand that a man who was charged with "willfully, unlawfully, and feloniously conniving at, consenting to, and permitting" the placing of his wife in a house of prostitution was charged with placing her there for the purpose of prostitution, and not in the innocent capacity of a cook or seamstress. The words "willfully, unlawfully, and feloniously" must be given some effect in construing such language, and they certainly would exclude an act which by law was innocent. The utmost that can be said in criticism of this information, therefore, is that it may not be direct and certain as to the particular circumstances of the offense. Such an objection is waived by a failure to demur. Pen. Code, § 1012.

A motion in arrest of judgment is made after the trial. In this case the record contains the evidence, and it shows that there was no pretense on the part of the prosecution that the defendant would be guilty if the wife was placed in the house of prostitution for innocent purposes only. The chief effort of the prosecution was to show that she was there for the purposes of prostitution, and that the defendant had knowledge of the purpose, and not only passively consented thereto, but actively procured her to be there. If the defendant before the trial had presented a demurrer to the information, and had then urged the defect therein which he now suggests, there would have been an opportunity for the court to have directed an amendment of the information, curing the defect. Instead of raising the question at that point in the case, he seeks to gain an advantage by taking the chances of an acquittal upon the trial, and, after conviction, attempting to get a new trial by reason of the defect which he should have urged before. It is very clear that he was not in any respect prejudiced on the trial by the supposed defect in the information. Section 960 of the Penal Code provides that no information is insufficient "nor can the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." And by section 1258, Pen. Code, this court must give judgment "without regard to technical errors or defects which do not affect the substantial rights of the parties." In view of these provisions, we do not think the judgment should be reversed for the alleged defect in the information, even if we concede that the language used does not with certainty state all the facts constituting a public offense.

2. When the wife of the defendant was testifying as a witness the court refused to allow the defendant's attorney on cross-examination to ask if, prior to the time she went to the house in question in this case, she had not been an inmate of a house of

prostitution at Martinez conducted by her sister. This ruling is assigned as error. The defendant's argument is that the question was asked in order to show that she had previously been an inmate of a house of prostitution, and would therefore be more likely to enter the house in question of her own volition, without being influenced by fear of her husband. At the time the court made this ruling there had been no testimony that fear of her husband had caused her to enter the house of prostitution. Such testimony as there was on the subject of fear was brought out by the defendant's counsel upon subsequent cross-examination. Therefore we cannot say that the court erred in excluding the testimony. But the fact really sought to be elicited by the question was immaterial. Immediately before the question was asked the witness had testified that she had previously been in "quite a few" houses of prostitution, one of which was a house in Martinez, and the purpose of the question was manifestly to ascertain whether or not this house in Martinez was conducted by her sister. It having been shown that she had previously been in several houses of prostitution, the entire purpose for which the defendant contends had been accomplished, and the mere question whether or not the particular house in Martinez had been conducted by her sister was wholly immaterial.

3. It is contended that the verdict is against law, because the court instructed the jury that a house of prostitution is one in which "two or more women reside and engage in illegitimate sexual intercourse for money"; and, further, "a single room may constitute a house of prostitution"; and that the evidence shows that the defendant's wife occupied a single room alone. The theory is that the state is bound by the definition of the law given by the court in its instructions, whether they be right or wrong, and that if the crime proven by the evidence does not measure up to the standard fixed by the court in its instructions the verdict is against law, and there must be a new trial. We do not think it is necessary to decide whether this theory is correct or not.

The evidence, however, shows that the house in question contained 12 rooms, commonly known as "cribs," each one of which was occupied by a different woman as a place of prostitution for herself alone, and that the wife of the defendant occupied one of them for that purpose. We hold that, under these circumstances, defendant's wife was in a "house of prostitution," within the meaning and intent of the statute under consideration, and hence the verdict was not against law. The fact that the court instructed the jury that the house must be occupied by two or more women would not justify this court or the court below in granting a new trial because there was no proof that a particular room of the house was occupied by more than one woman, if the evidence was otherwise sufficient to justify the verdict.

4. There is the usual claim that the rights of the defendant were prejudiced by misconduct of the district attorney in his closing argument. The misconduct consisted in commenting upon the alleged failure of the defendant to deny that the woman who was placed in the house of prostitution was his wife. Section 1323, Pen. Code, declares that the neglect or refusal of the defendant to be a witness cannot be used against him on the trial. It may be conceded that under this section in general it is not proper for the district attorney to comment on the effect of the failure of the defendant to testify upon any subject connected with the trial, although he may have been a witness and may have testified on other subjects. But the record in this case does not show that the defendant failed to testify on the subject, as his counsel claims. There had been testimony on the part of the prosecution satisfactorily showing that a legal marriage ceremony had been performed between the defendant and the witness Gertrude Mead, and that they had thereafter lived together after the manner of husband and wife. This was sufficient prima facie proof that they did sustain that relation. The defendant, while he did not testify expressly on the question whether or not they had been actually married, did testify to several circumstances which would justify the inference that they were living together meretriciously, and not as husband and wife. Thus, he testified that, after coming ashore from a man-of-war about May, 1900, he saw her in a saloon conducted by her sister, and that they had a few drinks together, after which he left her for a time and came back, and had some more drinks with her and went to bed; that he went with her to see her mother and visit her aunt, and was with her pretty much all night; that she said she had done wrong, and asked him to take her back again, promising to conduct herself like a lady and behave and lead a decent life, and that she thought it best for her to go back with him again, and that if he would take her back she would lead a different life; that he saw her again some five weeks later, and went from her mother's home down town with her, where they met a man named Rogers, and the three of them went around town for several hours, drinking at several places, and that she again asked him to take her back, and that he promised her to take her back provided she would live decent and quit drinking; that she got drunk that very night, and he was going to quit her again; that he engaged a room and stayed all night with her; that he rented a room with the intention of making her behave herself, and that after they commenced living together she behaved herself about a week, and then began carousing and drinking, and the next thing he knew she was in a crib; that he

had not had anything to do with her for about three weeks previous to his arrest. Under this testimony the jury might have inferred either that he was taking her back to live with him again as a paramour, or that as a husband he was condoning her offense and taking her back to live with him as his wife. Under this very equivocal testimony of the defendant, himself, if there was any contention on the part of the defense that the defendant was not her husband, there was no impropriety in the district attorney commenting upon the fact that he had made no express denial of the fact. If the jury should take one of the possible inferences, the effect would be that he had, by his testimony as a whole, denied by implication that she was his wife. If the other inference were adopted, the effect would be that his testimony would be considered as an admission of their marital relations. The prosecution was justified in calling the attention of the jury to the vague character of his testimony on the subject, and the absence of an explicit denial.

5. The last point made by the defendant is as follows: "The court erred in refusing defendant's proposed instructions Nos. 3, 6, and 7 (folios 40 to 44, inclusive)." We cannot dignify this portion of the brief by styling it an argument. It does not justify any consideration of the errors supposed to be presented thereby.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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145 Cal. 490

ABNER DOBLE CO. v. KEYSTONE CONSOL. MIN. CO. (S. F. 3,086.)*

(Supreme Court of California. Nov. 29, 1904.)

PLEADING—DEFECTS—CURE—APPEAL—PRESUMPTIONS.

1. Code Civ. Proc. § 469, provides that no variance shall be deemed material unless it has actually misled the adverse party to his prejudice, when the court may order the pleadings to be amended on terms; and section 475 prohibits a reversal for any error not substantially injuring the party complaining, and that there shall be no presumption that error is prejudicial, or that injury was done by error shown. *Held* that, in the absence of a showing that any objection or exception was taken to any of the evidence on the ground of variance, it would be presumed on appeal that sufficient evidence was introduced to justify the findings and judgment.

2. Where plaintiff's pleadings disclosed that plaintiff sued for a balance on an account, which included as credits to defendant three certain notes, credited as payments on account, and plaintiff claimed that after crediting such notes there still remained due the balance sued for, a defect in defendant's cross-complaint, relating to the amount claimed by defendant to be due from plaintiff by reason of such notes, alleged to have been executed by defendant to plaintiff for its accommodation, in that it did not allege nonpayment of the amount defendant claimed to be due, was cured.

Department 1. Appeal from Superior Court, City and County of San Francisco; Wm. R. Daingerfield, Judge.

Action by the Abner Doble Company against the Keystone Consolidated Mining Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Jesse W. Lilienthal, Wm. F. Gibson, and Frohman & Jacobs, for appellant. Edward Lynch, for respondent.

VAN DYKE, J. The plaintiff corporation sued the defendant corporation for the sum of $1,527.29 as a balance due for work, material, and money which it furnished said defendant. The bill of particulars furnished by the plaintiff to the defendant on its demand showed charges amounting to $8,094.27 and credits for cash and allowances of $6,566.98, leaving as a balance the amount sued for. In the answer and cross-complaint filed by the defendant it is claimed that the charges in the bill of particulars aggregating $4,752.93 were made for reconstructing and transforming the compressor at the Keystone mine, and that this amount should be disallowed because the plaintiff did not fulfill its contract as to the efficiency which the compressor would have when transformed, as guarantied by plaintiff, and its alteration had rendered the compressor worthless. It was further claimed by the defendant that the four promissory notes given by said defendant to the plaintiff, amounting to $5,200, were so given upon a written agreement that they would be applied upon the amount of goods sold and to be sold to the defendant mining company, and, if they should overpay the amount due the plaintiff company the balance was to be repaid to the defendant company at its option; and the defendant alleges that these notes were negotiated and transferred by the plaintiff to the Anglo-Californian Bank, Limited, and that the defendant paid them, except $750, which it was liable for, and would be compelled to pay. Defendant also claimed that it had been damaged to the extent of $2,000 by being deprived of the use of a compressor since its alteration, and in said amended cross-complaint defendant demanded judgment against the plaintiff for $3,257.14, with legal interest thereon from May 14, 1895.

In its decision the court found, in substance, that the transformation of the air compressor was a failure, and that the plaintiff did not in any particular comply with its contract in that regard, and that defendant advanced to plaintiff three promissory notes, amounting to $4,000, on the agreement between the parties that the notes should be applied in payment on account for goods sold and to be sold to the defendant, and, in the event that they overpaid the account, the balance was to be repaid to the defendant at its option. The court further found that the defendant owed the plaintiff $3,375.09 for goods sold and delivered, and which were not connected with the compressor transaction, and that the defendant had paid and advanced to the plaintiff $6,566.85, leaving a balance due defendant of $3,191.89, which should be returned by plaintiff by virtue of the agreement between the parties already referred to, and that the defendant should have judgment for that amount, with interest at the legal rate from May 14, 1895, together with the further sum of $1,046, as damages sustained by the defendant through the failure of the plaintiff to perform its contract. On these findings judgment was entered accordingly on November 23, 1899, in favor of the defendant and against the plaintiff for $5,203.89 and costs. The plaintiff appealed from the judgment so entered December 8, 1899, upon the judgment roll. The transcript thereof was filed in this court February 8, 1902. Plaintiff's opening brief on this appeal was filed April 15, 1902; respondent's points and authorities May 23, 1902, and appellant's reply brief June 23, 1902.

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*Rehearing denied December 29, 1904.

In the points and authorities on behalf of appellant the greater portion is devoted to the consideration of the alleged error in awarding judgment to the defendant in excess of the amount demanded in the prayer of the amended cross-complaint. The prayer was for judgment in the sum of $3,257.14, with legal interest thereon since May 14, 1895, amounting at the date of the entry of the judgment to the sum of $4,289.65, whereas the judgment in fact as entered was for $5,203.89. By a supplement to the transcript herein, filed January 5, 1903, it appears that after the entry of the judgment under consideration the plaintiff moved for a new trial in the court below, whereupon said court, upon said motion coming on to be heard, granted an order that, unless defendant should consent to a reduction of the judgment to the sum of $3,257.14, together with interest thereon at the rate of 7 per cent. per annum from May 14, 1895, and costs of suit, a new trial would be granted, and that defendant thereupon consented to such a reduction, and accordingly said superior court made and caused to be entered an order making said reduction in the judgment theretofore entered, and directing the clerk of said court to enter said reduction in the judgment book and make appropriate reference to said correction, and that plaintiff's motion for a new trial was thereupon denied. The stipulation contained in said supplement to the transcript shows that the said reduction was thereupon entered in the judgment book of said court on November 26, 1902, and on December 24, 1902, plaintiff filed and served its notice of appeal from said judgment as modified, and gave an undertaking on appeal in due form. And it was further stipulated that, in order to avoid the necessity of printing again the matter already appearing in the transcript filed on appeal from the judgment before its reduction, said transcript might stand for the transcript on appeal from the judgment as reduced, together with the matter contained in the stipulation, and that it be considered together with the briefs already filed and the oral argument which counsel might desire to make, and that, as the superior court had already reduced the judgment to the amount demanded in the amended cross-complaint and answer, "the appellant withdraws his objection to said judgment on the ground that it exceeded the amount demanded in the amended cross-complaint and answer, and which said objections are contained in points 1 and 2 of its opening brief, and no objections are made to the form of the order or manner of entry of the same reducing said judgment."

Point 3 of appellant's brief is the only remaining portion applicable to the appeal from the judgment as modified, and this is based upon the contention that the amended cross-complaint furnishes no basis for the judgment. It is objected on the part of appellant that there is a variance between the finding and the pleadings, in that it is alleged in the amended cross-complaint that the defendant was damaged in the sum of $2,000, being the value of the use of the air compressor in the condition it was prior to the making of the alteration by the plaintiff, whereas the finding is that his damage was for money expended for railroad freight, costs of hauling material, brick, and for labor used in transforming the compressor, and for the cost of restoring it to its original condition. Further, it is claimed that there is no averment in the amended cross-complaint of the nonpayment of the sums of money claimed to be due defendant from plaintiff.

There is no bill of exceptions or statement brought up in the transcript. The respondent, in his brief, states that a bill of exceptions containing the testimony and part of the documentary evidence given at the trial—and some of an important character to respondent—was taken away from the clerk's office by the plaintiff in October, 1899, and by said plaintiff claimed to have been lost. However that may be, there is nothing now before the court showing that any objection or exception was made to any of the evidence introduced at the trial, and we must presume, therefore, that sufficient evidence was introduced to justify the findings and judgment, as all presumptions and intendments are in favor of the judgment. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled the court may order the pleadings to be amended, upon such terms as may be just." Code Civ. Proc. § 469. "No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." Code Civ. Proc. § 475. "It is unfair for a party to withhold an objection founded upon a defect, which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient in order that he may have a fatal objection. Such course is a fraud upon justice, and prevents a fair trial. It is therefore not tolerated." Greiss v. State Investment Company, 98 Cal. 242, 33 Pac. 195. In Treanor v. Houghton, 103 Cal. 54, 36 Pac. 1081, it is said: "That the omission in the complaint would have been fatal in the face of a special demurrer is settled by the cases quoted supra, and by many others to which we might refer. The question, however, is, can appellant, after verdict, raise the question here for the first time?" Then, after quoting from Chitty on Pleadings, this court continues: "The difficulty experienced in many cases of this character is to determine whether or not the omitted fact or facts were proven at the trial. In the present instance we are met with no difficulty of this character. The cause having been tried by the court, and the facts found, it appears affirmatively by the record that what was omitted in the complaint was supplied without objection at the trial." And the same may be said in reference to the case at bar, as already stated. In Chitty's Pleading, vol. 1, page 705, quoted in Treanor v. Houghton, the rule is stated as follows: "The second mode by which defects in pleading may be in some cases aided is by intendment after verdict. The doctrine upon this subject is founded upon the common law, and is independent of any statutory enactments. The general principle on which it depends appears to be that, where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by verdict. The expression 'cured by verdict' signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proven at the trial." If the portion of the cross-complaint relating to the amount claimed to be due from the plaintiff to the defendant by reason of the three notes executed by defendant to the plaintiff for its accommodation is defective because of the failure to allege nonpayment of the amount the defendant claims to be due, that defect is sufficiently disposed of by the original complaint and the plaintiff's answer to the cross-complaint, taken in connection with the copy of the plaintiff's account set forth in the defendant's answer. These pleadings show that the plaintiff sues for a balance alleged to be due plaintiff on an account which includes as credits to the defendant the three notes referred to, they being credited as payments on the account; that they were accepted as payments; and that the plaintiff in fact claims that, after crediting the same, there still remained due plaintiff the balance sued for, and does not claim that there should have been any items in the account for any supposed payment of the amount claimed in the cross-complaint; in other words, that the plaintiff does not really claim that there ever was any such payment to be denied by a formal allegation of nonpayment. The alleged error is, therefore, without substantial merit, and would by no means justify a reversal of the judgment. It is a familiar rule that defects in a pleading may be cured by averments in the pleadings of the opposite party. Vance v. Anderson, 113 Cal. 536, 45 Pac. 816; Daggett v. Gray, 110 Cal. 172, 42 Pac. 568; Schenck v. Hartford etc. Ins. Co., 71 Cal. 28, 11 Pac. 807; Cohen v. Knox, 90 Cal. 266, 27 Pac. 215, 3 L. R. A. 711; Pomeroy on Remedies and Remedial Rights, § 579.

The judgment, as modified, is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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145 Cal. 474

WITTMAN v. POLICE COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 3,015.)

(Supreme Court of California. Nov. 28, 1904.)

CERTIORARI—WHEN LIES.

1. Under Code Civ. Proc. § 1068, providing for a review on certiorari when an inferior tribunal, board, or officer exercising judicial functions exceeds its jurisdiction, and there is no appeal or other adequate remedy, that writ does not lie to review the action of a police judge in ordering or summoning a jury, pursuant to section 230, for the trial of a misdemeanor case.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Certiorari by George W. Wittman against the police court of the city and county of San Francisco and George H. Cabaniss, judge. From a judgment for plaintiff, defendant appeals. Reversed.

John J. Barrett, for appellant. P. F. Dunne and J. A. Hosmer, for respondent.

GRAY, C. This is a certiorari proceeding in which the trial court gave the plaintiff judgment annulling an order of defendant which directed the sheriff of the said city and county to summon 40 jurors for the trial of the plaintiff on a charge of misdemeanor then regularly pending before the defendant police court. The defendant appeals from the judgment.

The writ of certiorari, otherwise denominated the writ of review, is an extraordinary remedy, and lies only "when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy." Section 1068, Code Civ. Proc. It is provided in section 230, Code Civ. Proc., as follows: "When jurors are required in any of the justices' courts or in any police or other inferior court, they shall, upon the order of the justice or any one of the justices where there is more than one, or of the judge thereof, be summoned by the sheriff, constable, marshal or policeman of the jurisdiction." In the regular course of the misdemeanor case pending before the herein defendant police court, the defendant therein having demanded a jury, it became necessary for the judge of said court to construe said section 230 for the purpose of determining whether it gave him any discretion as to which of the officers mentioned the venire should be directed. He seems to have concluded that it did give him a discretion, and exercised that discretion in favor of the sheriff. The construction of the section and the issuance of the venire were not only matters within the jurisdiction of the police judge, but were absolutely necessary to the further progress of a case in which it is admitted that the police court had jurisdiction of the subject-matter as well as of the person of the defendant. To what officer the venire should run was a question that it was the necessary duty of the police judge to decide. It is not necessary for us to say, and we do not here even intend to intimate, whether he decided the question correctly in directing the venire to the sheriff. If he decided it incorrectly, it was only an error that might have been waived without invalidating any subsequent judgment in the action; and, if not waived, it might also have been reviewed as an error of law on appeal from any judgment that might have followed. It may not be amiss in this connection to say that there is nothing in the petition for this writ to show that the summoning of the jury by the sheriff was not waived or consented to by petitioner, but, so far as we can gather from the petition, the case was continued from time to time after the jury was summoned, and it is not shown that any objection was made in the police court at any time on account of the sheriff having summoned the jury. The writ should have been refused for the dual reason that the order of which the annulment was sought was clearly a matter within the jurisdiction of the police judge, and, if any error was involved in the making of it, the defendant in the action had an adequate remedy by appeal. Bennett v. Wallace, 43 Cal. 25; Valentine v. Police Court, 141 Cal. 615, 75 Pac. 336.

This court has held in two well-considered cases that the denial of a jury altogether in a misdemeanor case was but an error of law, and that the justice's court did not in such denial exceed its jurisdiction. Ex parte Miller, 82 Cal. 454, 22 Pac. 1113; Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143. If an order denying a jury trial altogether is not in excess of jurisdiction, it is difficult to see how an order merely directing what officer shall summon persons from whom to select a jury can be said to be in excess of jurisdiction. In the still later case of In re Fife, 110 Cal. 8, 42 Pac. 299, also well considered, it is said: "A jury may be waived in any civil case, and it is not contended by any one that the refusal of a demand for a jury in a civil case affects the jurisdiction, or is anything more than an error; and as a jury may, under the Constitution, be waived 'in all criminal cases not amounting to a felony,' a jury is not a necessary constituent part of a court for the trial of a misdemeanor, and the refusal of the court to allow a jury on such a trial is mere error. This principle will be found to be established by the general authorities, but, as it has been definitely declared by decisions of this court, we need look no further."

We advise that the judgment be reversed, with directions to the court below to deny the petition of plaintiff in every particular.

We concur: HARRISON, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to deny the petition of plaintiff in every particular: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

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145 Cal. 482

MURPHY v. MURPHY. (S. F. 3,027.)

(Supreme Court of California. Nov. 28, 1904.)

JUDGMENT — ACTIONS— PLEADINGS—FINDINGS —INTEREST—PRESUMPTIONS—CALCULATION.

1. In an action on a judgment a complaint alleging "that said Queen's Bench Division of said High Court of Justice had jurisdiction of the subject-matter of said action and of the parties thereto," and further alleging that said judgment "was duly given, made, and entered in and by" said court, sufficiently alleged the jurisdiction of the court rendering the judgment, in the absence of a demurrer.

2. Where a complaint in an action on a judgment alleged that the court had jurisdiction of the subject-matter of the action and of the parties thereto, and that the judgment was duly given, made, and entered in and by said court, findings that the allegations of the complaint were true sufficiently showed the jurisdiction of

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¶ 1. See Judgment, vol. 30, Cent. Dig. §§ 1772, 1773.

the court by which the judgment was rendered.

3. In the absence of any showing to the contrary, an English judgment will be presumed to have drawn interest at 7 per cent., the same as a domestic judgment.

4. In an action on an English judgment, an allegation of the complaint that on the date of the judgment "the value of said judgment in lawful money of the United States of America was $7,055" sufficiently alleged the value of the judgment.

5. In an action on an English judgment, where the complaint alleged the value of the judgment in American money on the date of its rendition, and asked interest on that amount at the rate of 7 per cent. per annum from said date, and the court found that the allegations of the complaint were true, the judgment to be rendered was properly calculated from the figures and allegations of the complaint.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Nora Helen Gertrude O'Neill Murphy against Bertham Samuel Joseph Finniston O'Neill Murphy. From a judgment for plaintiff, defendant appeals. Affirmed.

Bishop & Wheeler (William Rix, of counsel), for appellant. Elliott McAllister and Frank H. Powers, for respondent.

GRAY, C. The action is based upon a judgment made and entered in favor of plaintiff against defendant in the Queen's Bench Division of the High Court of Justice of the Supreme Court of Judicature in England on the 11th day of November, 1898, for the sum of £1,454 4s. The plaintiff obtained judgment, from which the defendant appealed.

1. There was no demurrer to the amended complaint. The appellant attacks it, however, upon the ground that it fails to state facts constituting a cause of action, in that it contains no facts showing that the English court had jurisdiction of the subject-matter of the action or of the person of the defendant. The complaint contains the following allegations in this behalf: "That said Queen's Bench Division of said High Court of Justice had jurisdiction of the subject-matter of said action and of the parties thereto." It also avers that said judgment "was duly given, made, and entered in and by" said court. Certainly, in the absence of a demurrer, this was sufficient on the subject of jurisdiction in the English court. Dore v. Thornburgh, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100. The findings are that all the allegations of the complaint are true, and hence the findings also sufficiently show the jurisdiction of the court in which the judgment here sued on was rendered.

2. The allegation of the complaint as to the value of the judgment is: "That upon said 11th day of November, A. D. 1898 [the date of the English judgment], the value of said judgment * * * in lawful money of the United States of America was, to wit, seven thousand and fifty-five dollars." The complaint also alleged that no part of said judgment had been paid, and that the judgment remained "wholly unpaid, and in full force and effect." The law of England on the question of interest, as on every other question, will, in the absence of any showing to the contrary, be presumed to be the same as the law of this state. Wickersham v. Johnston, 104 Cal. 407, 411, 38 Pac. 89, 43 Am. St. Rep. 118. The judgment, being of a given value when rendered is presumed to have drawn interest at the rate of 7 per cent., and nothing having been paid on it, the value of the judgment at the date of the commencement of this action, as well as at the date of the judgment herein, was a mere matter of figures, to be calculated with mathematical certainty from the allegations of the complaint. The prayer of the complaint was for $7,055, together with interest thereon at the rate of 7 per cent. per annum from said 11th of November, 1898, the date of the English judgment. The complaint was entirely sufficient as to allegations of value of the judgment, and the findings following it were also entirely sufficient, and fully support the conclusions of law and the judgment herein for $8,284.13, which judgment was properly calculated from the figures and allegations of the complaint; all of which were found to be true.

We advise that the judgment be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

145 Cal. 485

ROHRBACHER v. AITKEN et al. (S. F. 3,028.)

(Supreme Court of California. Nov. 29, 1904.)

CONSIDERATION FOR NOTE—COMPROMISE OF LEGAL PROCEEDINGS.

1. There having been a shortage in the account of plaintiff's deceased husband as executor of an estate, the dismissal of proceedings against his co-executor, and refraining from presenting a claim against the estate of plaintiff's deceased husband, is a sufficient consideration for plaintiff's note for the amount of shortage.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action for the cancellation of a note by Mary S. Rohrbacher against John R. Aitken and J. C. Cullen. From a judgment for defendants and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Reddy, Campbell & Metson and Campbell, Metson & Campbell, for appellant. John R. Aitken in pro. per., and also for respondent J. C. Cullen.

COOPER, C. This action was brought to obtain the cancellation of a promissory note upon the ground that the maker had received no consideration therefor, and to enjoin the holder from attempting to realize upon certain shares of stock pledged to him as security for said note. Upon the findings judgment was entered for defendants, and this appeal is from the judgment and order denying plaintiff's motion for a new trial.

The case turned upon the question as to whether or not there was a good and sufficient consideration for the note. The trial court found that "there was a good and sufficient consideration therefor moving from the said defendant, John R. Aitken, to the said plaintiff." The promissory note is presumed to have been executed for a sufficient consideration, and all presumptions are in favor of the finding of the court. We are of the opinion that the evidence supports the finding. Philip Rohrbacher, the husband of plaintiff, prior to his death, had been a joint executor with one Ehmann of the will and estate of one Merz. After his death, in April, 1897, it was discovered that there was an apparent shortage on the part of deceased in the funds of the Merz estate of about $5,000.

Defendant Aitken is the assignee of a three-fourths interest in the estate of Merz. In September, 1898, two of the heirs of the Merz estate, assignors of defendant Aitken, petitioned the court having jurisdiction to suspend the powers of the surviving executor, Ehmann, and to revoke his letters testamentary, and thereupon a citation was issued and an order made "temporarily suspending the powers of the executors of said estate, and directing said executors to show cause on the 12th day of September, 1898, why they should not be removed as executors of said estate." Pending the hearing on the citation Mr. Louis F. Dunand, who was attorney for plaintiff in the estate of her deceased husband, had investigated the matter of the shortage in the Merz estate, and had been engaged in negotiations with Mr. Asher, the attorney for defendants, as to said shortage. Dunand testified: "She examined the figures, and I communicated the facts to Mrs. Rohrbacher. One day Emma Rohrbacher, a daughter, stated that she preferred that she, her two daughters, and Mrs. Rohrbacher should pay the money by the execution of this note. * * * Mrs. Rohrbacher was the executrix of her husband's estate. * * * The lady and her child wished to pay the obligation of their father to the estate of Merz. * * * The daughter stated that she did not want her papa to owe any money; that when any money came out of her father's estate she would be willing to contribute her share; and Mrs. Rohrbacher stated that she would see the other sisters, and that if they wished to contribute she would give us an answer. At the next interview they were perfectly satisfied. * * * Our conversations were with reference to settling the amount of the deficit. The note was signed four or five months after negotiations had been commenced." Plaintiff testified: "I signed the note and agreement submitted to me. It was claimed that there was a shortage in the Merz estate, and, as I didn't want any scandal, or anything, I thought if I got anything out of my husband's estate, and my daughter's, we decided to settle that matter rather than to have any scandal." Defendant Aitken testified: "The consideration for the note was the dismissal of the proceedings against Mr. Paul Ehmann—the waiving of the claim against him. The consideration was the dismissal of the citation against Ehmann."

Plaintiff was represented by her counsel in all the negotiations and investigations as to the shortage of her deceased husband as executor of the Merz estate. She consulted her daughters, and fully investigated the matter. After such investigation, and with the consent of her attorney, she executed the note and agreement. The citation against the surviving executor Ehmann was thereupon dismissed, and the matter regarded as settled. The defendants changed their position upon the faith of the note and agreement. It may be that now they would be unable to collect from the co-executor. Where legal proceedings have been instituted, and the parties after investigation, in the absence of fraud, make a compromise agreement, and the proceedings are in consideration thereof dismissed, the dismissal of the proceedings constitutes a consideration for the agreement. The parties cannot afterwards make the agreement depend upon the question as to whether or not the party could have prevailed in such proceeding. If so, no compromise agreement would be valid. Such agreements, in the absence of fraud, are favored and sustained by the courts, because they put an end to litigation, and tend to produce peace and good will. Plaintiff, having faith in her attorney, and wishing to sustain the reputation of her deceased husband, knowing all the facts, made the agreement and signed the note. Good faith and honesty now require that she keep the contract she has made. She made the contract and note in March, 1899. She did not commence this action until September, 1899. The action was not tried until May, 1901. It was not necessary for defendants to have presented a claim against the estate of plaintiff's deceased husband. The claim was settled by the personal obligation of plaintiff. If she desired the estate of her deceased husband alone to be responsible, she should have taken that position before she signed the note. The principles herein stated have been applied by the courts in many cases. They were applied in a case where the husband died leaving a note unpaid, and having transferred all his property to his wife, who in turn transferred it to her daughter, and the mother and daughter gave a new note to the creditor of the deceased husband. Whelan v. Swain, 132 Cal. 389, 64 Pac. 560. And where a note and mortgage had been executed by the husband and wife, the husband died, and the claim of the mortgagee was proven against the estate, the wife and children executed a new note and mortgage upon the same property. Humboldt Sav., etc., Soc. v. Dowd, 137 Cal. 408, 70 Pac. 274. It was there said: "The mortgagors, after executing the note and mortgage in extension of a debt which was a legal charge upon their property, will not now be heard to say that their act was without consideration. If their sense of right and justice does not impel them to pay the note so made by them, the court, as a matter of law, will compel them to pay it."

In Conn. Life Ins. Co. v. McCormick, 45 Cal. 580, it was held that a mortgage executed by a married woman upon her separate property to secure money due and owing by her husband was valid. In the late case of Farmers', etc., Bank v. De Shorb, 137 Cal. 693, 70 Pac. 771, it is said: "It is the well-settled rule that a married woman may mortgage her separate property for the debt of her husband." See, further, Walker v. Dixon Crucible Co., 47 N. J. Eq. 342, 20 Atl. 885; McNulty v. Cooper, 3 Gill & J. 214; Shipman v. Lord, 58 N. J. Eq. 581, 44 Atl. 215. We have carefully examined the case of Chaffee v. Browne, 109 Cal. 211, 41 Pac. 1028, relied upon by appellant, and are not disposed to extend its doctrine beyond the facts therein stated, though it is not in conflict with what is here decided. There the mortgage was given by a married woman to secure the pre-existing debt of her husband. No extension of time was given, and nothing was given up or surrendered. "The wife received nothing, the husband received nothing, the creditor parted with nothing." (As to the effect of Chaffee v. Browne, see McDonald v. Randall, 139 Cal. 252, 72 Pac. 997.) In this case the creditor parted with his right to pursue the proceedings instituted by his citation. Six months' time was given by reason of the note. The plaintiff kept the question as to her husband's shortage in his capacity as trustee from being openly investigated in such proceeding.

We advise that the judgment and order be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

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145 Cal. 497

KELLOGG v. LOPEZ. (S. F. 3,022.)

(Supreme Court of California. Nov. 30, 1904.)

PRINCIPAL AND SURETY—ACCOMMODATION PAPER—CONSIDERATION—CONTRIBUTION—NATURE OF CAUSE OF ACTION.

1. Where defendant and other stockholders of a corporation made and indorsed a note for the accommodation of the corporation, in pursuance of an agreement to that effect, at one time and as part of one transaction, whereupon the note was discounted and the money was received and used by the corporation, defendant and his comakers were merely sureties of the corporation, and, as such, entitled, by the terms of Civ. Code, § 2848, to contribution from each other.

2. Under Civ. Code, § 2831, defining a surety as one who, at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor, persons who execute and indorse a note for the accommodation of a corporation of which they are members are primarily liable for their individual proportion of the debt, and secondarily liable as sureties for the proportions owed by the others.

3. Under Civ. Code, § 1605, providing that any prejudice suffered or agreed to be suffered by another as an inducement to the promisor is a good consideration for a promise, the signing of accommodation paper by joint makers thereof is a sufficient consideration to support each other's promise to pay his proportion of the paper, but the secondary liability of such joint makers as sureties for the others' proportion of the obligation in case of their default is without consideration and invalid.

4. Where sureties are such not only upon equitable principles, but by the legal effect of their contract, a suit for contribution can be maintained in assumpsit on the implied contract by the surety satisfying the obligation; but where there is an express promise to pay there is always, to the extent that there is a consideration, a legal cause of action which will prevail except to the extent that grounds for equitable relief are affirmatively shown by defendant.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by C. R. Kellogg against R. E. De B. Lopez. From an order denying a new trial, plaintiff appeals. Reversed.

Gavin McNab, for appellant. Chapman & Clift and Martin Stevens, for respondent.

SMITH, C. Suit on a promissory note for the sum of $1,500, with interest, etc. The note runs from the defendant Lopez to H. F. Anderson as payee. It was indorsed by the latter to the Bank of British Columbia, and upon payment by Anderson was, by his direction and for his use, assigned by the bank to the plaintiff. The defense set up in the answer is, in effect, that the note was signed by Lopez for the accommodation of Anderson, and that it was without consideration. The verdict and judgment was for the defendant. The appeal is by the plaintiff from an order denying his motion for a new trial.

The principal question involved in the case is as to the sufficiency of the evidence to justify the verdict, with relation to which the defendant's answer may be regarded as setting up two defenses: The one, that he signed as security for Anderson only (Civ. Code, § 2832); the other, that there was no consideration for his promise (Civ. Code, § 1550). These defenses are, in effect, identical, but they rest on different principles, which should be distinguished.

With regard to the former, there was no

evidence in the case tending to show that Lopez signed the note for the accommodation of Anderson. But the facts proven by the defendant were, merely, that Anderson and Lopez and one Stackpole were stockholders of the San Mateo Coursing Association, a corporation, and made and indorsed the note for the accommodation of the association; that this was done in pursuance of an agreement to that effect, at one time and as part of one transaction; that the note was then delivered to an agent of the association to be discounted for its use, and that the money was received and used by the association. Upon this state of facts it is clear, at least in this state, that in equity—where "the form of the instrument may be * * * disregarded"—the parties to the note are to be regarded as mere sureties of the association, and as such entitled to contribution from each other. Reynolds v. Wheeler, 10 C. B. N. S. 564; McDonald v. Whitfield, 8 App. Cases, L. R. 744–5; Machado v. Fernandez, 74 Cal. 362, 16 Pac. 19; Leeke v. Hancock, 76 Cal. 127, 17 Pac. 937; Civ. Code, § 2822; and see, also, Deering v. The Earl of Winchelsen, 2 Bos. and Pul. 271, 273; Powell v. Powell, 48 Cal. 236; Norton v. Coons, 3 Denio, 132; s. c. 6 N. Y. 33; 1 Story's Eq. Jur. §§ 492–3; and Civ. Code, § 2848. The case, therefore, differs materially from the case pleaded; and the question is thus suggested, whether the facts proven were relevant to the issue presented by the answer. For if not, there was, with regard to the allegation that the note was made for the accommodation of Anderson, a total failure of proof.

The solution of this question will depend upon the nature of the reciprocal rights and obligations of the sureties between each other, disregarding their common relation to the principal debtor. Thus viewed, in such a case as we are considering each surety is primarily liable for his proportion of the debt, and for the balance as surety for the others. Civ. Code, § 2831; Bouvier's Law Dic. "Suretyship." As to his own part of the debt, therefore, he is not, as to his fellows, a surety, but a principal debtor. Thus, in the case before us, Lopez, in terms, agreed to pay to Anderson or order the whole of the debt, but in effect his agreement was to pay, unconditionally, his proportion of it, and the balance only upon the default of the others, and to the extent of this primary obligation the note precisely expresses the promise. As to the balance of the amount named in the note, the proofs show that Lopez was surety only for Anderson and Stackpole, and hence to that extent the note is invalidated. But as to his principal obligation the effect of the note is not varied nor its validity affected. The facts proved were therefore relevant to the issue, and all that can be said is that the defendant failed to prove his case in part; that is to say, he proved only that he was surety for Anderson for a third of the debt, and for Stackpole for another third, but as to the remaining third he failed to make out his case.

The same result must also be reached if we consider the defense as a plea of want of consideration. As to two-thirds of the note for which Anderson and Stackpole were primarily liable, there was no consideration moving to the defendant, and to that extent his promise was invalid. But as to his own part of the debt the incurrence of like obligations by Anderson and Stackpole constituted a "prejudice suffered or agreed to be suffered (by them) as an inducement" for the defendant's promise, and was therefore a sufficient consideration. Civ. Code, § 1605.

The suit, it may be observed, is not a suit for contribution merely. It is a suit on defendant's express promise to pay, to which the defense interposed has either wholly or partly failed. The case, therefore, differs from the case of contribution between sureties who are such not only upon equitable principles, but by the legal effect of their contract. In the latter case the suit for contribution can be maintained in assumpsit on the implied contract by the surety satisfying the obligation, but, it is said, cannot be maintained by him as assignee of the original contract. But in a case like the present, on an express promise to pay, there is always, to the extent there is a consideration, a legal cause of action, which remains unaffected except to the extent that the grounds for equitable relief are affirmatively shown by the defendant; and here the defendant has partly, if not wholly, failed to make out such equitable defense.

We advise that the order appealed from be reversed.

I concur: GRAY, C.

For the reasons given in the foregoing opinion, the order appealed from is reversed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

145 Cal. 512

FRITTS v. CHARLES, Justice of the Peace.

(S. F. 3,909.)*

(Supreme Court of California. Nov. 30, 1904.)

MISDEMEANORS — ARREST —WARRANT—JUSTICE OF THE PEACE—ISSUANCE—MANDAMUS—RIGHTS OF PRIVATE CITIZENS.

1. Under Code Civ. Proc. § 1086, providing that a writ of mandate will not be issued except on the application of the party beneficially interested, a private citizen was not entitled to such writ to compel a justice of the peace to issue a warrant of arrest for an alleged misdemeanor committed by another in unlawfully playing a game of chance with a slot machine, where there was nothing to show that its operation constituted an injury to plaintiff different in kind from the injury to the general public.

Commissioners' Decision. In Bank. Appeal from Superior Court, Santa Clara County; Hiram S. Tuttle, Judge.

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*Rehearing denied December 29, 1904.

Application for a writ of mandate by Joseph Fritts against S. W. Charles, as justice of the peace. From a judgment denying the application, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and Jas. H. Campbell, Dist. Atty., for appellant. S. W. Charles, in pro. per. Louis O'Neal and Owen D. Richardson, amicus curiæ.

COOPER, C. Defendant is a justice of the peace in Palo Alto township, in Santa Clara county. Plaintiff filed an affidavit with said justice in which he alleged that a misdemeanor had been committed by one Levin, by unlawfully playing and conducting a "certain game played with a device known as a slot machine; said machine being supplied with a certain amount of money, and being operated by placing therein a nickel and turning a crank; the person placing said nickel therein securing thereby a chance of getting a much larger sum of money from said machine upon turning said crank." The defendant refused to issue a warrant for the arrest of Levin for the reason that, in his opinion as justice aforesaid, the said criminal complaint or affidavit did not state facts sufficient to show that any public offense had been committed. Thereupon this application was made to the superior court for a writ of mandate to compel the defendant, as justice, to issue a warrant for the arrest of Levin. The court denied the application for the writ, and plaintiff prosecutes this appeal from the judgment.

It is not necessary to pass upon the question as to the sufficiency of the complaint in the justice's court. The writ of mandate will not be issued except upon affidavit on the application of the party beneficially interested. Code Civ. Proc. § 1086. The plaintiff is not the party beneficially interested, within the meaning of the statute. If a misdemeanor has been committed, the law provides machinery for the arrest and prosecution of the party who committed the misdemeanor. If the officers of the law fail to do their duty where the rights of the public are involved, the law provides a remedy in such case. It is the settled rule that a private individual can apply for this remedy only in those cases where he has some private or particular interest to be subserved or some particular right to be preserved or protected by the aid of this process, independent of that which he holds with the public at large. In Marini v. Graham, 67 Cal. 130, 7 Pac. 442, the petitioner asked for a writ of mandate to compel the superintendent of public streets to abate an alleged public nuisance. The writ was denied, and the court said in speaking of the rights of the applicant: "The facts upon which he relies as the basis of his action to enforce an alleged private right in himself affirmatively show that the obstruction in the sidewalk of which he complains is not more injurious to himself than it is to the inhabitants at large. Any injury or annoyance which he suffered from it may be greater in degree, but it is not different in kind from that sustained by the public. Therefore he receives from it no special injury for which he is entitled in law to a private action, * * * or in a special proceeding to obtain a writ of mandate." See, also, Linden v. Alameda County, 45 Cal. 6; Ashe v. Board of Supervisors, 71 Cal. 236, 16 Pac. 783; People ex rel. Wirt v. Budd (Cal.) 47 Pac. 594; Mitchell v. Boardman, 79 Me. 469, 10 Atl. 452.

In this case there is nothing to show that operating the machine in which a person, by placing a nickel therein, "secures a chance of getting a much larger sum of money from said machine upon turning said crank," injures plaintiff in any manner different from the general public. He is not compelled to put a nickel in the machine and turn a crank, but, if he should do so, according to the complaint, he "secures a chance of getting a much larger sum from the machine."

The judgment should be affirmed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

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145 Cal. 508

In re TRAVER'S ESTATE. (Sac. 1,275.)

BURK et al. v. NORTON et al.

(Supreme Court of California. Nov. 30, 1904.)

EXECUTORS AND ADMINISTRATORS — EXPENSES OF ADMINISTRATION—FROM WHAT FUND PAYABLE.

1. Code Civ. Proc. § 1560, provides that, if testator by his will designates the estate to be appropriated for the payment of debts and administration expenses, they must be paid out of the appropriated estate so far as it is sufficient. Section 1562 provides that, if the estate appropriated is insufficient, any portion of the estate not disposed of by will must be appropriated for that purpose. *Held*, that where testator died having disposed of only one-half of his estate by will, and without having made any provision for the payment of debts and expenses, they were to be paid out of the intestate estate.

In Bank. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Charles Traver, deceased. From a decree ordering the payment of debts and expenses of administration out of the portion of the estate as to which deceased died intestate, Mary E. Burk and others, heirs at law of deceased, appeal. Affirmed.

Albert M. Johnson and Hiram W. Johnson, for appellants. S. Solon Holl, Holl & Dunn, Arthur C. Huston, and Holl & Powers, for respondents.

LORIGAN, J. Charles Traver died in Sacramento county in 1901, leaving a will made August 5, 1897. At the time this will was made his wife was living, and by its terms he bequeathed all his property to her during her life. He then provided, after reciting that all the property was community property, and that the will was only intended to convey that portion of it over which he had testamentary capacity, that "at the death of my wife it is my will that one-half of the property hereby given, devised, and bequeathed to my wife during her lifetime shall descend and go to Lott D. Norton, Charles T. Norton, and Russell Day, Jr., in equal proportions." And then further provided that: "If my wife dies before I do, in that event I give, devise, and bequeath one-half of the whole of my property to Lott D. Norton, Charles T. Norton, and Russell Day, Jr., or, in the case of the death of either of them, to their heirs by right of representation." These were the only provisions of the will disposing of his estate.

The testator's wife died before he did, the effect of which was to vest in him the entire community property, only one half of which was disposed of under his will; as to the other half he died intestate, leaving as his heirs-at-law to succeed to the same, among others, the appellants George W. Traver, a brother, and Mary E. Burk, the daughter of a deceased sister.

The will was duly admitted to probate, the estate consisting solely of real property. In due course of administration a petition for distribution came on for hearing, and the court determined thereon that the testator had made testamentary disposition of but one half of his estate, and that as to the other half he had died intestate. It accordingly distributed one half thereof to the respondents as devisees under the will, and the other half to the appellants and others, as his heirs, according to the law of succession; but further decreed that all the debts of deceased, and the expenses of administration of the estate, should be borne by, charged to, and paid by that portion of the estate which the testator had not disposed of by his will, and which had descended to these appellants and others, as his heirs at law, thus exempting the portion of the estate devised by the will to the respondents from the payment of any of these charges.

It is from this latter portion of the decree that this appeal is taken by some of the heirs at law, and the correctness of the decree of the court charging the undevised portion of the estate with the payment of the debts and expenses of administration is the only question presented for determination, and must be solved by an examination of the provisions of our Codes upon the subject.

While our attention is directed to sections 1562 and 1643 of the Code of Civil Procedure, and to section 1359 of the Civil Code, as bearing upon the question, we are of the opinion that the matter is settled by the provisions of section 1562 of the Code of Civil Procedure, considered in connection with section 1560 of the same Code. The other sections referred to—while applicable to some extent—are not directly to the point, and are discussed by counsel upon both sides more particularly upon the question whether expenses of administration are to be treated as included within the debts of the estate referred to in these sections.

But, under the construction which we think must be given to sections 1560 and 1562 of the Code of Civil Procedure, cited above—particularly the latter—we do not think it of any moment to a determination of the main point in controversy on this appeal to discuss that question, or to consider the other sections at all.

It is provided by section 1560, above referred to, that if the testator makes provision by his will or designates the estate to be appropriated for the payment of his debts, expenses of administration, or family expenses, they must be paid according to that provision, or out of the appropriated estate as far as the same is sufficient. Section 1562 provides that: "If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter."

The testator, Traver, made no provision by his will for the payment of the debts or expenses of administration, nor did he designate or appropriate any portion of his estate for that purpose. The will in no manner referred to any of these matters. It was entirely silent upon the subject. Now, as we construe the sections just referred to, according to the first, permission is granted to the testator to himself declare by his will what portion of the estate should be used for the payment of the enumerated charges, and the property so designated shall be devoted to that purpose. By the second, if insufficient appropriation is made, the law makes the selection, and the undevised portion of the estate must be appropriated or disposed of for that purpose. Both sections deal with the same subject-matter, namely, the payment of debts, expenses of administration, and family expenses, and, in declaring what portion of the estate shall be used for that purpose, contemplate the existence of either of two general conditions—an ample appropriation for that purpose by the testator, or insufficient appropriation. And while it is true that section 1562 speaks of an "insufficient" appropriation, we do not think that the section should be construed so as to hold that it could only apply in cases where the testator had actually made some, but still an inadequate, appropriation of property from which to make payment. This, in our judgment, would be placing too narrow and restricted an interpretation upon the section, and one not in harmony with the apparent purpose of its enactment. The main purpose of this section apparently is to fix the class of property which shall be disposed of to meet payment, from whatever cause the necessity for its disposition arises, whether from inadequate appropriation for that purpose, or on account of an entire failure of appropriation.

Section 1560 was intended to apply where ample and sufficient appropriation had been made in the will, and, in our opinion, section 1562 was intended to apply in all other cases, no matter from what the insufficiency sprung—whether because the appropriation was too small, or because there was none made.

The fair meaning of the language of the section that, "If the * * * estate appropriated therefor is insufficient to pay its debts, expenses of administration," etc., resort shall be had to that portion of the estate undisposed of for their payment, is that where no estate is appropriated by will, or that which is appropriated is inadequate, such resort shall be had. Where a will fails to make any appropriation to pay the debts and charges against the estate, there is clearly an insufficient appropriation for that purpose. The absence of all appropriation is certainly an insufficient one.

We are of the opinion that the court properly charged the debts and expenses of administration against the property undisposed of by the will, and which descended and was distributed to the appellants as heirs at law of the testator, and the decree appealed from is thereby affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

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145 Cal. 419

CITY OF OAKLAND v. SNOW et al. (S. F. 2,955.)

(Supreme Court of California. Nov. 21, 1904.)

MUNICIPAL CORPORATIONS — OFFICERS — OFFICIAL BOND—DEFALCATION—ACTION—CHARTER —CONSTRUCTION — TRIAL — FINDINGS — EVIDENCE—ADMISSIBILITY—SUFFICIENCY.

1. The charter of the city of Oakland (St. 1889, p. 533) § 42, provides that all fees and other moneys collected by any officer of the city, except the city engineer, shall be paid into the city treasury. Section 44 (page 533) provides that the compensation of the auditor and assessor shall be $3,000 per annum. Section 195 (page 569) provides that no officer shall receive any salary or compensation for any service unless specially authorized by law or by the charter. Section 137 of article 8 (page 558) provides that the general laws concerning the levy and collection of taxes for state and county purposes shall govern in levying and collecting city taxes, and that the officers of the city shall have the same "powers and duties" as county officers, but makes no reference to compensation. *Held*, that a contention that an incumbent of the office of auditor and assessor is entitled to compensation above the salary of $3,000 per annum as assessor, because of the powers and duties conferred on him by section 137, is untenable, especially as the provision of law relating to the collection of taxes and the compensation of assessors is applicable only to certain counties, under Const. art. 11, § 5, requiring the compensation of county officers to be paid in proportion to duties.

2. Under the charter of the city of Oakland (St. 1889, p. 514), there is no enumeration of the several offices of the city, but article 2, headed "Elections," enumerates the officers to be elected, among which is "an auditor, who shall be ex officio assessor." In the article on the "Executive Department," section 40 (page 531) is entitled "Auditor and Assessor," and declares that the auditor shall be ex officio assessor, and then prescribes his duties as assessor and as auditor. Section 44 (page 533), entitled "Salaries of Officers," declares that the compensation of the auditor and assessor shall be $3,000 per annum. In an action against the official and surety on his bond for an alleged defalcation as city assessor, it appeared that he had been duly elected "auditor and ex officio assessor"; that he filed an oath of office, and acted as auditor and ex officio assessor for two years; that the city council fixed his bond at $10,000; that thereafter the bond in suit was executed, reciting his election to that office, and binding the obligors for the faithful performance of the duties thereof. *Held*, that a contention that the bond is void because, under the charter, there is no office of auditor and ex officio assessor, is untenable.

3. The office of assessor is a distinct office from that of auditor, but the duties are required to be discharged by the same person; and hence a contention in an action on the bond of an incumbent of the office of auditor and ex officio assessor that the offices are distinct, and that, though the bond be a valid obligation as to the office of auditor, it did not cover the duties of assessor, and that, as the complaint charged only a violation of duty as assessor, there can be no recovery, is without merit.

4. A finding in an action against the official and the surety on his bond for a defalcation as assessor that the official collected money "as assessor," or "as ex officio assessor," is of the same legal import; and the finding that he "failed to perform the official duties of such office of ex officio assessor" is equivalent, under the charter (St. 1889, pp. 531, 533, 534) §§ 40, 44, 45, to a finding that he failed to perform that portion of the duties of the office to which he was elected, and for which the bond was given.

5. Whether in such action the official was entitled to compensation under the charter (St. 1889, pp. 531, 533, 534, 558, 569) §§ 40, 42, 44, 45, 137, 195, for his services in the collection of taxes, is a question of law; and hence an allegation in the answer that the incumbent retained the moneys sued for, because of his right to such compensation, did not make an issue of fact requiring a special finding.

6. The declaration of the auditor and assessor prior to his election that he intended to claim commissions on the sums collected as assessor did not confer on him a right to the commissions.

7. The fact that he previously retained commissions on sums collected as assessor did not confer on him a right to the commissions, as against the provisions of the charter.

8. The fact that some of the city officials had approved of his act, or consented thereto, gave him no such right.

9. Nor the fact that it was a matter of common notoriety.

10. In an action against a city auditor and ex officio assessor on his bond, where the amount which he collected was shown, and the amount which he paid into the treasury during the term of his office was also shown, and there was neither allegation in the answer, nor proof on the part of defendants, that any further amount had been paid, a finding that the excess of the

amount paid in by the official had been appropriated to his own use was sustained by the evidence.

11. Where the official, in an action on his bond, answered, admitting that he and the surety executed the bond in suit, and the surety, in its answer, admitted that the official, as principal, and it, as surety, made and signed a certain bond, and that the official took the bond away—not, however, setting forth the character of the bond—but, on the ground that it had no information or belief on the subject, denied that the bond relied on in the complaint correctly set forth the bond signed by it and the official, without alleging wherein it was incorrect, the answers were equivalent to an admission of the execution of the bond in all respects according with the one counted on by plaintiff, except the omission or misspelling of some immaterial word.

12. In an action on an official bond of a municipal officer, the inability of the plaintiff to produce the bond at the trial and its loss were shown. The official testified that he signed an official bond for the period in question, with the other defendant as surety. A witness, who was mayor, testified that the official gave him the bond, and that witness gave it to the city clerk, by whom it was copied into the register of official bonds. The copy was introduced in evidence. *Held* sufficient, together with the presumption that official duty has been regularly performed, to show a delivery of the bond to the city by the official.

13. The bond of an officer of a municipal corporation is a valid obligation, as against the official and his surety, without any approval by the mayor or city attorney.

Commissioners' Decision. Department 1. Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by the city of Oakland against Roland W. Snow and another. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

T. C. Coogan and C. H. Wilson, for appellants. James A. Johnson, City Atty., and Seymour W. Conlan, Asst. City Atty., for respondent.

HARRISON, C. The plaintiff seeks by this action to recover from the defendants, upon a bond executed by them for the faithful performance by the defendant Snow of his official duties, the sum of $1,868.32, alleged to have been received by him in his official capacity during his term of office and appropriated to his own use. Snow held the office of "auditor and assessor" of the plaintiff for two years, during the time for which the bond was given, and the moneys which the plaintiff seeks to recover are a portion of the taxes upon personal property collected by him by virtue of his office. Judgment was rendered in favor of the plaintiff, and the defendants have appealed therefrom, and also from an order denying a new trial.

The collection of the moneys by Snow is not controverted, but the appellants claim that he has the right to retain the amount sued for, as the commission allowed by law for their collection. On the other hand, the plaintiff insists that it was his duty to pay them into the treasury immediately upon their collection. The correctness of the judgment depends upon the construction to be given to various provisions of the charter of the city of Oakland (St. 1889, p. 514).

1. Section 44 of the charter (page 533) provides: "The compensation of officers and employees of the city shall be per annum as follows: * * * Auditor and assessor three thousand dollars." And section 195 of the charter (page 569) declares: "No office shall be created nor shall any person be employed in any capacity, nor shall any officer, clerk or employee receive any salary or compensation for any service of any kind unless the same is specially authorized by law or by this charter." Section 42 (page 533) declares: "All fees and other moneys received or collected by any officer, agent or employee of the city (excepting only such fees as the city engineer may be authorized by ordinance to collect) shall be paid by such officer, agent or employee each month, or as much oftener as the council may require, into the city treasury for the use of the city." Under these provisions, it is very clear that unless there is some law or some provision in the charter by which the defendant Snow is specially authorized to receive some compensation for his official services as such officer, other than the salary above provided, he was not authorized to retain any moneys collected or received by him, but was required to pay them into the city treasury. The provision that "all moneys collected by any officer of the city shall be paid by such officer into the city treasury for the use of the city" is as comprehensive and as exclusive of any right to retain any portion of such moneys as is the provision of the charter of San Francisco, considered in Dodge v. City and County of San Francisco, 135 Cal. 512, 67 Pac. 973.

The appellants, however, contend that, in addition to his salary, he is entitled, under the provision of section 137 of the charter (page 558) to compensation for his services in collecting taxes upon personal property at the rate of 6 per cent. upon the amount so collected. That section is as follows: "Except as in this article otherwise provided, the assessment of property taxable in the city for municipal purposes, the equalization of assessments and collection of taxes, and the sale of property for unpaid taxes, and the redemption of property sold for taxes, shall be made and had at the same time and manner, and with like effect as now or may be hereafter provided by law for the assessment of property, equalization of assessments, levy and collection of taxes, and sale of property for unpaid taxes for state and county purposes and redemption thereof; and all provisions of law applicable to such assessment, equalization, levy, collection and sale for state and county purposes are hereby applied to and shall be the law governing such assessment, equalization, levy, collection and sale for municipal purposes; and the respective officers of the city shall have, possess, and perform the same powers and duties in all matters concerning revenue and taxation for municipal purposes as are by law conferred or imposed upon county officers in matters concerning revenue and taxation for state and county purposes; and to that end: First. All powers and duties so by law conferred or imposed upon the county assessor, are hereby conferred and imposed upon the city assessor. * * * Sixth. All powers and duties so conferred or imposed upon the county clerk or county auditor are hereby conferred and imposed upon the city clerk and city auditor."

By this section the framers of the charter, instead of setting forth in detail the several steps to be taken for raising revenue for the city, adopted certain provisions of the general laws of the state upon the same subject. They have provided that the provisions of the general laws which may from time to time be prescribed for taking certain proceedings in levying and collecting taxes for state and county purposes shall be the law governing such proceedings in levying and collecting taxes for municipal purposes, and that the said proceedings in reference to municipal taxes shall be taken "at the same time and manner and with like effect" as may be prescribed by law for such proceedings in reference to state and county taxes, and that in taking these proceedings the officers of the city shall have the same "powers and duties" as are by law given to county officers in matters concerning taxation for state and county purposes.

The incorporation into a statute of the terms of a prior statute merely by reference thereto is governed by the same principles in interpretation as govern the interpretation of statutes, the primary object in all cases being to ascertain and carry out the intention of the Legislature. Mr. Endlich says (Interpretation of Statutes, § 73), "The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature has in view;" and again, in section 101, states as the rule, "An act adopting another by reference does not adopt it beyond the purposes of the new act." Mr. Sutherland (Statutory Construction, § 241) says, "The application of particular provisions is not to be extended beyond the general scope of the statute unless such extension is manifestly designed;" and in section 257 says, "By the adoption of another statute, only such portion is in force as relates to the particular subject of the adopting act." The rule was stated by Ashurst, J., in Rex v. Justices of Surrey, 2 T. R. 510, to be that "all the general powers and provisions given and made in acts in pari materia are to be considered as incorporated into the new statute, but that such provisions as are always considered as special provisions shall not." And in Williams v. Ellis, 6 Q. B. Div. 176, it is said, "Where the words employed by the Legislature do not directly apply to the particular case, we must consider the object of the act." See, also, Queen v. Badcock, 6 Q. B. 787; Jones v. Dexter, 8 Fla. 276; Matthews v. Sands, 29 Ala. 136; Succession of D'Aquin, 9 La. Ann. 400.

There is nothing in section 137 aforesaid by which any officer of the city is "specially authorized" to receive compensation for his services, nor does the section make any reference to the compensation of officers. Article 8 of the charter, in which this section is contained, is headed "Revenue and Taxation," and the manifest purpose of the framers of the charter in inserting this section therein was to provide a mode for raising revenue for the city from taxes upon property. The purpose of giving to the proceedings in reference to municipal taxes "like effect" to that given in the same proceeding in reference to state and county taxes, and the clothing of municipal officers with the same "powers and duties" in reference thereto as are given to county officers, is that by these proceedings a valid lien or charge for the tax may be imposed upon the property assessed, and that the officers may have ample authority for enforcing the collection of the tax. It would be an unwarranted as well as an unnatural construction to hold that by the use of these terms the framers of the charter intended to make any provision for the compensation of the officers.

Neither can the clause in the section declaring that all the provisions of law applicable to the collection of taxes for state and county purposes shall be the law governing such collection for municipal purposes be construed as authorizing the municipal officers to receive compensation for their services in reference thereto. There can be no presumption that it was intended to incorporate into the charter the provisions of law upon any subject other than those which are therein enumerated. By designating certain proceedings connected with taxation, in reference to which it has adopted the provisions of the general law applicable thereto, there is necessarily excluded from such adoption any provision applicable to proceedings not designated; and it is not to be held that by specifying the "collection" of taxes it has also adopted a provision of law for the compensation of officers for their collection, even though such provision for compensation is found in the same statute with the law for the collection of taxes. There is no necessary connection between the collection of taxes and the compensation of officers for their collection, nor do the provisions of law "applicable" to their collection presumptively include a provision for such compensation. These provisions for the collection of taxes are directed to the relation between the officer and the taxpayer, and create the "power and duty" of the officer in reference to the collection of the tax.

The provisions of law applicable to the levying and collection of taxes are found in the Political Code, but the provisions for the compensation of officers are not contained in that Code. Section 3829 of this Code, under which the appellants claim the right to compensation, does not itself fix the compensation, but refers to the county government act for the purpose of ascertaining whether any compensation for such services shall be received. This section is not to be held as containing any provision of law applicable to the "collection" of taxes merely because it is found in a chapter relating to that subject, but its character is to be determined by the purpose which is expressed in it, and that purpose is limited to the compensation for the collection of taxes which is contained in the county government act. By reference to section 215 of the county government act (St. 1897, p. 572, c. 277), it is seen that in a majority of the counties of the state compensation is allowed, but that in some counties the assessor is not entitled to any compensation for this service.

It cannot, therefore, be held that any portion of this section of the county government act was incorporated into the charter of Oakland by reason of the terms of the above section 137. Not only is there not in it any general provision of law applicable to the collection of taxes, but the provision therein for compensation upon which the applicants rely is not operative throughout the state, but is a special provision fixing the compensation of the assessor in certain counties. It was enacted by the Legislature in conformity with the provisions of the Constitution (article 11, § 5) requiring the compensation of county officers to be regulated "in proportion to duties," and, as it cannot be determined that the provision for those counties in which compensation is allowed is more entitled to consideration than the provision for those in which it is denied, it cannot be held that any portion of the section is available to the appellants.

2. It appears from the record herein that at the city election in 1897 the appellant Snow received a majority of the votes cast "for auditor and ex officio assessor," and was declared elected to that office, and that a certificate declaring that he was duly elected auditor and ex officio assessor of the city of Oakland was issued to him by the city clerk; that he thereafter took and filed an oath that he would faithfully discharge the duties of auditor and ex officio assessor of the city of Oakland to the best of his ability, and that he acted as auditor and ex officio assessor of the city of Oakland from April 5, 1897, to April 1, 1899; that the common council of the city fixed the bond to be given by the "auditor and ex officio assessor" at $10,000; that thereafter, and before entering upon the duties of the office, he executed to the city of Oakland a bond, with the other appellant herein as surety, in which, after reciting that the appellant Snow was on the 8th day of March, 1897, elected to the office of auditor and ex officio assessor in and for the city of Oakland, they bound themselves in the penal sum of $10,000 that he would well and faithfully perform all official duties required of him by law, and would well and faithfully execute and perform all the duties of such office of auditor and ex officio assessor required by any law to be enacted subsequent to the execution of the bond.

It is contended by the appellants that under the charter of Oakland there is no office of "auditor and ex officio assessor," and for that reason the bond sued upon is void; and they have cited certain cases in support thereof which arose where the appointment of the officer was made without any authority therefor, or where the office itself had never been authorized by law. It may be conceded that a bond given for the faithful performance of the duties of an office that has no existence would not create any obligation. If there is no office, there can be no official duty to perform, and no violation of official duty. The cases cited by the appellant upon this point are therefore inapplicable to a case where the bond sued upon has been given for the faithful performance of the duties of a legally existing office by one who has been properly appointed or elected thereto.

It is further contended by the appellants that under the charter of Oakland the offices of auditor and assessor are distinct; that, if it be assumed that the bond in question is a valid obligation for the faithful performance by Snow of his duties as auditor, it does not cover his duties as assessor; and that, as the complaint charges only a violation of his duty as assessor, there can be no recovery upon the bond. The cases cited by the appellants in support of this proposition arose where there were two legally existing and separate offices held by the same individual, and it was held that, in the absence of a statute making his bond given for one office cover his duties and liabilities in both, his bond would cover only his defalcations in the office for which it was specifically given. In the revenue act of 1854 (St. 1854, p. 108, c. 63) the Legislature provided that in the several counties of the state the sheriff should be the tax collector; and it was held in People v. Edwards, 9 Cal. 286, that, inasmuch as the Constitution required a tax collector and sheriff to be elected in each county, it had thereby created the two offices, and, although the Legislature might provide that the same person should perform the duties of each office, it could not abolish either of the offices, and that the two offices were not by such provision blended into one. See Lathrop v. Brittain, 30 Cal. 684. It was under this provision of the Constitution that it was held in People v. Ross, 38 Cal. 76, that the bond given by the defendant as surety did not cover his defalcation as tax collector. In the county government act (St. 1883, p. 315,

c. 75, § 57) the Legislature specifically named the auditor and assessor as distinct officers of the county, but authorized the board of supervisors of any county to elect to consolidate the duties of the two offices. Section 59, however, provides that when they are so consolidated the person elected must give the bond required for each office.

There is no enumeration in the charter of Oakland of the several offices of the city, but article 2, headed "Elections," which enumerates the officers to be elected, provides, "At each general election there shall be elected: * * * An auditor who shall be ex officio assessor." In the article upon the "Executive Department," section 40 is entitled "Auditor and Assessor," and declares, "The auditor shall be ex officio assessor," and then prescribes the duties required of him "as assessor," and his duties "as auditor." Section 44, entitled "Salaries of Officers," declares: "The compensation of officers and employees of the city shall be per annum: * * * The auditor and assessor three thousand dollars." Section 45, entitled "Official Bonds," declares: "Every officer provided for by law shall, before entering upon the duties of his office, file an official bond in such sum as the council may direct." Under these provisions, it must be held that the charter of Oakland has not created the office of assessor as a distinct office from that of auditor, but that, by requiring the duties of such functionaries to be discharged by the same person, it has created a single office for the purpose of discharging those functions, which is styled in the charter "auditor and assessor"; that, as there is no office of assessor distinct from the office of auditor, Snow was not required to give a bond for the faithful discharge of his duties as auditor, and another and separate bond for his duties as assessor, but that the bond set forth in the complaint was sufficient, and applies to all of the duties required of him by virtue of his official position, and covers his defalcations in the moneys collected by him as charged in the complaint and found by the court. See People v. Leet, 13 Ill. 269.

The designation of Snow in the instrument as "auditor and ex officio assessor," instead of "auditor and assessor," is a trivial and harmless misdescription, which does not affect the validity of the obligation. The charter itself declares that the auditor shall be ex officio assessor, and whether he styles himself "auditor and assessor," or "auditor and ex officio assessor," is immaterial. He is none the less assessor because he is only ex officio assessor, and being styled in the instrument "auditor and ex officio assessor" is the same in legal effect as if styled "auditor and assessor." The bond that is given is the obligation of the individual whose duty it is to perform the duties of the office in his official capacity. The moneys collected by Snow were received by him by virtue of the official position to which he had been elected, and they are public moneys belonging to the city. In so holding, there is no infringement of the rule that a surety is entitled to stand upon the strict letter of his bond. The provision of the charter defining the duties of the officer are read into the bond, and are to be construed in connection with it. The obligation of the surety is not extended beyond the fair import of the terms which it has employed in the instrument, but the meaning of those terms is to be construed in accordance with recognized rules for the interpretation of contracts. See People v. Breyfogle, 17 Cal. 504.

Upon the same consideration, the objection of the appellants that the findings do not support the judgment must be overruled. Findings, as has been often decided, are not to be subjected to the test of a special demurrer, but any ambiguity or uncertainty in them is to receive such construction as will sustain, rather than defeat, the judgment rendered thereon. The office of "auditor and assessor," which was held by Snow, required of him the faithful performance of all the duties which the charter required of the incumbent of that office, irrespective of the particular designation of such duties, or the capacity in which he was required to perform them; and the bond which was given by him extended to all of the duties required of him by virtue of his official position, whether these duties are required of him "as auditor" or "as assessor." The finding of the court that he collected the money "as assessor," or "as ex officio assessor," is of the same legal import; and the finding that he "failed to perform the official duties of such office of ex officio assessor" is equivalent to a finding that he failed to perform that portion of the duties of the office to which he was elected, and for which the bond was given. Whether Snow was entitled to compensation for his services in the collection of taxes is a question of law, and the allegation in the answer of the defendants that he retained the moneys sued for by reason of such right did not make an issue of fact which required a special finding, but is the question to be determined upon a consideration of the entire case.

3. There was no error in excluding the evidence offered on behalf of the defendants for the purpose of showing that the plaintiff had consented that Snow might have the compensation claimed by him. It was not competent for the city to consent to a violation of its charter, nor could the acquiescence of its officers confer upon Snow a right to compensation which the charter forbids him to receive. His declaration prior to his election that he intended to claim the commission, or the fact that he previously retained like commissions, or that some of the city officials had approved of his act or consented thereto, or that it was a matter of public notoriety, did not, as against the provisions of the charter, confer upon him a right to the commissions. The plaintiff could not be estopped from claiming the money collected by him by reason of an

erroneous interpretation of the provisions of the charter by its officials. The objection in the brief of the appellants to the action of the court in striking out the portion of the answer of Snow relative to this issue evidently results from an inadvertence of the record. Although the court did at an early stage of the case, upon motion of the plaintiff, strike this clause out, it afterwards, before the trial of the cause, vacated this order.

4. The finding that Snow had failed to pay into the treasury the amount for which the judgment was given is sustained by the evidence. The amount which he collected was shown, and the amount which he paid into the treasury during the term of his office was also shown. There was no allegation on the part of the defendants, or evidence in their behalf, that any further amount had been paid. The fact that he collected this amount of money in excess of the amount paid in by him sustained the finding that he appropriated it to his own use. The finding that the bond was executed and delivered to the plaintiff was fully sustained by the evidence and the admission in the pleadings. Snow, in his answer, admits that he and the surety company executed it; and the surety company, in its answer, admits that Snow, as principal, and it, as surety, made and signed a certain bond, and that Snow took the bond away. It does not set forth the character or form of this bond, but, upon the ground that it has no information or belief upon the subject, denies that the bond set forth in the complaint correctly sets forth the bond signed by it and Snow, but does not allege wherein it is incorrect. Its averment in this respect is equivalent to an admission of the execution of a bond in all respects according with that set forth in the complaint, except the omission or misspelling of some immaterial word. Upon the same grounds it denies the delivery of the bond to the city by Snow. The inability of the plaintiff to produce the bond at the trial and its loss were clearly shown. Snow testified that he signed an official bond for that year, with the other defendant as surety. Mr. Thomas, who was mayor, testified that Snow gave him the bond in question, and that he gave it to the city clerk, by whom it was copied into the register of official bonds. This copy was introduced in evidence. To this testimony must be added the presumption that official duty has been regularly performed. The bond was a valid obligation of the defendants without any approval by the mayor or city attorney.

We advise that the judgment and order denying a new trial be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

145 Cal. 534

PARKE & LACY CO. v. SAN FRANCISCO BRIDGE CO. (S. F. 3,090.)*

(Supreme Court of California. Dec. 5, 1904.)

CONTRACTS—CONSIDERATION—PAST SERVICES—EVIDENCE—PLEADING.

1. Where, in an action on a contract for commission for services rendered in procuring a government contract, the case was tried as if the fact of the continued efforts of plaintiff as required by the contract was at issue, defendant could not on appeal raise the question of the insufficiency of the complaint in averring that plaintiff complied with its agreement to continue in its efforts to secure the contract.

2. Where, in an action on a contract for services rendered in procuring government work, defendant introduced evidence that plaintiff had done nothing under the contract, it was not error to admit letters written by plaintiff after the making of the contract, not as evidence of the truth of their contents, but as evidence of acts tending to rebut defendant's evidence.

3. Where, in an action on a contract for services rendered in procuring government work, a witness testified that plaintiff had not paid or given anything to defendant either before or at the time of the contract, and there was no pretense by plaintiff that there was any consideration for the contract other than its services in procuring the government work, it was not error to sustain an objection to a question asked the witness as to whether defendant received any consideration for the contract.

4. Where one rendered services in procuring for a contractor government work, without expectation of receiving any compensation therefor unless the work was procured, a contract thereafter made, which provided for payment on the work being procured, was a contract which merely put into a written form what was agreed on as to the future contingent compensation, and was not open to the objection that the past services furnished no consideration for the promise to pay in the future therefor.

Department 2. Appeal from Superior Court, City and County of San Francisco; Wm. R. Daingerfield, Judge.

Action by the Parke & Lacy Company against the San Francisco Bridge Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. Percy Wright, for appellant. H. A. Powell, for respondent.

McFARLAND, J. This is an action to recover of defendant $1,750, alleged to be the balance due of a commission of 5 per cent. on $70,000, arising out of the written contract between plaintiff and defendant set out in the complaint. Judgment went for plaintiff as prayed for, and, from the judgment and the order denying a motion for a new trial, the defendant appeals. Each party is a corporation.

The written contract above mentioned was executed on the 24th day of April, 1896. It recites that plaintiff, "party of the first part," through its agents, Richardson & Kelton, in Guatemala, has been acting as agent for the defendant, "party of the second part," to secure to the latter a contract with the government of Guatemala for furnishing a hydraulic dredge, and also a contract for the dredging in whole or in part of the harbor of Istapa for said government, and that said contracts are likely to be awarded to the party of the second part. The contract then proceeds as follows: "Now therefore: In consideration of the services already rendered by the party of the first part, and such further services as it may render in the matter, and for other good and valuable consideration, the party of the second part hereby agrees that in the event that the said contracts, or either of them, are awarded to the party of the second part, either direct or through any other person or contractor, it, the said party of the second part, will pay unto the party of the first part a sum equal to five (5) per centum of the total gross moneys received by the party of the second part on account of said contract or contracts. Said payments to be made to the party of the first part as payments are made to the party of the second part, and are to be in full compensation to the party of the first part for its time, trouble and expense in respect to the said contracts. The party of the first part agrees to continue in its efforts to secure the said contracts for the party of the second part, and to do everything in its power towards this end." It is then averred in the complaint that the said contracts were awarded to defendant by the government of Guatemala on or about the 29th day of July, 1896; that defendant had received on said contracts the sum of $70,000, and had paid one-half of the said 5 per cent. thereon, to wit, $1,750, and no more, and has refused to pay any of the balance thereon; and judgment is prayed for the $1,750 remaining unpaid. The court found these averments to be true, and rendered judgment for the plaintiff for the balance of $1,750, and the evidence amply supports the findings.

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*Rehearing denied January 4, 1905.

The answer contains an averment that the agreement of plaintiff was to influence the officers of the government of Guatemala corruptly, or in some improper way, and it seems to be contended by appellants that on account of this contemplated improper influencing of said officers the contract was void as being against public policy; but the court found that this averment was not true, and the finding is fully justified by the evidence.

Appellant contends for a reversal of the judgment upon the ground of the insufficiency of the complaint, because, as is claimed, there is no averment that after the execution of the written contract on June 24, 1896, respondent complied with its agreement to "continue in its efforts to secure the said contract." It is doubtful if such an averment was necessary, considering the fact that, after what respondent had already done, it was to receive the 5 per cent. if the contract should be secured "either direct or through any other person or contractor." But, at all events, the case was tried as if the fact of the continued efforts of respondent was at issue, and appellant introduced a considerable amount of evidence tending to show that respondent had not done anything of value toward securing the contracts from the government of Guatemala after the date of the contract between appellant and respondent of April 24th. There was no demurrer to the complaint. There was an objection made by appellant to a letter offered in evidence by respondent, because it was dated after April 24, 1896; but that was in rebuttal, and after the appellant itself had introduced evidence tending to show that respondent had done nothing after that date. We think that as to this point the case is within the rule, cited in numerous decisions, that when a case has been tried on the theory that a certain issue was before the court, the point that the issue had not been properly presented in the pleadings will not be heard on appeal.

There was no error in admitting certain correspondence between respondent, who resided in San Francisco, and its agents, Richardson & Kelton, at Guatemala. Appellant had introduced evidence to the point that respondent had done nothing in the matter of procuring contracts from Guatemala, and the ruling of the court was that the letters were admissible, not as evidence of the truth of their contents, but merely as acts tending to refute the evidence of appellant that respondent had done nothing about the matter of procuring the contracts. Moreover, these letters were shown to appellant, and answers from respondent to its agents at Guatemala were in great part dictated by appellant. This correspondence, both before and after the 24th day of April, was admissible; for in the answer it was denied that there was any consideration whatever for the contract, and appellant's evidence had been to the point that respondent had not done anything in the premises either before or after the date of the contract. For the same reason it was not error to admit testimony that other letters were written pertaining to the dredging contract, although the letters themselves were not formally introduced. They were in court, subject to appellant's inspection.

There was no prejudicial error in sustaining respondent's objection to the general question, asked by appellant of a witness, whether the appellant ever received "any consideration for the agreement of April 24, 1896." The witness had already testified that the respondent had not paid or given appellant anything either before or at the time of said agreement, and there was no pretense by respondent that there was any consideration for the contract other than its alleged services in procuring the dredging contracts from Guatemala. Therefore the only question before the court touching the consideration was as to respondent's said services, and each party had full opportunity to present its evidence on that issue, and the appellant could not have been prejudiced by the ruling.

Appellant contends that, even if respondent rendered any services before the execution of the written contract of April 24th, they were past services, and did not furnish any consideration for appellant's promise to pay in the future 5 per cent. of the moneys which should be received from Guatemala; but we do not think that this contention is maintainable. It goes upon the theory that a past executed consideration will not support any promise different from that which the law implies—which is a promise to pay in præsenti, on request—and that an executed consideration will not support a promise to pay in future. Whatever may be said of this rather abstruse doctrine, it is not applicable to the case at bar. Here, as appears from the testimony, it was not expected that the respondent was to receive any compensation unless the dredging contracts were secured; and by the contract of April 24th the parties merely put into a permanent written form what they then finally agreed upon as to the future contingent compensation.

There are no other points calling for special notice, and we see no reason for reversing the judgment or the order denying a new trial.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

In re BLAKE'S ESTATE. BROWN v. BROWN et al. (L. A. 1,545.) (Supreme Court of California. Nov. 10, 1904.) Department 2. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge. Judicial settlement of the estate of Anna S. C. Blake, deceased. From a judgment in favor of Allen A. Brown and others, Philip King Brown appeals. Affirmed. Richard C. Harrison, for appellant. Richards & Carrier, for respondent.

PER CURIAM. The situation briefly is this: Both sides agree that whatever rights appellant has come from the decree of partial distribution. His title is absolutely fixed by that. The decree of final distribution does not purport, in terms, to affect this property and this right, but it merely makes provision for whatever undiscovered property in the estate there may be. If, by any chance, any part of this Miradero estate should ever fall into the residue of the estate, the decree of final distribution would operate upon that. If not, it would not operate. That is a matter for future consideration, and is to be governed wholly and entirely by the terms and language of the decree of partial distribution under which this appellant takes. Therefore the judgment appealed from should be affirmed, and it is so ordered.

DE LEONIS v. WALSH. (L. A. 1,504.) (Supreme Court of California. July 18, 1904.) In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge. Action by M. E. C. De Leonis against E. E. Walsh. Order of submission on points and authorities entered nunc pro tunc. For opinion in department, see 73 Pac. 813. Dunnigan & Dunnigan, for appellant. H. H. Appel and Horace Bell, for respondent.

PER CURIAM. The following order having been made on June 6, 1904, and not having been entered, it is ordered that the same be now done nunc pro tunc as of date of June 6, 1904: "The appellant moves to submit the case upon his points and authorities, upon the ground that the respondent had failed to file points and authorities within the time allowed therefor under rule 5 [64 Pac. viii]; and upon the said motion it is ordered that the said cause be entered upon the submission calendar provided for in rule 3 [64 Pac. viii]."

144 Cal. 770

PEOPLE v. MASON. (L. A. 1,451.) (Supreme Court of California. Sept. 21, 1904.) Department 2. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge. Proceeding by the people against Alfred D. Mason. From the judgment, defendant appeals. Affirmed. F. D. Brandon and Edwin A. Wells, for appellant. U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Deputy Atty. Gen., and Cassius Carter, Dist. Atty, for the People.

PER CURIAM. This case is in principle similar to that of People v. Norris (L. A. 1,336, just decided) 77 Pac. 998; and, on the authority of that case, the judgment is affirmed.

POTTER v. STATE. (Sac. 1,194.) (Supreme Court of California. Sept. 19, 1904.) In Bank. Appeal from Superior Court, Sacramento County; G. W. Nicol, Judge. Action by Robert P. Potter against the state. From a judgment in favor of plaintiff, the state appeals. Affirmed. U. S. Webb, Atty. Gen., and Geo. A. Sturtevant, Deputy Atty. Gen., for the State. J. B. Curtin, for respondent.

PER CURIAM. This action was brought under the provisions of an act of the Legislature of the state of California, approved March 23, 1901 (St. 1901, p. 646, c. 214), entitled "An act authorizing suits against the state on claims or demands arising under an act entitled 'An act fixing a bounty on coyote scalps,' approved March 31, 1891 [St. 1891, p. 280, c. 198], and regulating the proceedings therein." Judgment went for the plaintiff in the court below, and the defendant appeals therefrom on the judgment roll alone. The action is the same in character as that of Bickerdike v. State (just decided, Sac. No. 1,237) 78 Pac. 270, and the complaint is substantially the same as in that case. The points presented on behalf of the appellant here were also urged in that case, and the opinion filed therein fully answers and

disposes of appellant's contention in that case here. On the authority of Bickerdike v. State, the judgment herein is affirmed.

SAN FRANCISCO LAW & COLLECTION CO. v. STATE. (Sac. 1,278.) (Supreme Court of California. Sept. 20, 1904.) In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge. Action by the San Francisco Law & Collection Company against the state. From a judgment for plaintiff, and an order denying a motion for a new trial, the state appeals. Affirmed. See 74 Pac. 1047. U. S. Webb, Atty. Gen., and Geo. A. Sturtevant, Deputy Atty. Gen. (Devlin & Devlin, of counsel), for the State. T. Carl Spelling, for respondent.

PER CURIAM. Plaintiff obtained a judgment against the defendant in an action brought under the provisions of an act of the Legislature authorizing suits against the state on claims arising under "An act fixing a bounty on coyote scalps," approved March 31, 1891 (St. 1891, p. 280, c. 198). From that judgment, and an order denying its motion for a new trial, defendant appeals. These appeals present no points which were not advanced and insisted on by appellant in an appeal theretofore taken in the same character of action entitled Bickerdicke v. State (Sac. No. 1,237, which has just been decided) 78 Pac. 270. The similar objections urged herein are there fully discussed and disposed of adversely to the appellant; and, on the authority of that decision, the judgment and order appealed from are affirmed.

Ex parte ZABALA et al. (Cr. 1,207.) (Supreme Court of California. Dec. 5, 1904.) In Bank. Application by P. E. Zabala and J. J. Wyatt for writ of habeas corpus to be directed against H. V. Trafton, sheriff of Santa Cruz county. Petitioners discharged. C. F. Lacey, for petitioners.

BEATTY, C. J. The petitioners were in the custody of the sheriff under an order adjudging them guilty of a contempt of court. It is conceded that the return to the writ does not sustain the jurisdiction of the court to make the order. The petitioners are discharged from custody.

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145 Cal. 555

AMBROSE v. HYDE. (S. F. 3,045.)

(Supreme Court of California. Dec. 13, 1904.)

ACTION FOR RENT—EVIDENCE—CONVERSATIONS.

1. In an action for rent plaintiff cannot recover, the evidence not showing an express contract to rent the premises for the period sued for, there being no evidence of the value of the use and occupation, and, if there was a tenancy by operation of law by reason of a holding over, there being no evidence of what was the rent under the previous lease.

2. In an action for rent, conversations between plaintiff and the person who had formerly rented the premises to defendant, and between them and third persons, relative to rental thereof, are not admissible against defendant, who was not present at such conversations, and knew nothing about them.

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Thomas Ambrose against F. A. Hyde. Judgment for defendant. Plaintiff appeals. Affirmed.

A. Morgenthal, for appellant. Leon Samuels, for respondent.

LORIGAN, J. Plaintiff sought in this action to recover the sum of $500, in which amount he alleged the defendant was indebted to him on October 1, 1899, for rent of certain grazing lands in Contra Costa county for the year commencing October 1, 1898. The answer of the defendant was a denial of all the allegations of the complaint. Judgment went for defendant, and from it and an order denying his motion for a new trial plaintiff appeals.

The court made a general finding in favor of defendant, which was, in effect, that he was not indebted to the plaintiff on October 1, 1899, or at any other time, in any sum whatever, and this finding is attacked as not sustained by the evidence. As far as this point relates to the testimony in the case bearing directly upon any negotiations for the rental of this property entered into between the plaintiff and the defendant, but little discussion is necessary. The only evidence in the case bearing upon it was that of the parties to the action themselves. The plaintiff testified that the defendant, in his office in San Francisco, October 1, 1898, made a verbal agreement with him to rent the land for a year at a rental of $500. This defendant denied, claiming that he positively declined to rent for a year (he was then in possession of the property), but made overtures to plaintiff for a lease of three or five years, and, being unable to secure it, left the premises. In this conflicting condition of the evidence the lower court credited the testimony of the defendant, and, as so credited, it justified the finding of the court, and under the well-recognized rule the finding is conclusive upon us.

Appellant contends, however, that the evidence shows that the defendant became a tenant of the premises under him for the year alleged by operation of law, and hence that the finding is not sustained by the evidence, but is contrary to it. On this point the evidence shows that the premises alleged to have been leased were, at all the dates involved in this controversy, owned by one Dr. Posey, the plaintiff having a mortgage on them. In 1897, Dr. Posey being away, his wife leased the premises to some third parties for a term to end October 1, 1898, and from these parties the defendant sublet them for a few months towards the close of the term, and was in possession when negotiations were opened between plaintiff, who had authority from Dr. Posey to rent the place and apply the rents on his mortgage, and the defendant, relative to a further lease. Pending these negotiations the defendant remained in possession of the premises and occupied them for several months after the yearly lease under which he sublet had expired, and it is from this continued occupation that plaintiff insists that by the operation of law (section 1161, subd. 2, Code Civ. Proc.) the lease was renewed for a year upon the same terms as the lease for the previous year. This section creates a presumption of law merely, and it is always permissible for either of the parties to a lease to show circumstances tending to rebut the legal implication arising thereunder from continuous occupation of the premises after the expiration of the original term. To what extent, however, the negotiations between plaintiff and defendant in the present case, looking to a lease for several years instead of for one year, was effective to rebut this presumption, or whether the section has any application to the facts in the case at bar under respondent's contention that it has not, we are not called on to determine, because, assuming that the section does apply, still there is not a particle of evidence in the case to show what the terms of the previous lease were as to the amount of rental to be paid under it. All that appears is that Mrs. Posey made a lease for less than a year to certain parties from whom the defendant sublet, but what rent the original lessees agreed to pay, or the defendant under them, is nowhere mentioned in the record, nor from the evidence can any fair or reasonable inference be deduced upon the subject. There is nothing to show that the rental for the previous year was $500, or any other sum whatever. In fact, it is apparent from the record that the case was tried upon the theory that there was an express contract with the defendant to rent the premises for a year from October 1, 1898, for $500, and this was the point to which the evidence was mainly addressed. The matter of the previous lease arose incidentally in the case. Nothing was shown as to the amount of rent agreed to be paid under it, and hence the claim of a tenancy by operation of law for another year, and liability for the same rental sum as was provided to be paid in the former lease, is presented on this appeal without any evidence appearing in the record as to what the previous rental was, and the absence of this essential evidence is fatal to the claim.

Appellant insists that the evidence in the case shows that he was entitled to a judgment for at least some amount against the defendant. While it is not very clear upon what theory this claim is based, we will assume that it is asserted upon the ground that, as the defendant remained in possession for some months after the lease under which he had sublet had expired, he was, at least, liable for the value of the use and occupation of the premises for the period of time he remained on them subsequent to the expiration of that lease. The conclusive answer to this claim, on the merits, is that he offered no proof whatever on that subject. He now insists that a statement contained in a letter written by the defendant to him that he was ready to pay the rental for the time he used the place supports his contention. But the strongest effect that can be given to this statement is that it was a direct acknowledgment by the defendant of his liability for rental during that period; a liability which the law fixed upon him independent of his acknowledgment. There was no statement in the letter as to what that rental was, or rather as to what defendant considered was the value of the use and occupation of the premises during the term defendant occupied it. This was the essential matter to be proven, and plaintiff failed to make any proof of it. He not only did not attempt to offer any competent evidence upon the subject, but, when defendant sought to offer it strenuously and successfully objected to its being accepted.

Appellant presents several rulings of the court sustaining objections to questions asked of witnesses by him, and striking out testimony on motion of respondent, and assigns them as error. These rulings were so clearly right that it would serve no useful purpose to particularly refer to them. Mentioned generally, they applied to purported conversations and communications between Mrs. Posey and the appellant concerning the rental of the premises to the defendant, and Mrs. Posey's conversations with persons who applied to her to rent them. The testimony showed that the defendant was not present at any of these conversations, and was not advised of any of the communications, nor did he know anything about them. Under these circumstances the conversations and communications between plaintiff and Mrs. Posey were not admissible against defendant, and, as this was the ground upon which the testimony was stricken out, it was properly done. The conversations with third parties relating to rental by them of the ranch were not admissible for any purpose, and the objections to the questions which involved that matter were properly sustained. There are a few minor points in this same line which we do not think of any moment, and which we therefore do not discuss.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

145 Cal. 563

Ex parte LETCHER. (Cr. 1,216.)

(Supreme Court of California. Dec. 19, 1904.)

HABEAS CORPUS—EXTRADITION—FUGITIVE FROM JUSTICE—DECISION OF FEDERAL COURT.

1. On habeas to prevent extradition of one charged with an offense against the laws of another state, the regularity of the proceedings before the extradition are not reviewable.

2. The decision of the United States Supreme Court as to what constitutes a fugitive from justice, within Const. U. S., is binding on a state court.

In Bank. Application by George E. Letcher for writ of habeas corpus, prayed to be directed against Garret Fox, fire marshal of the state of Ohio, and George W. Wittman, chief of police of the city and county of San Francisco, to prevent petitioner's extradition to the county of Williams, in said last-named state. Denied.

Samuel G. Tompkins, D. W. Burchard, and John B. Kerwin, for petitioner. C. G. Nagle and Nagle & Nagle, for respondents.

PER CURIAM. The indictment charges a public offense within the statute of the state of Ohio. The regularity of the proceedings had before the extradition are not reviewable by us in this proceeding.

Upon the proposition as to whether or not the petitioner is a fugitive from justice, within the meaning of the Constitution of the United States, that question seems to be absolutely decided against petitioner's contention by the Supreme Court of the United States in Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544, and the decision of that court upon this constitutional question is absolutely binding upon this tribunal. Whether or not the facts in the case of petitioner are such as to call for a modification of the views expressed in Roberts v. Reilly is a question which can only be decided by the federal courts whose writs and processes are open to petitioner.

The petitioner is remanded.

145 Cal. 540

MARTIN v. BARRY. (S. F. 3,097.)

(Supreme Court of California. Dec. 10, 1904.)

TROVER—CONVERSION—EVIDENCE.

1. Evidence in trover *held* insufficient to go to the jury on the question of conversion by defendant.

Commissioners' Decision. Department 2. Appeal from Superior Court, Sonoma County; E. D. Ham, Judge.

Action by Charles Martin against Julia Barry. Judgment for defendant. Plaintiff appeals. Affirmed.

Lippitt & Lippitt, for appellant. J. P. Rodgers, for respondent.

CHIPMAN, C. The action was trover to recover the value of certain 30 tons of hay and also damages for pursuit of the property. At the close of plaintiff's evidence, defendant moved for a nonsuit. His motion was granted, and judgment was entered for defendant. Plaintiff appeals from the judgment, and from the order denying his motion for a new trial.

The grounds of the motion for nonsuit were: First, that there is no evidence connecting defendant in any way with the hay; second, that plaintiff offered in evidence certain proceedings in the justice's court of Petaluma township, Sonoma county, showing that defendant had obtained a judgment against the plaintiff for the whole of the hay involved, and plaintiff therefore has no interest in the hay.

John Zenoni, plaintiff's assignor, testified that he was in possession of a ranch, which he had leased for one year from defendant and her son, William Barry, dated September 29, 1896; that the rental was payable in cash, and was fully paid for the year; that he raised a crop of hay on the land, part of which he sold, and that on August 26, 1897, he had 25 bales remaining, on which day one Brush, constable of Petaluma township, served certain papers on him, and took all the hay and put it in the keeping of one Tom Barry, who was defendant's son; and that he (Zenoni) never got the hay back (nor did his assignee, as elsewhere appeared), but the hay was left on the ranch, and was there after the lease expired. Plaintiff next introduced in evidence certain papers in an action brought in the justice's court of Petaluma township, wherein Julia Barry, defendant herein, was plaintiff, and John Zenoni, assignor of plaintiff herein, was defendant. These papers were introduced presumably to show that Mrs. Barry took the hay from Zenoni, and by what means. The action was claim and delivery to recover possession of the same hay as is here in question. Plaintiff introduced the complaint, answer, and undertaking. No affidavit, as required by the statute, appeared among the papers, and none was introduced, nor was its absence explained. Plaintiff also introduced the summons in the action, which was returned duly served on August 26, 1897. Plaintiff next introduced what is entitled, "Transcript on Appeal Offered in Evidence," which apparently is followed by the entries in the justice's docket in Julia Barry v. John Zenoni. It shows: Complaint filed August 26, 1897. Undertaking on claim and delivery of personal property filed August 26, 1897. Summons and demand issued and handed to G. M. Brush, constable, August 26, 1897. Summons returned and filed August 27, 1897, "with the following indorsement," which shows personal service on defendant Zenoni by delivering a copy of the complaint attached to the summons. Answer filed August 31, 1897, and trial set for September 8, 1897, by agreement, on which day the cause was tried, and "after argument by respective parties the action was then submitted to the court, and after due consideration the court found judgment for plaintiff," and judgment was entered. "Done in open court this 18th day of September, 1897. N. King, Justice of the Peace." There is nothing in the justice's docket to show that the cause was in fact appealed. The caption, "Transcript on Appeal, Offered in Evidence," is not evidence that there was an appeal. George Brush, constable of Petaluma township, testified that he went to the Barry Ranch, and, being asked who sent him there, testified: "I got the papers at the justice's court. I do not know that anybody sent me out there, particularly." Being asked what papers he got at the justice's court, he replied: "Well, I got the summons and the writ of attachment." He was asked whether he meant "writ of attachment or claim and delivery," and replied: "When I first went out there, it was a writ of attachment." He made no further explanation, and his testimony remained in this condition. Being asked what he did after he got to the ranch, he replied: "I went out there and attached the hay, and I believe I attached some 200-odd bales. I put a keeper in, and I took the hay in my possession and put the keeper in. * * * I did not turn it over to anybody. I had no authority to do that. * * * I do not know what became of it." He testified that he saw it afterwards in November on the ranch when one of the Barrys was in possession of the ranch. He testified that he did not turn it over to defendant, Mrs. Barry. Mrs. Barry testified that the hay was put in her barn; that "the mice and rats eat it up. It got wasted away since that time. Q. Did you use any portion of it? A. No, sir; not a stalk. I have no stock, and never used a stalk of it." She testified that she and her two sons owned the place. "When the hay was first put in the barn, it was not baled. It was loose, and then he took it out and baled it. It was put back in the barn after it was baled because he was about to take it away. My sons put it back—Thomas and William." Asked who was on the ranch then, she replied: "I was not there at all." This is all the evidence in the case.

There is evidence that the hay belonged to plaintiff when taken by the constable, and, if the suit had been commenced against the officer, a different case would be presented. Construing the evidence strongly against defendant, on her motion for nonsuit, we yet cannot see that it connects her with the taking of the hay. The constable insisted that he took the hay under writ of attachment, and, if he was mistaken in this, the plaintiff failed to show it. No affidavit on claim and delivery was shown, on which the plaintiff or her attorney might have indorsed a direction to the constable to take the property. Code Civ. Proc. § 511. So far as we know from the transcript, there was no affidavit filed in the replevin case. The docket of the justice showed no affidavit. No inference can be drawn from Mrs. Barry's testimony that the constable took the hay by her direction, or that she personally had anything to do with it before, at the time of, or after the taking by the constable. As the evidence stood when the case was submitted by plaintiff, there was no cause of action proven against defendant.

We advise that the judgment be affirmed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

145 Cal. 544

MERRILL v. GUNNISON et al. (S. F. 3,950.)*

(Supreme Court of California. Dec. 10, 1904.)

CONTRACTS — PERFORMANCE OF SERVICES—IMPLIED AGREEMENT—EVIDENCE—SUFFICIENCY—TRIAL—FINDINGS.

1. In an action to recover for services rendered in effecting a settlement of certain actions then pending, evidence examined, and *held* to sustain a finding that defendants did not engage the services of plaintiff, nor employ him in said settlement, nor request him to perform the services.

2. In an action for services rendered, a finding that they were not rendered at the request of defendants negatives the fact of an implied request, as well as of an express request, and was sufficient, without finding the person to whom the services were rendered.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by George B. Merrill against Andrew J. Gunnison and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Geo. B. Merrill, in pro. per. (John H. Miller, of counsel), for appellant. Orrin K. McMurray and Campbell, Metson & Campbell, for respondents.

SHAW, J. The plaintiff appeals from an order denying his motion for a new trial. The action is to recover the value of services alleged to have been rendered by plaintiff for the defendants in effecting a settlement and compromise of certain actions then pending, in which one T. I. Bergin was plaintiff, and Florence B. Moore was defendant, and in which the defendants here were attorneys for the defendant Moore. The court found that the defendant did not engage the services of plaintiff, nor employ him, in said settlement and compromise, nor request him to perform the services. The appellant admits that there was evidence to sustain a finding that there was no express request by defendants to the plaintiff to perform the services, but he insists that the uncontradicted evidence establishes facts from which the law will imply both a request and a promise to pay. The facts from which it is claimed that this request must be implied are that plaintiff performed the services in question with the knowledge and assent of the defendants, that the services were beneficial to the defendants, that defendants have received the benefits, that the circumstances were such that the defendants had good reason to believe that plaintiff expected defendants to pay him for the services, and that they, without objection, permitted him to render the services, and did nothing to disabuse his mind of the expectation that they would pay him, or to let him know that they supposed he was acting for Mr. Bergin in the matter of the compromise. That there was some evidence tending to establish these facts cannot be denied. But on the other hand, there was evidence which, either by direct statement or fair inference, tended to show that the defendants had reasonable cause to believe, and did believe, that the plaintiff was engaged by Mr. Bergin to perform the services in connection with the compromise; that the defendant Bartnett was the only one of the defendants who had any talk with plaintiff, and that the matter of the suit was first mentioned between plaintiff and Bartnett in two conversations which came up casually, or at least without design on the part of Mr. Bartnett; that the suggestion of a compromise came from the plaintiff; that there was nothing in the subsequent negotiations to indicate to the defendants that plaintiff was not acting in the matter at the instance and on behalf of Bergin; that they all the time supposed they were dealing with him as the representative of Bergin; and that their intention in stating to him from time to time what Mrs. Moore would pay in settlement was to inform him as Bergin's agent, and not to authorize him, as their agent, to communicate the offers to Bergin. Under these circumstances, we cannot say that defendants had reason to believe that plaintiff expected them to pay him for his efforts in aid of the compromise, or that it was not reasonable for them to suppose that he was acting for

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*Rehearing denied January 9, 1905.

Bergin, or that it was incumbent on them to inform him that they did not consider themselves to be his employers. The case is not the same as where one knowingly permits another to work for him under such circumstances that it would be unreasonable to suppose he was employed by a third person. Here there was good reason to suppose plaintiff was acting for the opposite party to the negotiation, and the plaintiff's own conduct was at least equivocal on that subject. We do not mean to say that there was not evidence contrary to these facts. But it is the province of the trial court not only to weigh the testimony which is in direct conflict, but also to determine between conflicting inferences and deductions which may reasonably be drawn from the direct testimony given and the circumstances proven. In view of this well-known rule, we cannot hold that the findings are not supported by the evidence.

It is also claimed that the decision is against law, for the reason that the court does not find the person or persons to whom the services were rendered. The finding that the services were not rendered at the request of defendants includes a negation of the fact of an implied request as well as of an express request, and means that there was no request, either express or implied. The findings must be so construed that they will support the judgment, where such construction is reasonable. As it thus clearly appears that the services were not rendered under circumstances which would make the defendant legally liable to the plaintiff for their value, it was not necessary for the court to find whether or not they were rendered to or for some other person, or whether or not the plaintiff voluntarily rendered the services to the defendants, without expectation of remuneration from them.

The order is affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; VAN DYKE, J.

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145 Cal. 548

HAGER v. ASTORG et al. (S. F. 3,110.)

(Supreme Court of California. Dec. 12. 1904.)

MORTGAGES — FORECLOSURE — PARTIES—GRANTEE OF UNRECORDED DEED — CESTUI QUE TRUST — ORDER OF SALE—COLLATERAL ATTACK.

1. Under Code Civ. Proc. § 726, providing that no person holding a conveyance from the mortgagor, which is not recorded at the commencement of the action to foreclose, need be made a party to the action, it is immaterial that plaintiff in the action knows of an unrecorded conveyance.

2. Though, when a mortgage was given, the mortgagor held the property in trust to the knowledge of the mortgagee, yet the trust having been terminated, before the action to foreclose, by an unrecorded deed to the cestui que trust, the latter, like any other holder of an unrecorded deed, is, under Code Civ. Proc. § 726, an unnecessary party to the action.

3. Matters necessarily adjudicated by a decree of mortgage foreclosure cannot be questioned, in ejectment for the mortgaged premises by the purchaser at mortgage sale, by the grantee of an unrecorded deed, the decree, by provision of Code Civ. Proc. § 726, being as conclusive against him as though he had been a party to the foreclosure action.

4. The order of sale in a foreclosure action is at most erroneous, and not void, because not having the seal of the court attached; and so the sale thereunder, as well as under a certified copy of the decree of foreclosure, cannot be collaterally attacked.

Department 2. Appeal from Superior Court, Lake County; R. W. Crump, Judge.

Action by V. A. Hager against A. Astorg and others. Judgment for plaintiff. Defendant A. Astorg appeals. Affirmed.

T. J. Sheridan (Geo. D. Shadburne, of counsel), for appellant. H. V. Keeling (Henry H. Reid, of counsel), for respondent.

LORIGAN, J. This is an action in ejectment to recover a tract of land in Lake county, to which plaintiff obtained a sheriff's deed under a sale upon foreclosure of a mortgage executed to her by the defendant M. Astorg. Judgment was entered in favor of plaintiff against all the defendants, but the defendant A. Astorg alone appeals, and does so both from the judgment and an order denying his motion for a new trial.

The main point on this appeal arises under the following facts: On April 27, 1898, the defendant M. Astorg executed the mortgage above referred to to the plaintiff, who immediately had it recorded. Subsequent to such recordation, and on June 2, 1898, said M. Astorg deeded the mortgaged premises to the appellant, A. Astorg. On January 12, 1900, the plaintiff commenced an action to foreclose the mortgage, making of these parties M. Astorg alone a defendant. When the foreclosure proceedings were commenced, the conveyance from M. Astorg to A. Astorg had not been recorded, and was not recorded until after the decree of foreclosure had been entered. Appellant set up these facts in his answer, and further averred that plaintiff, at the time she commenced her action of foreclosure, knew that the conveyance of the premises had been made by M. Astorg to him, and that he was then sole owner, but that she failed to make him a party defendant in the foreclosure proceedings. Upon the trial appellant sought to make proof of this knowledge of plaintiff of the existence of the conveyance to him when she filed her complaint to foreclose, but on objection of the respondent the court decided that this evidence was inadmissible, and whether the ruling of the court was correct or not is the important question to be now determined.

The lower court was undoubtedly of the opinion that, as the conveyance to the appellant was not recorded when the foreclosure proceedings were commenced, it was immaterial whether plaintiff had actual knowledge of its existence or not; that she was

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¶ 1. See Mortgages, vol. 35, Cent. Dig. § 1283.

required to make those persons defendants only whose conveyances appeared of record at the time she instituted her foreclosure suit. We are satisfied that this view was correct under the Code and the authorities. It is provided by section 726 of the Code of Civil Procedure that: "No person holding a conveyance from or under the mortgagor of the property mortgaged, * * * which conveyance * * * does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance * * * as if he had been made a party to the action." The language of this section is not open to construction. It plainly declares that it is unnecessary to make any person a party to an action of foreclosure, whose conveyance from the mortgagor, subsequent to the mortgage, is unrecorded at the time the action is commenced, while at the same time it binds such person by the decree in the action as conclusively as though he had in fact been made a party to the suit. The element of actual knowledge of the existence of such conveyance, in the absence of its recordation, is not within the terms of the section. The presence or absence of the subsequent conveyance upon the record in the proper office when the action is commenced is the exclusive test as to whether the holder thereof need or need not be made a party defendant, so as to bind him by the foreclosure decree. This is the only test in foreclosure proceedings which the law furnishes, and under the section above quoted it is not necessary to make such holder of an unrecorded conveyance a party defendant, even though the mortgagor may have actual knowledge of the existence of such conveyance when the foreclosure suit is commenced. He need only look to the appropriate records, and make parties to the action those alone whose subsequent conveyances appear thereon. This section, above quoted, was under consideration in the case of Aldrich v. Stevens, 49 Cal. 678, and this was the view there taken of the meaning of its provisions, and that decision has since remained undisturbed. See, also, Hawes, Parties to the Action, § 7. It necessarily follows from these considerations that the court properly excluded all evidence attempted to be offered as to knowledge upon the part of plaintiff, when she brought her action to foreclose, of the existence of the unrecorded subsequent conveyance to appellant.

Appellant further averred in his answer that at the time the mortgage was made by M. Astorg the plaintiff knew, and that it was the fact, that the said M. Astorg held the legal title to the premises in trust for appellant; and he sought on the trial to prove these facts under a contention that as beneficiary under the trust, and as the real party in interest, it was necessary for the plaintiff to make him a party defendant in the foreclosure suit, in order to bind him by the decree, and complains on this appeal because he was not permitted to introduce evidence to show these facts. Without discussing the legal aspect of this proposition, it is sufficient to say that other averments in appellant's answer show that the trust he claimed existed had been terminated almost two years before the foreclosure suit was begun by a conveyance from the trustee, M. Astorg, to himself, of such legal title; so that when the suit to foreclose was commenced appellant was not a beneficiary under any trust, but was the holder of a legal title by an unrecorded conveyance thereof, and for that reason, as far as the necessity for making him a party, came within the provisions of section 726, above cited.

Additional points are made by appellant in his brief concerning the action of the lower court in precluding him from proving other alleged defenses by sustaining objections of respondent to inquiries directed to that end. These defenses were that the foreclosure suit had been prematurely brought, because the note sued on was not then due; also involving some question as to the amount of interest due at that time, and a claim that plaintiff had agreed to release M. Astorg from all liability on the note and under the mortgage, and to hold the appellant solely responsible therefor. But these were all matters which were involved in the foreclosure suit—who was liable upon the note, and in what amount, and whether the note was due so as to authorize the foreclosure of the mortgage given to secure its payment—and these matters were necessarily adjudicated by the decree of foreclosure, and hence were not thereafter open to question by the appellant, who, by the section of the Code of Civil Procedure above cited, was conclusively bound by that decree.

There is but one further point in the case requiring consideration. In proving her title to the premises in dispute the plaintiff introduced in evidence the judgment roll in the foreclosure proceedings, together with the order of sale, return thereon, and the sheriff's deed of the land. The order of sale, while properly signed by the clerk, did not have attached to it the seal of the court, and appellant objected to its introduction in evidence on that account. The court admitted it, and this is assigned as error. It appears that this order of sale, properly signed by the clerk, but without the seal of the court attached, was delivered to the sheriff, and under it the sale was made. The order itself contained a complete copy of the decree of foreclosure, duly certified to by the clerk, with his signature and the seal of the court attached. The direction in the order of sale itself in the case at bar, which is not attacked save for want of a seal, consists of a direction to the sheriff to sell the property as provided by law, apply the proceeds of the sale to the satisfaction of the judgment, and to do all things according to the terms and requirements of the judgment and the provisions of the statute. But all these directions are equally provided for in the certified copy of the decree itself, which is incorporated in the order of sale, so that the recitals in the order aside from the decree amount to nothing more than a reiteration of the provisions of that decree. The contention of the appellant, as we gather it (because he makes this point by way of addenda to his brief with a reference to some authorities, but without discussing the matter), is that the validity of this order of sale is to be governed by the requirements of section 682 of the Code of Civil Procedure, relative to writs of execution. That section provides that such writs shall, among other things, be sealed with the seal of the court. Appellant contends that the failure to place the seal of the court on the order of sale rendered it void, and as bearing upon this point he cites from the decisions of this court the case of O'Donnel v. Merguire, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. But that case did not involve the question of the absence of a seal, but the failure of the clerk to authenticate the writ with his official signature, which failure, it was held, rendered the execution void. Whether the absence of a seal would have the like effect upon the validity of a writ of execution as the failure of the clerk to attach his official signature thereto we are not called on to determine, because we are satisfied that, as far as its absence from an order of sale is concerned, it would only render the process erroneous. Aside from this, it may well be questioned whether the power of the sheriff to sell under a foreclosure decree is to be tested by the same rule which governs his power under a writ of execution issued upon a money judgment, as was the case in O'Donnell v. Merguire, as appears from a recital of the facts in Merguire v. O'Donnell, 139 Cal. 7, 72 Pac. 337, 96 Am. St. Rep. 91. Upon a money judgment it is, of course, clear that there can be nothing in the terms of the judgment authorizing a sale of property to satisfy it, and the only authority which the sheriff can obtain to do so must be by virtue of a valid writ of execution issued by the clerk and placed in his hands for that purpose. His authority to sell can be derived solely under the writ. His authority to sell under a foreclosure proceeding is, however, derived from the decree, and the specific directions to sell which it contains. As was said in Spaulding v. Howard, 121 Cal. 197, 53 Pac. 564, in discussing this subject: "The sheriff, under the Code of Civil Procedure, proceeds with the sale by virtue of the decree and such direction as the court may give. Code Civ. Proc. § 726. The proceedings follow by analogy sales upon execution, but not necessarily so. The power to sell comes from the statute and the decree." But, be this as it may, we are satisfied that as to an order of sale issued under a decree of foreclosure the omission of the seal of the court therefrom renders the process erroneous merely, and this view is supported by the case of Newmark v. Chapman, 53 Cal. 559. In that case the only process under which the sheriff made the sale was a certified copy of the decree of foreclosure, and hence there was involved in that case a more serious question as to the validity of the sale than is presented here. In the case cited there was no order of sale at all; in the case at bar there was a defective one. In Newmark v. Chapman the court, while holding that the process under which the sale was made, though erroneous, was not void, said: "The process under which the mortgaged property was sold was only a copy of the judgment issued and attested by the clerk. It did not conform to sections 682 and 684 of the Code of Civil Procedure, as it did not purport to have been issued in the name of the people, nor was it directed to the sheriff, nor did it direct him to execute the judgment. * * * The process was erroneous; but was it, for the defects above mentioned, void? The judgment itself directed the sheriff to do all that process, issued in the most formal and regular manner, could have directed him to do. If the process was amendable by supplying the above-mentioned defects, it was not void, for void process cannot be amended; and, if it was amendable, it will be treated in this proceeding as having been amended—that is to say, it cannot be attacked collaterally." If, then, in the case cited, the process under which the sale was made, consisting solely of a certified copy of the decree, was erroneous merely, as the court there held, in the case at bar there is less ground upon which to base a claim that the process here involved was void, because not only was this sale made under a certified copy of the decree of foreclosure, but also under an order of sale, which, at most, was defective in matter of form. We are satisfied from an application of the above authority alone that the process under which the sale in question here was made was not void, but merely erroneous, and that, as to the appellant, who was bound by the decree in the foreclosure suit, as declared by section 726, supra, and who is now in this proceeding collaterally attacking the sale made under it, the process under which sale was had was sufficient authority to the sheriff to sell and convey the premises mortgaged.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

145 Cal. 534

PARKE & LACY CO. v. SAN FRANCISCO BRIDGE CO. (S. F. 3,090.)

(Supreme Court of California. Jan. 4, 1905.)

In Bank. On motion for rehearing. Denied.

For opinion in department, see 78 Pac. 1065.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing and from the judgment. The complaint was fatally defective on general demurrer for want of facts in failing to allege performance by plaintiff of its stipulation to continue its efforts to secure the contract, and want of facts is a defect never waived by failure to demur. Nor was the action tried or even decided upon any understanding or assumption that continued effort on the part of plaintiff was an issue in the case. If it had been, the burden of proof was on the plaintiff, but it closed its case in chief without a word of evidence on the point; resting upon the theory of the complaint and of the argument here, viz., that the mere award of the contract, with or without effort on the part of the plaintiff, entitled it to the 5 per cent. The best proof of this is the fact that there is no finding by the court of anything more than the bald allegation of the complaint. The judgment, in short, is not only unsupported by the complaint, but equally without support in the findings. If, as assumed in the opinion of the department, the issue was imported into the case by the act of the defendant in introducing evidence to the effect that no services were rendered after the execution of the contract, then there was a material issue as to which the evidence was conflicting, and no finding upon it. How can a judgment be sustained without any finding upon a material issue?

145 Cal. 564

STEEN v. SANTA CLARA VALLEY MILL & LUMBER CO. (S. F. 4,020.)

(Supreme Court of California. Dec. 21, 1904.)

APPEALABLE ORDERS—MOTION TO DISMISS—SCOPE OF REVIEW.

1. An order denying a motion for relief from default in not serving within the statutory period a notice of intention to move for a new trial is appealable.

2. The merits of a motion for relief from default in not moving for a new trial within the proper time cannot be determined on a motion to dismiss the appeal from the order denying such motion.

Department 2. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Jacob Steen against the Santa Clara Valley Mill & Lumber Company, a corporation. Plaintiff had judgment, and, from an order denying defendant's motion for relief from default in not serving within the statutory time a notice of intention to move for a new trial, defendant appeals. Heard on motion to dismiss appeal. Denied.

See 66 Pac. 321.

Carl E. Lindsay, for appellant. Z. N. Goldsby and C. B. Younger, for respondent.

PER CURIAM. This case is before us now on a motion of respondent to dismiss appellant's appeal from the order of the court below, made January 21, 1904, denying appellant's motion to be relieved from default in not serving within the statutory time its notice of intention to move for a new trial. The order appealed from, being an order made after judgment, is appealable, and its merits cannot be inquired into and determined on this present motion. The motion to dismiss said appeal is denied.

145 Cal. 565

ALPERS et al. v. BLISS. (S. F. 2,888.)

(Supreme Court of California. Dec. 21, 1904.)

DISMISSAL—POWER OF JUDGE—STATUTES—CONSTRUCTION—APPEALABLE ORDERS.

1. Mere written requests to the clerk of the court for dismissal of an action, filed among the papers in the case, not being orders of court, are not appealable; and hence an order refusing to vacate the same is not appealable.

2. An order denying a motion to vacate and set aside a judgment of dismissal is not appealable.

3. Under Code Civ. Proc. § 956, providing that on an appeal from a judgment the court may review any intermediate order or decision excepted to which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken, and section 647, providing that any decision or order necessarily affecting the judgment is deemed excepted to, an order striking out a pleading is reviewable on appeal from a judgment of dismissal.

4. Under Code Civ. Proc. § 581 (1), giving a plaintiff the absolute right to dismiss his action at any time, provided a counterclaim has not been made or affirmative relief sought by cross-complaint or answer of defendant, an action may be dismissed, notwithstanding the filing of

a cross-complaint, where at the time of the dismissal the cross-complaint has been stricken from the files by the court, acting within its authority.

5. Under Code Civ. Proc. § 442, giving to a defendant who may seek affirmative relief "against any party the right to file a cross-complaint at the time he files his answer," and section 389, providing that, when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in, and, to that end, may order amended and supplemental pleadings or a cross-complaint to be filed, an order made by a judge and filed with the clerk on an ex parte application, without notice to the plaintiff, granting leave to file a cross-complaint and make other parties named therein defendants to the action, in view of the direct provisions of section 937, may be vacated, without notice, by the judge who made it.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Charles Alpers and another against George D. Bliss and others. From a judgment for plaintiffs, Bliss appeals. Affirmed.

W. C. Graves (Geo. W. Chamberlain, of counsel), for appellant. Black & Leaming and George E. De Golia, for respondents.

HARRISON, C. This action was brought in 1878 by Charles Alpers and Laura A. Mowry against 18 defendants for the partition of a tract of land in San Francisco. The plaintiffs, in addition to setting forth facts authorizing a judgment for the partition of the tract, alleged that they had for a long time occupied and made improvements upon a particular lot within the tract, less in extent than that to which they were entitled, and asked that in the partition that lot be set off to them. George D. Bliss, one of the defendants named in the action, demurred to the complaint, and on February 7, 1879, his demurrer was overruled, and 10 days' time given him within which to answer. No further step appears to have been taken in the action by any of the parties thereto until March 1, 1901, when Bliss filed an answer to the complaint, in which he denied that the plaintiffs had any interest in the tract of land, and alleged that he was the owner in fee of the specific parcel thereof described in the complaint. On that day the judge of the superior court, upon the ex parte application of Bliss, made an order, which was filed with the clerk, granting him leave to file in the action a "supplemental and cross complaint" against the plaintiff, Alpers, and Louisa Rabe Barroilhet and the National Fertilizing Company —the last two not having been named as defendants in the original complaint—and directing that these two be made defendants in the action.

In the cross-complaint thus filed, Bliss alleged that the plaintiffs had no interest in the tract of land described in the complaint, and set forth certain facts tending to show that in February, 1888, he had become the owner in fee of the specific parcel of land claimed by the plaintiffs, and also alleged that subsequent to the commencement of the action the plaintiffs had conveyed all their interest in the property which was the subject-matter of the action, and that the same had become vested in Louisa Rabe Barroilhet, one of the persons made defendant in the cross-complaint. He also alleged that the National Fertilizing Company, the other defendant brought into the action by the cross-complaint, "claims some interest in the premises, which, if any, is subordinate and subject to" his interests. He also alleged that the plaintiffs, Charles Alpers and Laura A. Mowry, were for a long time in the wrongful occupation of the premises, and that the rents, issues, and profits of the premises during such occupation were $5,000, and that he had suffered damage in the sum of $5,000 by reason of their withholding the same. He therefore prayed judgment for the possession of the premises, and that he be declared the owner thereof, and recover $5,000 for rents, issues, and profits, and $5,000 for damages.

May 17, 1901, upon motion of the plaintiff Alpers, the court made and entered in its minutes an order vacating and setting aside the previous order granting leave to file a supplemental and cross complaint, and thereafter the said cross-complaint was by its order stricken from the files of the court. Afterwards, on the same day, the plaintiff Alpers presented to the clerk of the court a written request to dismiss the said action on his part, which was filed among the papers in the case, and he also entered an order to like effect in the order book of the clerk of said court; and on May 20th George B. Mowry, as administrator of the estate of Laura A. Mowry, who had been substituted as a plaintiff in the action in the place and stead of Laura A. Mowry, the original plaintiff, since deceased, presented a written request to the clerk of the court to dismiss the said action upon his part, which was filed among the papers in the case; and he also entered an order to like effect in the order book of said clerk. May 22, 1901, the clerk entered a judgment of dismissal of said action on the part of the plaintiffs, in accordance with the said requests. Thereafter Bliss gave notice that he would move the court "to vacate and set aside the purported dismissal of said action by the plaintiff Alpers on the 17th day of May, 1901, and also the purported dismissal of said action of the 20th day of May, 1901, by George B. Mowry, as plaintiff in said action, as the successor of Laura A. Mowry, one of the original plaintiffs," and would also at the same time move the court to vacate and set aside the judgment of dismissal entered in the action May 22, 1901. Upon the hearing of this motion the court made and entered in its minutes an order denying the same. From this order and the aforesaid judgment the present appeal has been taken; the appellant stating in his notice of appeal that he appeals "from the order made and entered in the minutes of said court on the 17th day of June, 1901, denying the motion of the defendant George D. Bliss to vacate and set aside the purported dismissal of said action by the plaintiff Charles Alpers filed on the 17th day of May, 1901; also from the order denying the motion of defendant George D. Bliss to vacate and set aside the purported dismissal of said action on the 20th day of May, 1901; also from the order denying the motion of the defendant George D. Bliss to vacate and set aside the judgment of dismissal entered on the 22d day of May, 1901; and also from the judgment of dismissal entered on the said 22d day of May, 1901, and from the whole thereof."

1. The "purported dismissals" of the action by the plaintiff Alpers on May 17th and of the plaintiff Mowry on May 20th were merely written requests by them to the clerk for a dismissal of the action, filed among the papers in the case. As they were not orders of the court, there could be no appeal from them, and they are not subject to review by an appellate court; and, being thus nonappealable, the order of the court refusing to vacate or set them aside is also nonappealable. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103.

2. Neither is the order denying the motion to vacate and set aside the judgment of dismissal appealable. All of the matters presented by the appellant for consideration by the court upon that motion were a portion of its own records in the action, and existed before the order was entered. "It is settled that, when a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside." Goyhinech v. Goyhinech, 80 Cal. 409, 22 Pac. 175; Harper v. Hildreth, supra; Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758.

3. There remains to be considered the appeal from the judgment. Section 956, Code Civ. Proc., provides that upon such appeal the court may review "any intermediate order or decision excepted to, which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken." An order striking out a pleading necessarily affects the judgment, and, under section 647, Code Civ. Proc., is deemed excepted to, and, under the provisions of the above section 956, may be reviewed on an appeal from the judgment.

The right of the plaintiffs to have the action dismissed, and the authority of the clerk to enter the judgment of dismissal, depend upon the condition of the pleadings at the time the plaintiffs made the request for such dismissal. Section 581 (1), Code Civ. Proc., gives to a plaintiff the absolute right to dismiss his action at any time, "provided a counter-claim has not been made or affirmative relief sought by the cross-complaint or answer of defendant." Thompson v. Spraig, 66 Cal. 350, 5 Pac. 506. At the time the plaintiffs made their request to the clerk the cross-complaint had been struck from the files under the order of the court, and at that time the only pleading on file in the action on his part was his answer, in which he made no demand for affirmative relief. The plaintiffs' right to dismiss the action was therefore absolute, if the court was authorized to make the order striking the cross-complaint from the files.

The provision of section 442, Code Civ. Proc., giving to a defendant who may seek affirmative relief "against any party" the right to file a cross-complaint at the same time that he files his answer, is limited to cases in which he seeks affirmative relief against a "party" to the action. This section does not give him a right to file a cross-complaint for affirmative relief against one who is not already a party to the action, or bring new or additional parties into the action by including them in his cross-complaint as defendants thereto. He cannot bring a new party into the action without an order of the court therefor.

Section 389, Code Civ. Proc., provides: "The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed and summons thereon to be issued and served." This section does not give the court power to bring into the action for determination a controversy between the defendant and strangers to the action, which is irrelevant to the action between the parties already before it, except for the purpose of making its determination of the controversy between the parties already before it complete, and without prejudice to the rights of others. The defendant cannot inject into the action a controversy between himself and an outsider, even though it affects the property to which the action relates, unless some party already before the court is interested in or will be affected by the determination of such controversy. "The controversy" named in the concluding member of the above-quoted sentence is "any controversy between the parties before it" named in the first clause, and includes a controversy presented by a cross-complaint as well as that presented by the original complaint. Winter v. McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; Mackenzie v. Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209. See, also, East Riverside, etc., v. Holcomb, 126 Cal. 315, 58 Pac. 817; Boskowitz v. Thompson (Cal.) 78 Pac. 290. In either case the "other parties" who may be brought in must be persons whose presence is essential to the complete determination of a controversy between parties who were already before the court. It is "to that end" that the court is authorized to order a cross-complaint to be filed, and a summons thereon to be issued and served. It was evidently in view of these principles that before filing the cross-complaint herein the appellant obtained an order granting him leave to file it, and making the "other parties" therein named defendants in the action. This order, however, was made upon the ex parte application of the appellant, and without any notice to the plaintiffs, and was not made by the court, but was made by a judge of the court and filed with the clerk.

Section 937, Code Civ. Proc., provides: "An order made out of court without notice to the adverse party may be vacated or modified without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made." It may be assumed that, when plaintiffs moved to vacate the order granting leave to file the cross-complaint, the judge made a more careful examination of the pleadings than was given when the order was made. Upon such examination, and finding that under its allegations the interest of the appellant in the property described in his cross-complaint was not acquired by him until more than nine years after the commencement of the action; that he had neglected for more than thirteen years thereafter to assert any right thereto as against the plaintiffs; that after the commencement of the action the plaintiffs had transferred all their interest in the property, and that the same was then vested in Mrs. Barroilhet; that he did not allege that the plaintiffs, or either of them, were in possession of the property described in his cross-complaint, or made any claim thereto; that the right to the possession of the property claimed by him is a controversy between him and Mrs. Barroilhet, in which no other party to the action is shown to be interested; that the only affirmative relief sought by him against the plaintiffs, or either of them, is a money judgment for the value of the rents and profits of the property during the period it was in their occupancy; that, as the action is for the partition of the property described in the complaint, and is not brought upon any "contract" or "transaction," the affirmative relief thus sought does not affect the property to which the action relates; that neither of these "other parties" named as defendants in the cross-complaint are necessary parties for the complete determination of this controversy—the court might very reasonably conclude that the order had been inadvertently made, and that the plaintiffs should have had an opportunity to be heard before it was made, and therefore that it should be vacated. If so, its action in vacating the order was authorized by virtue of the above section 937, Code Civ. Proc. Fremont v. Merced Mining Co., 9 Cal. 19; Borland v. Thornton, 12 Cal. 440; Coburn v. Pacific Lumber & Mill Co., 46 Cal. 31; Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646.

The motion was addressed to the judicial discretion of the court, and we cannot say that there was any abuse of this discretion in granting it. It was, however, granted "without prejudice"; thus leaving to the appellant the right to renew his application upon notice to the persons entitled thereto, and upon the hearing of such application to establish his right, if it existed, to file a cross-complaint.

The judgment and order should be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

145 Cal. 573

MERNIN v. CORY. (S. F. 2,963.)*

(Supreme Court of California. Dec. 21, 1904.)

MALPRACTICE—NEGLIGENCE — INSTRUCTIONS — EXCLUSION OF EVIDENCE.

1. In an action against a dentist for malpractice in extracting a tooth it is proper to take into consideration the fact that plaintiff's injuries were aggravated by a delay on the advice of defendant in consulting a physician and obtaining treatment.

2. Where the instructions in an action against a dentist for malpractice, taken as a whole, clearly inform the jury that carelessness or unskillfulness must have attended all the alleged acts of defendant in order to render him liable, it is not necessary to repeat those words in every paragraph of the instructions.

3. Where plaintiff claimed, in an action against a dentist for malpractice, that after the acts complained of there was a "clicking" or disagreeable sound made by the movement of the jaw, the refusal to allow defendant to show by numerous witnesses that they were similarly afflicted was proper, plaintiff not claiming that the condition could be produced only by a dental operation.

Department 2. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Gertrude Mernin against B. E. Cory. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

M. K. Harris and W. D. Turner (Goodfellow & Eells, of counsel), for appellant. F. B. Cook and A. P. Black (Frank Short, of counsel), for respondent.

McFARLAND, J. This action was brought to recover damages for injuries alleged to have been sustained by plaintiff by reason of the malpractice of the defendant as a dentist. The jury returned a verdict in favor of plaintiff for $2,000, and judgment was rendered for that amount. Defendant appeals from the judgment and from an order denying his motion for a new trial.

We do not see any sufficient ground for

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*Rehearing denied January 20, 1905.

maintaining appellant's contention that the verdict was not supported by the evidence. There is no room for doubt that the extraction of one of plaintiff's teeth by defendant resulted in serious and permanent injury to plaintiff's jaw, and, while the question whether or not this injury was caused by the careless and unskillful conduct of defendant when extracting the tooth is one about which there might well be different conclusions drawn from the evidence, still it cannot be truly said that there was no material evidence supporting the conclusion at which the jury arrived on that subject. If the jury believed the testimony of plaintiff, they could not well avoid finding the malpractice averred.

The main contention of appellant is that there should be a reversal on account of an instruction No. 4 given the jury at the request of respondent. The facts out of which this litigation arose commenced with an attempt of appellant on or about October 15, 1899, to extract a tooth from the lower jaw of respondent. Respondent testified, in substance, that while appellant claimed that he had extracted the whole of the tooth, he had, in fact, broken and mutilated the same, and had left part of the root in the jaw; that she so informed appellant at the time, but that he insisted that he had taken it all out; that the jaw became much inflamed, and very painful; that she visited appellant a number of times, and complained to him that part of the root was still in the jaw, but that he declared that this was not so, and that the inflammation and pain would soon subside; that afterwards appellant admitted that part of the root did so remain, and on November 10th extracted the same, but in doing so he first carelessly and unskillfully took hold with his instrument of the jaw itself, instead of the root, and, as described by respondent in detail, inflicted grave and permanent injury to plaintiff's jaw; that her jaw continued to get worse, so that at times it became fixed, and she could not open her mouth; that she frequently visited appellant, and asked him to treat it; that he said there was nothing serious the matter; that she repeatedly asked him if she should not have her jaw examined and treated by a physician or surgeon, and he repeatedly advised her not to do so, and that, if she did so, she would make herself a laughing stock; that, relying on such advice, she postponed consulting a physician or surgeon for a long time, and that when afterwards she did consult a physician, and was treated at a hospital, it was too late for her to receive much benefit from such treatment. In view of this and other evidence the court gave the said instruction No. 4, which is as follows: "If you find from the evidence that defendant advised plaintiff not to consult a surgeon or secure medical treatment after her jaw was injured by defendant, if you find the same was carelessly and negligently injured by defendant, and that plaintiff relied thereon, and did not consult a physician or surgeon for a number of weeks after such injury, and that by reason of such delay plaintiff's injuries were aggravated and made worse, and that it was more difficult or impossible to treat or cure such injuries of plaintiff, and that thereby such injuries became and are permanent and cannot be cured, and the same has affected the general health of plaintiff, and she has become and is sick and disordered and unable to work or perform labor, or support herself by her own labor and work as she did prior to such injuries, if you find that she did so work and support herself before she was injured by defendant—then I instruct you that you may take all such matters into consideration in fixing the damage incurred by plaintiff by such acts."

It is first contended that this instruction No. 4 was erroneous, because it was not the duty of appellant, being merely a dentist and not a general physician or surgeon, to give the kind of advice asked by respondent. We do not think that this contention is maintainable. While a dentist may be qualified for his profession without being learned in the general science of therapeutics, he certainly should have such knowledge of the very bone out of which he extracts a tooth as to enable him to understand whether it had been so injured as to require treatment beyond his skill. It was also contended that the instruction is erroneous because it does not expressly state that the advice was carelessly or unskillfully given. But, in the first place, the court in other parts of its charge, both at the request of appellant and on its own motion, fully and in various forms instructed the jury that, even if respondent's injuries resulted from the acts of appellant, still respondent could not recover unless such acts were carelessly or unskillfully done. For instance, the jury were instructed: "Should the evidence fail to show that defendant did not exercise ordinary skill, care, and prudence in the work which he did for plaintiff, then you must find a verdict for the defendant." Also: "You should also bear in mind that the contention of plaintiff that there was a lack of skill or care on the part of defendant is a fact which the law requires the plaintiff to prove by a preponderance of the evidence, the same as any other fact or facts in the case, and the jury would not be justified in finding this as a fact upon mere surmises or assumptions." Also: "If the plaintiff sought the services, care, and skill of the defendant for dental work, and the defendant accepted her employment to do such work, the law only required of him the possession of such skill and learning in his profession, and only requires of him in the performance of his work such ordinary care and skill as is ordinarily possessed by a person following such profession, and if you find from the evidence in this case that the defendant at the time he performed services for the plaintiff did possess skill and learning, and that in his services rendered to the plaintiff, in all the work performed for her by him, he exercised that skill and care and good judgment, then you must find a verdict for the defendant, even if you should also find from the evidence that the plaintiff suffered injuries and pain after such services were performed for her, even if caused by the work of the defendant." These instructions clearly informed the jury that carelessness or unskillfulness must have attended all the alleged acts of appellant in order to make him liable, and there was no necessity of repeating them at every part of the instructions. Moreover, if the facts stated showed malpractice, the use of adjectives or adverbs to expressly characterize such malpractice as careless or unskillful would add nothing to the statement.

It is contended also that the instruction was erroneous because it is averred in the complaint that the conduct of defendant referred to in the instruction was willful, and intended to deceive, while the instruction does not include the element of willfulness, etc.; but this averment of willfulness was superfluous, unless respondent had claimed punitive damages, and the proof of want of reasonable care or skill was sufficient to maintain the action without any evidence of the willfulness.

After the alleged acts of malpractice, respondent had a "popping" or "clicking" of the jaw—a disagreeable sound made by a movement of the jaw. Respondent testified that this clicking commenced immediately after the alleged acts of appellant, claiming that it was produced by said acts. Appellant offered to call several witnesses to testify that each of them had a clicking jaw. The court sustained an objection to the proposed testimony, and it is contended that this ruling was prejudicial error. We do not think that this contention is maintainable. In addition to the general objection to the introduction of special instances of this kind and the remoteness of the proposed testimony, its purpose could only have been to show that a number of persons had this peculiar condition of the jaw, which had not been produced by the cause to which respondent attributed her condition. But it was abundantly shown by the evidence that this condition may be produced by various causes, and there was no claim or pretense by respondent that it could be produced only by a dental operation. We think, therefore, that the court properly refused to have its time taken up by listening to the sound of a lot of clicking jaws, for such a spectacle would have added nothing to the elucidation of any real points at issue in the case.

The two contentions above noticed are the ones mainly relied on. We see nothing in any of the other points made for a reversal which calls for special notice, and it is sufficient to say that, in our opinion, no one of them is tenable.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

sion and commenced making improvements thereon, which continued six months thereafter, and aggregated $500; that the plaintiff gave no notice whatever, or made any indication, of her claim to the property until the commencement of the action, nearly three years after her return from Canada, and after being informed of the whole transaction. If the plaintiff did not approve of the transaction on the part of her husband, it was her duty, when informed of the same, to promptly repudiate what had been done by her husband in the premises. Instead, however, it appears that no notice whatever was given, or steps taken, to inform the defendant that she disapproved of the transaction, until the commencement of the action, nearly three years after becoming acquainted with all the facts. It is laid down as one of the maxims of the law that "he who can and does not forbid that which is done on his behalf is deemed to have bidden it." Civ. Code, § 3519. In Quick v. Milligan, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392, the appellant, in conjunction with her husband, signed and acknowledged a conveyance of her interest in the land in question to one Etchison, and sent such conveyance to her sister, with instructions to deliver it only upon the condition that he pay the amount of the purchase money in question. In violation of these instructions, however, the sister delivered the deed to the grantee named in it, without the payment of the purchase money. In that case it was contended, on behalf of the plaintiff, that the deed, having been delivered in violation of the condition imposed by the said plaintiff, did not become effective. The court, after admitting to the full extent the abstract proposition as stated to be correct—that a deed delivered in escrow is not effective if placed in the hands of the grantee in violation of a condition upon which the person who holds in escrow is authorized to deliver it—however, decided the case against the appellant and in favor of the defendant, the purchaser from Etchison, on the ground of estoppel, to wit, that, where one of two innocent persons must suffer, he through whose agency the loss occurred must sustain it (citing a number of authorities to that effect).

In Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175, the plaintiffs owned a tract of land near Redlands and the defendants owned a tract near Downey, and exchanged deeds for the same on December 1, 1898, in pursuance of a verbal agreement previously entered into. On the night of November 30, 1898, a house which stood on defendants' land was destroyed by fire, but it was found that at the time the deeds were exchanged the parties believed that the dwelling was on the land; that the existence of the dwelling house was an inducement to the plaintiffs and a part of the consideration moving to them in the transaction, and that, had plaintiffs known of the destruction of the house, they would not have made the exchange. On December 19th plaintiffs served notice of a rescission and demanded a reconveyance, but prior to that time, and after the exchange of the deeds, defendants had placed permanent improvements on the land taken by them of the value of $359, and expended $18 for cultivating and irrigating said lands, and $40 paid to the plaintiffs' intestate, and one of the parties who made the exchange, for fertilizing material left on the premises conveyed to the defendants. The court below held that, although the plaintiffs had the right to rescind in view of the mutual mistake, they were yet estopped by subsequent conduct; that the acts and conduct of plaintiffs' intestate indicated that he did not intend to rescind, and rather encouraged the defendants in the work performed and expenditures made, adding: "These things created an equitable estoppel, because it is unconscionable for a party to permit another to so improve property obtained in such a bargain, and then claim the property and improvements, even were he to pay the costs of the improvements;" and this court, after citing a number of authorities bearing upon the question of estoppel, affirmed the judgment.

In Alexander v. Welcker, 141 Cal. 302, 74 Pac. 845, the note and mortgage sued on were executed by the defendant (appellant) and her husband in his lifetime—W. T. Welcker—the title to the mortgaged premises being in the appellant alone. The court finds that, after executing the mortgage with her husband, she exacted a promise from him as to the delivery of the note and mortgage at the time she intrusted the same to him, but that he never at any time informed the mortgagees (under whom plaintiff claimed) of the promise he had made to defendant, and they had no notice or knowledge thereof. It was contended in that case by the appellant, as here, that there was no legal delivery of the mortgage to the mortgagees. This court, however, in the opinion affirming the judgment, says: "Under the circumstances, the appellant is clearly estopped from denying the delivery of the mortgage."

The reasons for the application of the old rule of equitable estoppel are equally as cogent in the case at bar.

Judgment affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.

145 Cal. 601

WILLEY v. BENEDICT CO. (S. F. 2,944.)

(Supreme Court of California. Dec. 27, 1904.)

CORPORATIONS—FOREIGN CORPORATIONS—SERVICE OF PROCESS—SHERIFF'S RETURN—MOTIONS TO QUASH—RECORD—APPEAL—TRANSCRIPT.

1. Under St. 1899, p. 111, c. 94, § 1, requiring foreign corporations to designate an agent for the service of process, and to file such designa-

tion with the Secretary of State, in which case process may be served on the agent, or, if no person is designated, on the Secretary of State, a return reciting service on the Secretary of State, but failing to state that there was no designation of an agent on file, is insufficient to confer jurisdiction over the corporation, and cannot be aided and rendered sufficient by a certificate of the Secretary of State, attached to the summons as returned, showing that the corporation had not made the required designation.

2. Under Code Civ. Proc. § 670, providing that in case of judgment by default the judgment roll consists of the summons, with affidavit of proof of service, the complaint, with memorandum indorsed thereon of defendant's default, and a copy of the judgment, a certificate of the Secretary of State, attached to a summons served on him for a foreign corporation, under St. 1899, p. 111, c. 94, § 1, providing for such service in case no person is designated by the foreign corporation as an agent for the service of process, is not a part of the record, and cannot be looked to, on a motion made on the record to quash the service and return, to supply an omission of the return to recite that the corporation had not designated an agent for the service of process.

3. Where affidavits offered on the hearing of a motion did not appear either in full or in substance in the transcript, the refusal of the court to admit them in evidence cannot be considered on appeal.

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Charles G. Willey against the Benedict Company, a corporation. From an order vacating a service of summons and setting aside a default judgment, plaintiff appeals. Affirmed.

Franklin P. Bull, for appellant. Rigby & Rigby and Wal. J. Tuska, for respondent.

LORIGAN, J. The plaintiff, as assignee of one Lea Bleakmore, on December 22, 1900, brought an action in the superior court of San Francisco against the defendant, a foreign corporation, to recover the value of personal services alleged to have been rendered it by Bleakmore, and had certain property of the defendant attached. Summons was issued, directed generally to "The Benedict Company (a corporation)," and delivered to the sheriff of Sacramento county, who in due time returned that he had served it upon the defendant, "a foreign corporation doing business in the state of California, defendant therein named, by handing to and leaving with C. F. Curry, Secretary of State of the state of California, a copy of said summons," having attached thereto a copy of the complaint. On March 14, 1901, the default of the defendant having been theretofore entered, on motion, judgment was rendered in favor of plaintiff against the defendant for $3,488.75, the amount claimed. On April 19th following, the defendant, appearing specially for that purpose, and upon due notice given, moved the court to vacate the service of the summons and complaint, and to set aside the default and the judgment entered, on several grounds, one of which was that the court had acquired no jurisdiction of the person of defendant, as there had been no legal or valid service on it of the summons and complaint. This motion was based, and its hearing had, solely upon the record in the case; and, the court having thereafter granted the order as prayed for, plaintiff appeals.

While, as stated, several grounds were urged in the lower court in support of the motion to quash the service of the summons and vacate the judgment, and they are all equally insisted on here to sustain the order, we think the matter may be disposed of upon a consideration of the question, solely, whether the return of the sheriff, under which jurisdiction of the defendant was assumed, was sufficient in law to give the superior court jurisdiction of defendant. If not, the order of the lower court must be affirmed.

The service of the summons was made, and its sufficiency is attempted to be sustained, under the provisions of section 1 of an act amending "An act in relation to foreign corporations," passed in 1899 (St. 1899, p. 111, c. 94), which provides, in effect, that every foreign corporation doing business in this state shall, within a specified time after commencing business here, designate some person residing in the state, upon whom process may be served, and file such designation in the office of the Secretary of State, in which case it shall be lawful to serve the process upon such designated person, and, in the event no such person is designated, then service shall be made on the Secretary of State. It will be noted that this provision is a radical departure from the ordinary method of procedure whereby jurisdiction is obtained over a defendant, and for that reason, having due regard for the protection of the personal and property rights of a defendant, before a court can assume jurisdiction of him under the substituted process it provides for, a strict compliance with its provisions must be insisted on. It is said "substituted service in actions purely in personam is a departure from the rule of common law, and the authority for it must be strictly followed. Therefore the existence of the conditions upon which the validity of such service depends must be shown affirmatively by the return, and cannot be inferred." 18 Ency. of Pl. & Pr. 932.

Now to apply this rule to the substituted service of the summons in the case at bar, as the return of the sheriff discloses it to have been made: It will be observed that section 1 of the statute above referred to requires every foreign corporation doing business in this state to designate, by filing such designation in the office of the Secretary of State, a person upon whom process may be served, and when so designated the process shall be served on him; and it then declares that where no such person is designated the required service may be made upon the Secretary of State. It provides in any event for the service upon some one, but as to that service, in as far as making it on the Secretary of State is concerned, the statute prescribes a condition, namely, that the records of the office of the Secretary of State disclose that no person has been designated by the corporation for that purpose. If there is a designated person, service must be made on him; if there is none, then on the Secretary of State; but the right to serve the latter is conditioned solely on the nonexistence of the former.

When we examine the return of the sheriff (and we have recited above its essential particulars), we find an entire absence of any recital upon the subject as to whether the defendant foreign corporation had filed any designation of a person to be served. The only statement is that he served the summons on the Secretary of State. But as, by the terms of the statute, there was no authority to serve the Secretary of State unless it appeared that there was no designation of a person on file in his office, the return of the sheriff should have shown the existence of this condition, upon which alone service on the Secretary of State could be either authorized or sustained. If it was a fact that no designation had been made, it should have been contained in his return, and his failure to so make it renders the return insufficient to show that any such service had been made as would give the court jurisdiction of the defendant.

In Works, Courts & Their Jurisdiction, p. 291, it is said: "Where service is allowed on one person only where some other person cannot be found, the proof of service must, where service is made on the second person, show that the first could not be found. In other words, where service is allowed to be made on a particular person or officer only on condition, the return must show the existence of the condition, or it is insufficient."

In Nevada a statute of that state similar to ours provided that, in a suit against a foreign corporation doing business there, service of process might be made upon the Secretary of State in the event of a failure of such corporation to appoint and keep an agent within that state upon whom service might be made. In Brooks v. Nickel Syndicate, 24 Nev. 325, 53 Pac. 597, passing upon the validity of a judgment of default upon substituted service, where the record showed, from the return of the sheriff, that he had served the summons on the Secretary of State, but his return did not show that the corporation had not appointed an agent within the state upon whom service might be made under the act, it was held that the return was insufficient to give the court jurisdiction. It was there said: "The statute of 1889, under which service of summons was made in the case at bar, authorized such service upon the Secretary of State in the event of the failure of the appellant to appoint and keep an agent within this state, upon whom such service could be made, and such facts should be affirmatively shown by the record." To the same general effect are Cairo & Fulton Railroad v. Trout, 32 Ark. 23; Glines v. Supreme Sitting Order of Iron Hall (Sup.) 20 N. Y. Supp. 275.

It is insisted, however, that in the case at bar the fact that the defendant corporation had designated no person upon whom service might be made appeared from the certificate of the Secretary of State to that effect, which was attached to the summons as returned. But in the first place, the statute does not provide for any certificate of the Secretary of State as evidence of that fact in aid of the sheriff's return, or otherwise; and, in the second, if it could be availed of at all, it does not pretend to be and is no part of the return of the sheriff, nor is it any part of the record, which, in cases of judgments by default, consists of the summons, with affidavit or proof of service, the complaint, with a memorandum indorsed thereon of the entry of defendant's default, and a copy of the judgment. Code Civ. Proc. § 670, subd. 1. As the motion to quash was made solely on the record, and as this certificate was not part of it, it is unavailing for any purpose.

It is further insisted by appellant that the court erred in refusing to admit in evidence the affidavits of certain persons, offered by him on the hearing of the motion. But as none of these affidavits, or the substance of them, appear in the transcript, there is nothing upon which appellant's point in regard to them can be considered.

We are satisfied, for the reasons given, that the order of the superior court vacating the service of the summons and setting aside the judgment was properly made, and is therefore affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

145 Cal. 596

KALTSCHMIDT v. WEBER. (S. F. 3,353.)*

(Supreme Court of California. Dec. 24, 1904.)

BILL OF EXCEPTIONS—SETTLEMENT — MISTAKE IN NOTICE—TRANSACTIONS IN LIFETIME OF DECEASED — MARRIED WOMAN — ACTION FOR PERSONAL SERVICES—COMMUNITY PROPERTY—GIFT — SEPARATE ESTATE—AGREEMENT WITH HUSBAND—PLEADING—EVIDENCE.

1. Though the day fixed in plaintiff's notice for the presentation of the bill of exceptions, proposed amendments of which had been proposed by defendant, was a day later than provided by the statute, settlement was proper; it being shown that the mistake was the result of an excusable inadvertence of plaintiff's attorney, thus making a proper case for relief under Code Civ. Proc. § 473.

2. Under Code Civ. Proc. § 1880, providing that parties to an action on a claim against a decedent's estate may not testify to a matter or fact occurring in deceased's lifetime, a married woman suing for services rendered deceased may not, for the purpose of showing that her earnings were her separate estate, testify to the

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*Rehearing denied January 23, 1905.

course of conduct of herself and husband with respect to her earnings.

3. For the purpose of showing, in an action by a married woman on a claim for services rendered by her, that the claim was her separate estate, by agreement with her husband, as authorized by Civ. Code, §§ 158, 159, the husband, who has testified that he had had an understanding with her ever since their marriage as to the control and management of her earnings, may testify as to who had had the management and control thereof during such time.

4. Civ. Code, § 172, providing that a married man may not make a gift of community property unless his wife, in writing, consent thereto, does not apply to a gift by him to her.

5. The complaint in an action by a married woman for her personal services, alleging that defendant was indebted to her therefor, authorizes evidence of an agreement between her and her husband that her earnings should be her separate property.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Eleonora Kaltschmidt against Adolph H. Weber, executor of Charles G. Schneider, deceased. Judgment for defendant. Plaintiff appeals. Reversed.

See 69 Pac. 497; 72 Pac. 632.

Arthur H. Barendt and Chas. E. Naylor (Wm. P. Hubbard, of counsel), for appellant. Alexander D. Keyes, for respondent.

SHAW, J. This is an appeal from an order denying the plaintiff's motion for a new trial.

The court did not err in settling the bill of exceptions, notwithstanding the fact that the day fixed for the presentation thereof in the notice given by the plaintiff was 11 days after the defendant had served his proposed amendments thereto. It was clearly shown by the affidavits and by all the circumstances of the case that the mistake of one day in fixing the time was the result of an excusable inadvertence on the part of plaintiff's attorney, and this made a proper case for relief under section 473, Code Civ. Proc.

The plaintiff was a married woman, and the action was on a contract for services alleged to have been rendered by her to the deceased in his lifetime as nurse and attendant upon him. The defendant denied the allegations of the complaint, and alleged affirmatively that the indebtedness sued on was community property of the plaintiff and her husband, and that there was a defect of parties, by reason of the fact that the husband was not made a party plaintiff. At the close of the testimony a motion by the defendant for a nonsuit was granted.

The plaintiff urges with much persistence that there was sufficient evidence to justify findings in her favor, and hence that the motion for nonsuit should not have been granted. In view of the conclusions that we have reached upon the rulings of the court rejecting certain evidence offered by the plaintiff, we think it unnecessary to decide the question as to the sufficiency of the evidence. One ground of the motion for nonsuit was that the indebtedness sued on accrued during the marriage of the plaintiff and her husband, and that there was no evidence of any agreement between her and her husband to the effect that her personal earnings should be her separate estate. This appears to have been one of the main reasons for granting the nonsuit. It follows that the exclusion of any evidence tending to show that such earnings were not community property would be prejudicial error.

The testimony of the plaintiff concerning the course of conduct of herself and husband with respect to her earnings was properly excluded. It related to matters of fact which must have taken place in the lifetime of the deceased, and therefore it would be inadmissible under the provisions of subdivision 3, § 1880, Code Civ. Proc. See Stuart v. Lord, 138 Cal. 672, 72 Pac. 142.

The husband of the plaintiff testified in her behalf that he had had an understanding with her ever since their marriage as to the control and management of her earnings. He was then asked the question: "Who has had the management and control of your wife's earnings during the past fifteen years?" The objection that this question was incompetent, irrelevant, and immaterial was sustained, and in this we think the court erred. Other questions as to whether or not he had himself had the management or control of such earnings, or had consented at all times to the control and disposition thereof by his wife, or had ever objected to her management and control thereof, and as to what she did with her earnings, and what the agreement was between them with respect thereto, were put to him, and upon objections, chiefly to the form of the questions, the witness was not allowed to answer, and the result of the entire effort of counsel on this subject was that no testimony of this character was obtained from the witness. It may be admitted that the other questions mentioned were objectionable in form, although, owing to the apparent dullness of the witness, the court should have been more liberal in its rulings in this regard. But the question above quoted was not subject to this objection, nor did it call for the conclusion of the witness—at least, not to such an extent as to make it objectionable for that reason—and it should have been allowed. There can be no doubt that the husband may make a gift of the community property to the wife, and that the effect of such gift will be to transmute it into her separate estate. The provision in section 172 of the Civil Code that he cannot make a gift of community property unless the wife, in writing, consent thereto, is a provision for her benefit and protection, and it has no application to the case of a gift

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¶ 4. See Husband and Wife, vol. 26, Cent. Dig. § 928.

by the husband directly to the wife. And so, also, he may, under sections 158, 159, Civ. Code, contract with her by an agreement that her personal earnings shall be her separate property, and this may apply to future as well as past earnings, and the effect of such an agreement will be to convert such earnings from the status of community property to that of separate property of the wife. Wren v. Wren, 100 Cal. 276, 34 Pac. 775, 38 Am. St. Rep. 287. Now, it may well have been the case that the husband could recall no conversation between them in which such an agreement was distinctly expressed. His testimony strongly indicates this condition of memory. And yet it might also be true that the fact that there was such an agreement was perfectly well understood between them. In such a case resort may be had to circumstantial evidence. The conduct and actions of the husband with respect to such earnings, indicating that he did not regard them as community property, or that he had relinquished to her the right to control and dispose of her receipts from that source, would be competent evidence and admisisble to prove the agreement. It had been shown that the plaintiff had been for more than 20 years keeping a lodging house in San Francisco; that she had rented the house herself, had collected all the rents, and had managed the disbursement of all funds in relation thereto; and that the services sued for had been rendered to the deceased by the plaintiff while he was an inmate of her house as a lodger and boarder. The husband testified, as above stated, that he had made an agreement with her concerning her earnings, but was not allowed to state the effect of that agreement. If, in connection with all these facts, the plaintiff had been allowed to prove that during the 22 years of their married life the wife had had exclusive and undisturbed control of her earnings, treating the same as her own property, and disposing of them as she pleased, without consulting her husband, such evidence would certainly tend to prove an understanding between them that such earnings were to be her own separate estate. The question tended directly to elicit evidence of such facts, and, if answered as the plaintiff manifestly expected, it would have produced competent and material evidence in her behalf.

The amendment to the complaint, inserting an allegation that there was an agreement between the plaintiff and her husband that her earnings should be her separate property, which amendment was made after this question was excluded, was not necessary as a foundation for testimony of that character. Before that amendment was made, the complaint contained a statement that the deceased was indebted to her for the services in question. Under this allegation she was entitled to introduce evidence of an agreement whereby her earnings during the marriage should be her separate estate, and thus show that the indebtedness was to her, and not to her husband.

The order denying a motion for new trial is reversed, and the cause remanded.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

7 Cal. Unrep. 195

ALEXANDER v. WILSON, Sheriff, et al.

(Sac. 1,069.)

(Supreme Court of California. Dec. 28, 1904.)

ATTACHMENT—KEEPING AND PRESERVING PROPERTY—COMPENSATION OF SHERIFF.

1. A sheriff is entitled to an allowance of his necessary expenses of keeping and preserving attached property until after the judgment.

Commissioners' Decision. Department 1. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Jules Alexander against T. W. Wilson, sheriff, and others. From a judgment for defendant Wilson for his costs only, disallowing a counterclaim, he appeals. Modified.

C. L. Claflin and H. D. Burroughs, for appellant. Goodwin & Goodwin, for respondent.

SMITH, C. This is a suit brought by plaintiff against appellant, Wilson, and his surety, for the sum of $4,200, as damages for failure of said defendant, as sheriff, to sell under execution certain personal property held by him under attachment in the suit of plaintiff against Anderson & Berry. The defendants pleaded in justification an injunction issued from the District Court of the United States for the Northern District of California in bankruptcy proceedings there pending; and the defendant Wilson further pleaded by way of counterclaim that plaintiff was indebted to him in the sum of $568 for money paid by him as keeper's fees, at plaintiff's request, while in charge of the property. The findings were for defendant, except as to the counterclaim, as to which the court finds: That the defendant Wilson did employ keepers of the property in his charge, who remained in possession until after the judgment; that an order was made by the superior court in the case allowing him the sum of $284 as his necessary expenses of keeping and preserving the property under the attachment; and that the said sum has not been paid to the defendant. But the court gave him judgment for his costs only, disallowing the counterclaim. The defendant appeals from the judgment, and the relief demanded is that the judgment be modified so as to adjudge to the appellant the amount of his counterclaim, as found by the

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¶ 1. See Attachment, vol. 4, Cent. Dig. §§ 640, 641; Sheriffs and Constables, vol. 43, Cent. Dig. §§ 72, 84, 85, 94.

court. The judgment was affirmed by this court on the appeal of the plaintiff June 30, 1904, 77 Pac. 706. There is no brief on file for respondent. The counterclaim seems to be a just debt; and no reason suggests itself to us as to why it should not be allowed (Lane v. McElhany, 49 Cal. 421, Shumway v. Leakey, 73 Cal. 261, 14 Pac. 841, and St. 1869–70, p. 158, c. 144, therein cited), and we are of the opinion that it should be so ordered.

We advise that the judgment be modified as above indicated, and, as modified, that the same stand affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment appealed from is modified by adding thereto a clause to the effect that the defendant also recover of plaintiff the further sum of $284, with interest from September 24, 1901, and, as so modified, stands affirmed: SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

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145 Cal. 615

SMITH v. SMITH. (S. F. 3,053.)*

(Supreme Court of California. Dec. 31, 1904.)

NEW TRIAL—SUFFICIENCY OF ORDER—DILIGENCE—DIVORCE.

1. Though an order granting a new trial "on the sole ground that it appears that defendant was sick, as alleged in" the affidavits, is indefinite as to whether it was granted because of abuse of discretion of the court in not granting an adjournment, or because defendant was prevented by unavoidable accident from attendance at the trial, it may be sustained on the latter ground.

2. It appeared on a motion for a new trial in a divorce case that defendant conducted the defense in person, without an attorney; that after the commencement of the trial an adjournment of several days was had; that during the adjournment defendant was sick, but expected to be able to proceed with the trial until the morning of the adjourned day, when she discovered that she was unable to do so; that she immediately sent a letter to the judge, stating her condition, and asked an adjournment; that after discovering her condition there was insufficient time to call a physician and obtain his certificate, or an officer to prepare an affidavit. *Held* to disclose sufficient diligence to justify a new trial, at least in an action for divorce.

3. The acceptance of money by defendant in a divorce case under a prior decree of maintenance does not prevent defendant from assailing the decree of divorce on motion for a new trial.

4. By admitting service of papers on a motion for a new trial by an attorney for defendant without objection, and by serving papers in plaintiff's behalf on such attorney, the objection that the attorney is not the attorney of record is waived.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action for divorce by Charles H. Smith against Josephine Smith. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Peter F. Dunne and Foshay Walker, for appellant. Aylett R. Cotton, for respondent.

LORIGAN, J. This is an appeal by plaintiff from an order granting the defendant a new trial. The action was for divorce, the pleadings being verified. The complaint charged extreme cruelty, and all its allegations were specifically denied by defendant in her answer. When the case was called for trial in the lower court the defendant appeared in propria persona, and during several days, while the trial was in actual progress, and up to an adjournment on December 20, 1900, actually conducted the proceedings in her own behalf. At the close of the daily session of the court on December 20th, the evidence thus far being introduced on behalf of plaintiff, the case was continued; the further hearing to be resumed at 10 o'clock December 24th. When the court resumed its session on this later date, the judge announced that he was in receipt of a letter from the defendant stating that she was sick and unable to be present, and that she wished him to continue the trial till some time in 1901. No one was then present, appearing or representing the defendant. The attorney for the plaintiff refused to consent to any further postponement, and objected that there was no sufficient showing to authorize it, and the trial was thereupon proceeded with; resulting, on the same day, in findings and a decree in favor of plaintiff being made and signed by the trial judge. In due course the respondent moved for a new trial on various grounds, but particularly on account of alleged abuse of discretion on the part of the court in refusing to continue the further hearing of the cause, and in proceeding with the trial during her absence while she was sick and unable to attend, and further on account of accident which ordinary prudence could not have guarded against, and which precluded her presence in court upon the day to which the adjournment had been had.

Without particularly discussing the evidence presented upon the motion under the affidavits, it unquestionably appears therefrom that after the adjournment of December 20th respondent became sick, and was confined to her bed on the 21st, 22d, and 23d days of December; that on the morning of December 24th, though still ill, she attempted to prepare for her attendance at court, and while doing so she became dizzy, and found herself so weak as to be hardly able to stand; that, realizing she would be unable to reach court, she sent by messenger a letter to the superior judge presiding at the trial, informing him that she was too ill to attend, and asked him to kindly continue the case. Upon this showing the court granted her motion for a new trial, and stated in its order that the motion was granted "upon the sole ground that it appears that defendant was sick, as alleged in her affidavit and in that of Ellen Sexton." While this order is apparently specific enough, as far as it goes, it affords no information as to which particular ground of the motion the new trial was awarded on—whether for abuse of discretion on the part of the court, or because respondent was prevented by unavoidable accident from being present at the resumption of the trial. This, however, we do not deem of particular moment, because, while a vigorous attack is made upon the order, if treated as one granting a new trial for abuse of discretion on the part of the court, on the ground of insufficiency of the evidence to sustain it, and, further, because the point could only be availed of upon a bill of exceptions or a statement of the case, and not by affidavits, yet we think the order can and should be sustained, as being based upon a sufficient showing of providential accident, preventing the attendance of respondent at the further hearing of the case upon adjournment, and for which the Code provides a new trial may be granted.

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*Rehearing denied January 25, 1905.

And while the sufficiency of the showing made by respondent in support of her motion on this ground is also questioned, we think it was sufficient to sustain the order of the court. Under her motion, on this ground, the essential fact to be established was the unavoidable accidental interposition of sickness which prevented her attendance. This was, however, established to the satisfaction of the lower court by the affidavit of respondent and that of her landlady—the only evidence on the point presented at the hearing. Her illness was an unfortunate occurrence, the happening of which she could not prevent, and through the existence of which her rights should not be prejudiced, and it is from a judgment obtained against one under such circumstances that the Code contemplates that relief shall be afforded by granting a new trial. It is insisted, however, that the respondent was wanting in reasonable diligence in calling the attention of the court to the fact of her illness, and her inability to attend at the adjourned hour of trial, both in the method and the manner she adopted; that she should have presented an affidavit, or at least a certificate of a physician, or should have employed an attorney to prepare the necessary moving papers, represent her in court, and ask for a continuance. Undoubtedly this would have been the better course to have pursued, and, in ordinary actions, where the conduct of proceedings are under the control of attorneys familiar with the rules of procedure and the method of preserving rights, would be requisite, but cases may occur where the circumstances show that but little opportunity was afforded a party litigant to adopt this method, which involves some preparation and the lapse of time. Of course, it is no strong excuse that the respondent is not a lawyer, and hence was unfamiliar with methods of procedure, because that fact would not ordinarily relieve her from mistakes concerning rules of practice. But the cases are so exceptional in which a person acts as her own attorney, that, at least in divorce cases, where the policy of the law is to afford a full hearing on both sides, and to relieve the parties from a situation which prevented it, when it would not do so if property rights alone were involved, we think the fact that the defendant was not an attorney, and hence unfamiliar with rules of practice, may be taken into consideration in determining, with the other circumstances in the case, whether reasonable diligence was employed by her in presenting to the court, in the manner she did, the fact of her inability to attend the trial upon the day to which it was adjourned. When you add to this the other facts that, in truth, the respondent was too ill to attend on that day; that she had no attorney; that she had endeavored in the morning to prepare herself to attend court, and only failed to do so because she was too feeble; taking also into consideration the natural distress of mind under which she must necessarily have labored, proceeding from her anxiety to attend court, and her inability to do so; the short time that probably intervened between her discovery that she would not be able to attend and the hour when the session of court commenced, within which to send for and consult with a lawyer, or to have a notary attend in preparation of an affidavit, or to call a physician (she had none in attendance), and obtain his certificate, and that, under these circumstances, and in this situation, she sent the letter to the court, explaining her condition, and asking a postponement of her trial—we think these facts disclose sufficient diligence, at least in an action for divorce, to obviate the objection urged.

In discussing this matter, we have limited our consideration to the rule as applied to actions for divorce. It is a matter of public policy that divorces should only be granted where the fullest opportunity has been afforded both sides to be heard, and then only when adequate cause for divorce is shown. Whether such adequate cause exists can only be disclosed after both sides have had an opportunity to present all their evidence. The public has an interest in having no divorce granted excepting for good cause, and it is this consideration of public interest which has largely entered into the formulation by the courts of a more liberal rule to be applied in relieving from default in divorce cases than applies in other cases, where property rights alone are involved. And while this rule has been applied more particularly in divorce cases, where the application to set aside a judgment by default was under consideration, the principle of public interest is as directly applicable to cases where during the actual trial the party has been precluded by unavoidable accident from presenting her case on the merits, and a motion for a new trial is made in order that she may do so, as in cases where relief from a default judgment is asked when the party had failed to appear at all. In the one case, as in the other, the opportunity has not been given to hear both sides of the case, or to permit the court to determine whether adequate cause for a divorce exists, and the same general condition prevailing the same liberal rule should apply.

In McBlain v. McBlain, 77 Cal. 509, 20 Pac. 61, this court said: "The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for a divorce; the policy and the letter of the law concur in guarding against collusion or fraud; and it should be the aim of the court to afford the fullest possible hearing in such matter." Subsequently, in Wadsworth v. Wadsworth, 81 Cal. 183, 22 Pac. 649, 15 Am. St. Rep. 38, where this court conceded that such negligence upon the part of the defendant appeared as in ordinary actions would entitle her to no relief, it was said: "So far as the divorce awarded to the defendant is concerned, the motion should have been granted under the rule laid down in McBlain v. McBlain, 77 Cal. 509, 20 Pac. 61. In that case the court, per Paterson, J., said: 'The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for a divorce; the policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters.' In the present case there seems to have been an honest desire on the part of the plaintiff to present her side of the case, and, while in an ordinary action the negligence shown might be sufficient to deprive her of a right to relief, yet in this kind of a case a more liberal rule should prevail. And we think that the same reasons require the application of a liberal rule to proceedings for the annulment of marriage, and therefore that the judgment should have been set aside as to the whole case." It is true that in both these cases the matter under consideration was relative to setting aside, upon application, judgments by default; but, as we have said, the same principle of public policy which requires that a full hearing in divorce cases should be had, and that a liberal rule to promote that end, as far, at least, as the showing is concerned, should obtain, applies in all cases where the application or motion is made within the statutory time upon the statutory grounds. And while, in the cases we have cited, the court speaks about the policy of the law being to guard against collusion and fraud, its policy is not limited solely to that end. It is as much public policy that divorces should not be granted, unless for adequate cause, as it is that they should not be obtained by collusion and fraud, because in either event they should not be granted at all, and this politic end can be best promoted and attained in the one, as in the other, by the fullest possible hearing.

In concluding this branch of the case, it may be said, as was generally declared in the Wadsworth Case, that there seems to have been an honest desire on the part of the defendant to be present at the trial and present her side of the case, and that, if we assume that in an ordinary action the showing she made might be deemed insufficient to warrant granting her a new trial, yet in this class of cases a more liberal rule should prevail, and the order granting her a new trial, as far, at least, as the objections now under consideration are concerned, should be sustained.

It is further insisted that the order granting the motion for a new trial should be reversed; it being contended that the record shows that respondent received money awarded her by the decree—$600—and hence, upon the principle that, having taken the benefit of the decree, she must bear its burden, she was not entitled to assail the decree on motion for a new trial. But this money was not received under the decree of divorce, but under a decree of maintenance awarded defendant in 1893. In the decree of divorce the court provided that the plaintiff continue to pay the amount provided for in the maintenance decree up to June 15, 1901, when further payment was to cease. This was the money paid defendant, but it was not under the decree of divorce, but under the decree of maintenance, which, by the terms of the decree of divorce, was not to be effective until June 15, 1901.

The further point is made that the notice of intention to move for a new trial is fatally defective because not signed by the attorney who originally appeared of record for the defendant. While it is true that said notice was signed by a different attorney, still it is apparent that any objection upon that ground was waived by appellant, in recognizing and treating the said attorney as representing the defendant on the motion for a new trial, by receiving and admitting service of papers from him in her behalf, without making or reserving any objection on that account at the time, and by serving papers in the appellant's behalf upon such attorney. Upon this subject it is said in Hayne on New Trial & Appeal, p. 59, at close of section 13: "But where the notice is not properly signed, the successful party must reserve his objection on that account at the time it is served upon him, and not treat the notice as sufficient. If he recognizes the attorney giving the notice as the one having authority to give it, he will not afterwards be permitted to question his authority. This is the rule with respect to notices of appeal, and it undoubtedly applies to notices of intention."

These are the only matters upon this appeal requiring attention, and the order appealed from granting a new trial is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

145 Cal. 578

PAGE v. W. W. CHASE CO. (S. F. 3,373.)*

(Supreme Court of California. Dec. 24, 1904.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS — ASSESSMENT — LIEN—FORECLOSURE —LIS PENDENS — LIMITATIONS — PURCHASE SUBJECT TO LIEN.

1. Code Civ. Proc. § 409, providing that a purchaser of property in litigation shall be affected by the suit only when he purchases after the filing of notice of lis pendens, applies to suits to foreclose the lien of street assessments.

2. By its express terms, Code Civ. Proc. § 1908 (2), providing that a judgment is conclusive between the parties and their successors in interest by title subsequent to the commencement of the action, is applicable only to persons who had notice of the action.

3. Under the statute authorizing enforcement of the lien of a street improvement by suit against the owner, who is defined by St. 1885, p. 159, c. 153, § 16, to be the person in whom record title appears to be, and who, by St. 1889, p. 166, c. 151, § 8, may be designated as "unknown," a suit to foreclose the lien of a street assessment is not a proceeding in rem, so as to make the judgment therein binding on the owner though not made a party.

4. Where, in an action to foreclose the lien of a street improvement, a purchaser of the land was made a party, but the action was afterward dismissed as to him, he was not bound by a judgment that his vendor was the owner of the land.

5. Under Street Improvement Act (St. 1885, p. 155, c. 153) § 9, providing that the lien of a street improvement assessment shall continue two years, the commencement of an action to foreclose within two years does not continue the lien after the expiration of two years as against a purchaser of the property not a party to the foreclosure action.

6. A provision in a deed that the conveyance is subject to any existing lien for street work does not render the vendee liable to the holder of a lien for street improvements.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Francis H. Page against the W. W. Chase Company. There was verdict for plaintiff, and from an order granting a new trial he appeals. Reversed.

Knight & Heggerty and Wm. M. Madden, for appellant. J. C. Bates, for respondent.

HARRISON, C. Action to quiet title. At the trial of the cause it was shown on behalf of the plaintiff that Rosalie M. Schwarze became vested with the title to the land in question on April 20, 1867, and that on March 19, 1900, she conveyed it to the plaintiff by a conveyance which was recorded in the office of the county recorder on April 2, 1900. The habendum clause of the deed contains the following: "Subject to any existing liens for street work." In its answer to the complaint the defendant alleged that on October 26, 1900, the superior court of San Francisco, in an action wherein it was plaintiff and Rosalie M. Schwarze was defendant, had rendered judgment that certain money was due to it, and was a lien upon the said land, and directed a sale thereof for the satisfaction of the lien, and that the said judgment was still in full force. At the trial herein the defendant offered in evidence the judgment roll in that action, from which it appeared that the action was commenced by it May 25, 1899, for the foreclosure of a street assessment against the land, and that Rosalie M. Schwarze, John Doe, and Robert Roe were named as defendants therein; that on October 2, 1900, Rosalie M. Schwarze filed an answer to the complaint therein, in which she disclaimed any interest in the land, and set forth that she had conveyed the same to the plaintiff herein on March 20, 1900, and that her said conveyance was recorded April 2, 1900, in the office of the county recorder; that the action was brought on for trial October 26, 1900, and that the court then ordered the defendants sued by the fictitious names of John Doe and Richard Roe dismissed therefrom, and gave judgment, which was duly entered of record, declaring a certain amount of money to be a lien against the said land, and directing its sale for the satisfaction thereof; that on September 18, 1900, prior to the filing of an answer by said Rosalie, the plaintiff herein was served with a copy of summons and complaint in said suit as and for John Doe, named as one of the defendants therein; that on November 13, 1900, he filed a demurrer to said complaint, which was sustained by the court on November 16th; that notice thereof was on the same day served on the plaintiff therein; that said plaintiff failed to amend its complaint, and that on November 30, 1900, the court gave its judgment, which was duly entered of record, by which it dismissed the action as to the plaintiff herein. The plaintiff then testified that he had no knowledge of the pendency of that action until the service of the summons and complaint therein upon him as John Doe on September 18, 1900. The defendant herein did not allege in its answer, nor was it shown at the trial, that a notice of lis pendens was filed in the recorder's office at the time the action against Schwarze was commenced, or at any time thereafter. The street assessment upon which the action was brought is shown by said complaint to have become a lien upon the land May 25, 1897, that being the date upon which it is alleged that the warrant and assessment were recorded by the superintendent of streets. Upon the foregoing facts judgment was rendered in favor of plaintiff, and thereafter, upon motion of the defendant, the court granted a new trial. From this order the plaintiff has appealed.

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*Rehearing denied January 23, 1905.

It does not appear upon what ground the court made the order appealed from. In its notice of intention to move for a new trial the defendant stated as grounds therefor insufficiency of the evidence to justify the decision and errors of law occurring at the trial; but it is not claimed that there was any conflict in the evidence upon any probative fact in the case, or that the existence of such fact depended upon the weight which the court might give to testimony thereon. The question to which counsel have directed the attention of the court in their briefs upon this appeal, and which underlies the respective rights of the parties to the action, is the effect of the judgment in the street assessment suit upon the title acquired by the plaintiff from Mrs. Schwarze. If he took the title from her in subordination to the judgment to be thereafter rendered in that action, the defendant's right to the land is superior to his. On the other hand, if the title then taken by him would not be affected by that judgment, it is superior to that of the defendant.

1. The rule of the common law that a purchaser pendente lite of the subject of the controversy took as a volunteer or intruder, and in subordination to the judgment thereafter rendered in the action, is not in force in this state. In lieu thereof, section 409, Code Civ. Proc., authorizes the plaintiff in any action affecting the title to real property to file in the office of the county recorder of the county in which the property is situated a notice of the pendency of the action, and declares that "from the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action." "The general rule is that one not a party to a suit is not affected by the judgment. The exception at common law is that a pendente lite purchaser, though not a party, was so affected. The qualification of the doctrine made by our statute is that such purchaser is not affected unless notice of such lis pendens be filed with the recorder." Richardson v. White, 18 Cal. 103. The proposition of the respondent that this section is not applicable to an action for the foreclosure of the lien of a street assessment cannot be maintained. No authority is cited in support of the proposition, and such action is as fully included within the terms of the section as is an action for the foreclosure of a mortgage or of any other lien. See McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421. The decision in Reeve v. Kennedy, 43 Cal. 643, cited by the respondent, was made by virtue of an express provision in the statute under which the proceedings involved in that action were had that the lien of the tax should not be removed until the taxes were paid or the property had absolutely vested in a purchaser under a sale for the taxes, and the court held that "the precise object of these provisions was to subordinate to the lien of the judgment all rights acquired by purchasers intermediate the assessment and the rendition of the judgment." The provision in section 1908(2), Code Civ. Proc., that a judgment is conclusive with respect to the matter directly adjudged between the parties and their successors in interest by title subsequent to the commencement of the action, is by the concluding clause of the section applicable only to those cases where the parties have had "notice actual or constructive of the pendency of the action." In Wood v. Jordan, 125 Cal. 261, 57 Pac. 997, and in Crane v. Cummings, 137 Cal. 201, 69 Pac. 984, cited by the respondent, the grantors in the deeds there discussed were named as defendants in the street assessment suits, and were served with the summons therein, and the conveyances were not made by them until after judgment had been entered against them. In Archbishop v. Shipman, 69 Cal. 586, 11 Pac. 343, the plaintiff alleged that, as he was not named as a party to the street assessment suit, he was not bound by the judgment therein; and all that the court decided was that under the allegations of his complaint he had not shown any equitable ground for restraining the enforcement of the judgment against the parties against whom it had been rendered.

2. An action for the foreclosure of the lien of a street assessment is not a proceeding in rem, as contended by the respondent, except in the sense that the amount of the lien can be collected only out of the amount of the property involved in the action. It is not a proceeding wherein a judgment for the sale of the property will bind the entire world, or affect the interest therein of any owner except those who are made parties defendant in the action. There can be no proceeding in rem except it be authorized by statute, and in such a proceeding the res which is to be affected thereby is the defendant, and must be brought before the court either by seizure or by publication of notice. Unless notice of the proceeding is in some form given to the owner of the res, and an opportunity afforded him to defend the same, a judgment for its sale would have the effect to deprive him of his property without due process of law. The lien of a street assessment—like any other tax—is to be enforced only in the mode and to the extent authorized by the Legislature. See Thompson v. Boskowitz (Cal.) 78 Pac. 290. In this state the Legislature has authorized its enforcement by means of a suit in equity against the "owner" of the land; and in section 16 of the street improvement act (St. 1885, p. 159, c. 153) the "owner" is defined to be, for the purposes of that act, the person owning the fee, or in whom appears the legal title to the land by deeds recorded in the county

recorder's office of the county. There is no provision that the land shall be made the defendant in such action, or that service of process shall be made upon it, as was provided by the statute involved in Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595, and other cases cited in Crall v. Poso Irrigation District, 87 Cal. 148, 26 Pac. 797, invoked by the respondent upon this point. Under section 8 of the act (St. 1889, p. 166, c. 151), if the name of the owner is unknown to the superintendent of streets, the owner is to be designated in the assessment as "unknown," but it would not be contended that the contractor could select any person he might choose as the defendant in his action, and bind the land by the judgment therein as against its actual owner as defined in section 16.

3. The finding and judgment of the court in the street assessment suit that Mrs. Schwarze was the sole owner of the land involved therein at the time of commencing the action and at all times mentioned in the complaint therein is not conclusive upon the plaintiff herein. He was not named as a party to that action, and although he was served with the summons and complaint therein as John Doe, named as a fictitious defendant, he was dismissed from the action before the judgment was rendered. After he had been served with process in the suit, the plaintiff therein was informed by the answer filed by Mrs. Schwarze that he had succeeded to her interest in the land many months prior thereto, and if he had been retained as a party defendant, and judgment had been rendered against him, his interest in the land so derived would have been bound by the judgment; but instead thereof the plaintiff caused him to be dismissed from the action, and took judgment against Mrs. Schwarze alone. The effect of this proceeding was the same as if the action had been originally brought against her alone. It is unnecessary to determine whether it was competent for the court, after such dismissal, to take any action upon the demurrer which he had previously filed, or whether its action in sustaining his demurrer or its judgment dismissing the action against him is entitled to any consideration. In either case, whether by reason of his previous dismissal from the case, or by reason of the dismissal of the action as against him, he ceased to be a party to the suit, and is not bound by the judgment therein. There was therefore no constructive notice to the plaintiff of the street assessment suit at the time he purchased the land and took the conveyance from Mrs. Schwarze, and as he testified at the trial that he had no knowledge of the pendency of the suit until he was served with the summons and complaint therein in September—nearly six months after receiving the conveyance—he is to be regarded as an innocent purchaser, and it must be held that the title then acquired by him is not affected by the judgment therein against Mrs. Schwarze.

4. The assessment upon which the action was brought became a lien upon the land May 25, 1897, and by section 9 of the street improvement act (St. 1885, p. 155, c. 153) this lien continued for two years. At the time the plaintiff herein purchased the land from Mrs. Schwarze more than two years had elapsed since the date of the lien, and he therefore took the title discharged therefrom. The contention of the respondent that because the action upon the assessment was commenced within the two years the lien continued as against the appellant cannot be maintained. Randolph v. Bayue, 44 Cal. 367, and the cases following it, cited by defendant, do not support this proposition. All that was decided in those cases is that, as against the defendants in the action, the lien does not expire during the pendency of the action if it is commenced within the life of the lien. As in the case of any other lien, the commencement of an action for its foreclosure suspends the running of the statute of limitations in favor of the defendants in the action; but it continues to run so far as others are concerned.

5. The title of the plaintiff is not affected by the judgment against Mrs. Schwarze by reason of the provision in her conveyance to him "subject to any existing lien for street work." The evident purpose of this clause in her conveyance was to relieve her from any liability by reason of the implied covenant against incumbrances. The principle which renders a clause in the conveyance of land whereby the grantee assumes the payment of an existing mortgage or other lien thereon available to the holder of the lien is that he thereby takes the place of his grantor in reference to the obligation secured by the land, and creates an equity in favor of the mortgagee by which the latter may enforce the obligation against him to the same extent that he can enforce it as against his grantor. Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868. The obligation thus assumed by him is, however, only such obligation as exists against his grantor, and is only an agreement for his indemnity. Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609. It can be enforced only by foreclosure, and is limited to the amount for which a deficiency judgment can be docketed after the sale of the mortgaged premises. Roberts v. Fitzallen, 120 Cal. 482, 52 Pac. 818. If there is no personal liability on the part of his grantor, there can be no deficiency judgment rendered, and consequently the rule has no application. Ward v. De Oca, 120 Cal. 102, 52 Pac. 130. As there is no personal liability for a street assessment, there can be no deficiency judgment in an action for its foreclosure. Moreover, the language of the aforesaid clause in the conveyance to the plaintiff is not such as would render him personally liable for

the amount of the assessment. Jones on Mtgs. § 748.

We advise that the order granting a new trial be reversed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the order granting a new trial is reversed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

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145 Cal. 606

MEACHAM v. BEAR VALLEY IRR. CO.

(L. A. 19,564.)

(Supreme Court of California. Dec. 27, 1904.)

EJECTMENT — COMPLAINT — SUFFICIENCY — JUDGMENT — PENALTY FOR VIOLATION OF RULES OF COURT—CONSTITUTIONAL LAW—STATUTE — OFFICIAL REPORTER—PER DIEM—PAYMENT IN ADVANCE.

1. A judgment against defendant in ejectment, rendered as a penalty for failure to comply with a rule of court requiring half of the official reporter's per diem to be paid by each party before the witnesses are examined, is repugnant to the constitutional inhibition against the deprivation of property without due process of law.

2. Such judgment is also unwarranted by Code Civ. Proc. § 274, as amended (Amendment of Codes 1880, Code Civ. Proc. p. 54), providing that the reporter's fees for taking notes in civil cases shall be paid by the party in whose favor a judgment is rendered, and taxed up by the clerk of the court as costs against the party against whom judgment is rendered.

3. A complaint in ejectment alleging that at the time of the commencement of the action the plaintiff was the owner of, and in possession of, the entire tract of land sued for, and that for about one year prior thereto the defendant "had been, and now is," unlawfully in possession, without any right or title, of a described portion thereof, is demurrable for ambiguity.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Bernardino County; John L. Campbell, Judge.

Action by Harry D. Meacham against the Bear Valley Irrigation Company. From a judgment for plaintiff, defendant appeals. Reversed.

G. E. Harpham, for appellant. Chas. J. Perkins, for respondent.

HARRISON, C. Action for the recovery of real property in the county of San Bernardino. A trial by jury of the issues in the above-entitled action was waived by the parties, and when the cause came on for trial the plaintiff's counsel read the verified complaint and answer, and called a witness to the stand, who was duly sworn by the clerk, whereupon the court made the following order: "This cause having been called for trial, and the pleadings read, and under the rule of court the parties were requested to deposit with the clerk each one-half of the reporter's per diem, to abide the result of this suit, and the reporter refusing to report the testimony unless the fees are paid, and the defendant refusing to comply with the order of the court, and the court deeming that this is a case where it is necessary to have a reporter, as it involves the examination of several witnesses orally, it is therefore ordered that the defendant deposit the fee of the reporter within five minutes, or a judgment will go for plaintiff, as prayed for." The defendant's counsel thereupon stated to the court that the defendant had no money with which to comply with the direction, and that he excepted to the order. Prior to this time the superior court of that county had adopted a rule, which was then in force, fixing the compensation of its official reporter at $7 per day, and declaring that "the per diem herein fixed shall, upon the opening of court and before the taking of notes by the reporter, be deposited, one-half thereof by the respective parties, with the clerk of the court for the use and benefit of said reporters, said amount to be thereafter taxed as costs by the party in whose favor judgment is rendered." Upon the expiration of the time named in the order, and the defendant having failed to deposit the reporter's fee as required by the order, the court, without any trial of the cause, ordered judgment to be entered in favor of the plaintiff, and thereupon judgment was entered in his favor for the recovery from the defendant of the possession of the property described in the complaint. From the judgment thus entered, the defendant has appealed.

The judgment thus entered by the court cannot be sustained. It was not within the power of the court to render a judgment giving to the plaintiff the right to property of which the defendant was in possession, without any evidence of such right, or affording to the defendant an opportunity to reply to whatever evidence the plaintiff might adduce. The failure or refusal of a defendant to pay the costs of an action, or any portion thereof, in advance of a trial, does not authorize the court to deprive him of his defense to the action. The guaranty of the Constitution that he shall not be deprived of his property without due process of law gives him the right to be heard in its defense against any claim that may be made against him for its possession, and he is not to be deprived of this right as a penalty for failing to comply with some rule of court. See Foley v. Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; Younger v. Superior Court, 136 Cal. 682, 69 Pac. 485. Not only has the Legislature not attempted to vest the court with such authority, but in section 274, Code Civ. Proc., under which the reporter's right to compensation is derived, as that section stood at the time the judgment herein was rendered (Amendments of Codes 1880, Code Civ. Proc. p. 54), the Legislature has expressly declared: "The reporter's fees for taking notes in civil cases shall be paid by the party in whose favor judgment is rendered and shall be taxed up by the clerk of the court as costs against the party against whom judgment is rendered." The amendment of this section in 1885 (St. 1885, p. 218, c. 167), requiring each party to pay the reporter's per diem before judgment or verdict is entered, was held unconstitutional. See Stevens v. Truman, 127 Cal. 155, 59 Pac. 397. If, upon the refusal of the defendant to comply with the order of the court, the plaintiff had desired a trial of the cause, he could have deposited with the clerk the whole of the reporter's per diem, and, if he had obtained judgment, included the amount in his cost bill, but he was not authorized to take judgment in his favor without a trial of the issues. In Adams v. Crawford, 116 Cal. 495, 48 Pac. 488, it was held that if the plaintiff, after demanding a jury, did not comply with a rule of the court requiring a deposit of the jury fee, the court did not err in refusing his demand and trying the case without a jury; but there is nothing in the opinion therein which justifies the action of the court in rendering a judgment without any trial.

The court also erred in overruling the defendant's demurrer to the complaint. The complaint alleges that at the time of the commencement of the action the plaintiff was the owner of, and in possession of, the entire tract of land therein described; and it also alleged that for about one year prior thereto the defendant "had been, and now is," unlawfully in the possession, without any right or title, of a portion of the above-described premises, and unlawfully withholds the same from the plaintiff—describing the portion so withheld. The defendant demurred to the complaint for ambiguity, pointing out in its demurrer these averments as the particulars in which it was ambiguous, and its demurrer should have been sustained.

The judgment should be reversed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

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145 Cal. 586

MARIN COUNTY WATER CO. v. MARIN COUNTY et al. (S. F. 3,918.)*

(Supreme Court of California. Dec. 24, 1904.)

EMINENT DOMAIN—PROPERTY SUBJECT TO RIGHT —LAND APPROPRIATED FOR HIGHWAY—RESERVOIR.

1. Code Civ. Proc. § 1237, defines eminent domain as the right of the people or government to take private property for public use. Section 1240, enumerating the private property which may be taken therefor, includes all real property belonging to any person; lands belonging to this state, or to any county, incorporated city, etc., not appropriated to public use, and property taken for public use, providing, however, that such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated. *Held*, that land of a private person subject to an easement for a public highway may be taken by a water company for a dam and reservoir as for a more necessary public use.

Department 2. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Condemnation proceedings by the Marin County Water Company against the county of Marin and others. From a judgment for the defendant county, plaintiff appeals. Reversed.

Jesse W. Lilienthal and E. B. Martinelli, for appellant. Thos. P. Boyd and Jas. Alva Watt, for respondent.

McFARLAND, J. A demurrer of defendant county of Marin to the complaint for want of jurisdiction, and an insufficiency of stated facts to constitute a cause of action, was sustained without leave to amend, and judgment rendered for said defendant. From this judgment plaintiff appeals. The material averments of the complaint, which presents a proceeding in eminent domain, are that the plaintiff is a corporation engaged in the business of supplying the inhabitants of Marin county with pure and fresh water; that defendant county of Marin is a body corporate and a political division of the state; that, in order that plaintiff may exercise its public use of supplying water as aforesaid it is necessary for it to construct and maintain a dam and reservoir at a certain point, and to take certain described property for the purpose of flooding and permanently covering the same with water by means of said dam and reservoir. It is further averred that the title in fee to said premises is in plaintiff, but that they are "subject to an easement in favor of defendant county of Marin for the uses of a highway, and that the premises sought to be taken herein are a part of the highway or road sometimes called the 'Fairfax and Bolinas Bay Road.'" It is further averred that the public use for which the property is sought to be taken "is a more necessary public use than that to which it is now appropriated" for certain reasons stated. And it is further averred that defendant county of Marin has refused to vacate the part of the road sought to be taken, or to fix any terms upon which it will consent to permit plaintiff to acquire or have the use thereof. The prayer is that it may be adjudged that plaintiff have the right to take and hold the said premises for the alleged public use upon its making compensation to be ascertained, etc.

The question presented is an important one, and we do not know of any former decision of this court in which it has arisen or been determined. After a full consideration of the subject, we have reached the conclusion that the plaintiff has the right to the judgment of condemnation prayed for, if it can prove the averments of the complaint; and that, therefore, the demurrer was improperly sustained. It may be conceded that the right of a person, natural or artificial, to exercise the power of eminent domain, must be found in some statutory provision. The two provisions of law which are mainly important here are section 1237 and the first three subdivisions of section 1240 of the Code of Civil Procedure. Section 1237 is as follows: "Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title." It is contended by respondent that this definition of eminent domain confines it to private property; that this definition attaches to and qualifies all subsequent provisions; and that the property sought to be taken in the case at bar is not private property, and therefore not within the reach of the power of eminent domain. But section 1240, to and including subdivision 3, is as follows: "The private property which may be taken under this act includes: (1) All real property belonging to any person. (2) Lands belonging to this state, or to any county, incorporated city, or city and county, village, or town, not appropriated to some public use. (3) Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated." These provisions of section 1240 describe and enumerate the kinds of property which, for the purpose of the exercise of eminent domain, shall be deemed to be private property, and "which may be taken under this act," and in subdivision 3 there is placed in this category, without qualification, "property appropriated to public use." Therefore property appropriated to public use—which includes the property involved in the case at bar—"may be taken" unless the particular property sought to be taken in a given case is excepted and excluded by some other provision. There is such an exception in subdivision 2, which provides that lands belonging to the state or a municipality can be taken only when the land had not already been "appropriated to some public use." In the case at bar the land which had been appropriated to a prior public use did not belong to the county of Marin, or to any other municipality; it belonged to appellant. There is here, then, presented the case of land belonging to a private person which had been appropriated to a public use, and which, under said subdivision 3, may be taken "for a more necessary public use than that to which it has been already appropriated."

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*Rehearing denied January 23, 1905.

Counsel on each side have given instances where unjust or mischievous consequences would follow from the view of the law opposite to that contended by them. The consequences which would follow any particular decision are hardly legitimate arguments to be considered in determining what the law is; but one or two of them may be noticed. Counsel for respondent say that, if appellant's view be sustained, then, for instance, a public square or park or schoolhouse might be taken by a private person or corporation under the power of eminent domain. But this apprehension is practically answered by subdivision 2 of section 1240, which provides that lands belonging to the state or to a municipality which have been already appropriated to a public use cannot be taken under eminent domain for another public use. On the other hand, it is said that, if a public road can, in no instance, be taken for a more necessary public use, then a city desirous of establishing waterworks, or a company furnishing water to a city, could not acquire and maintain dams and reservoirs in another county, no matter how necessary they might be, if a public road, though of little use, happened to run through part of the land necessary to be taken. However, whatever consequences may flow from any particular view, we must declare the law to be as we find it; and, considering all the provisions of the Code together as they stand, we think that the law on the subject is as above stated. The Legislature has always the power to change the law when experience shows that a change is necessary. We do not think that the provisions of the Political Code giving the board of supervisors certain general powers as to laying out and closing public roads have any bearing on the question here involved.

The judgment is reversed, with directions to the court below to overrule the demurrer to the complaint.

We concur: HENSHAW, J.; LORIGAN, J.

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145 Cal. 609

PEOPLE v. COLEMAN. (Cr. 1,181.)

(Supreme Court of California. Dec. 29, 1904.)

CRIMINAL LAW—INCREASE OF PUNISHMENT ON SUBSEQUENT CONVICTIONS—CONSTITUTIONAL LAW—STATUTES.

1. The increase in the penalty on subsequent convictions of the same person for crime, required by Pen. Code, § 666, does not punish accused twice for the same offense.

2. Pen. Code, § 666, provides for increasing the punishment of criminals on subsequent convictions. Section 988 provides that the arraignment must be made by the court, or by the clerk or district attorney under its direction, and consists in reading the indictment or information to the defendant, and delivering to him a copy thereof and of the indorsements thereon, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the indictment or information. Section 1158 provides that whenever the fact of a previous conviction of another offense is charged, the jury, if they find a verdict of guilty of the offense with which he is charged, must also, unless the answer of the defendant admits the charge, find whether he has suffered such previous conviction, and that their verdict shall be whether the charge of previous conviction is true or false. *Held*, that a contention that it is a discrimination and destruction of the uniform operation of the general laws in the trial of a case, where a

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¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 285.

former conviction is relied on to increase the penalty for the offense for which defendant is being tried, that the jury is prejudiced in advance from the fact of the reading of the indictment charging him with the previous conviction, and that thereby defendant is compelled to be a witness against himself, is untenable, in view of section 1093, directing that after the jury is impaneled and sworn in felony cases the indictment or information shall be read to the jury, the defendant's plea stated, and that where a previous conviction is charged, and the defendant has confessed the same, the clerk in reading the indictment shall omit therefrom all that relates to the previous conviction.

3. Under the statutes, in a case where a defendant charged with robbery and a previous conviction for the same offense is arraigned and tried in the same manner as any other defendant who has suffered a previous conviction to which a plea of not guilty is entered, followed by verdict of guilty and sentence for the crime charged with a previous conviction of robbery, there is not a deprivation of liberty without due process of law, within the direct inhibition of Const. U. S. Amend. art. 14.

Department 1. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

James Coleman was convicted of crime, and he appeals. Affirmed.

Adam Dixon Warner, for appellant. U. S. Webb, Atty. Gen., R. C. Van Fleet, and E. B. Power, for the People.

VAN DYKE, J. This is an appeal from a judgment sentencing the defendant to 15 years in the penitentiary for the crime of robbery, with a former conviction of robbery. The information alleged a prior conviction of robbery on the 11th day of March, 1892, and the new offense of robbery committed on the 25th day of November, 1903. On the arraignment of the defendant he stood mute as to said prior conviction of robbery as charged in said information, and the plea of not guilty was entered on the record by the clerk, whereupon the defendant entered a plea of not guilty of robbery as charged in the information, as committed on the 25th day of November, 1903.

The appeal is taken on the ground that the defendant did not have a fair and impartial trial, as intended by the Constitution of the United States and of the state of California, for the reason that the trial was conducted under the provisions of sections 666, 988, and 1158 of the Penal Code. These sections read as follows:

"Sec. 666. Second Offense, How Punished After Conviction of Former Offense. Every person who, having been convicted of petit larceny, or of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows: (1) If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison for any term exceeding ten years, such person is punishable by imprisonment in the state prison not less than ten years. (2) If the subsequent offense is such that upon a first conviction, the offender would be punishable by imprisonment in the state prison for five years, or any less term, then the person convicted of such subsequent offense, is punishable by imprisonment in the state prison not exceeding ten years. (3) If the subsequent conviction is for petit larceny, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding five years."

"Sec. 988. Arraignment, How Made. The arraignment must be made by the court, or by the clerk or district attorney under its direction, and consists in reading the indictment or information to the defendant and delivering to him a copy thereof, and of the indorsements thereon, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the indictment or information."

"Sec. 1158. Jury May Find Upon Charge of Previous Conviction. Whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense with which he is charged, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous conviction may be: 'We find the charge of previous conviction true,' or, 'We find the charge of previous conviction not true,' as they find that the defendant has or has not suffered such conviction."

Similar provisions have been contained in the statutes of various states for many years, and they have been uniformly sustained by the courts. Moore v. Missouri, 159 U. S. 676, 16 Sup. Ct. 179, 40 L. Ed. 301. Penal laws are not so much for the punishment of the offender as for the protection of society, and experience has shown that the persistent and hardened offender is more dangerous to society than a person who has committed but one offense, and that a severer punishment is demanded in such case, the better to protect society. Appellant's counsel in his reply brief says: "It may be admitted that the prior conviction constitutes the subsequent violation of the law an 'aggravated offense,' for that, we may admit, is the meaning and intent and the force and effect of section 666, with which we have no quarrel." But he claims that this matter of aggravation is for the information of the court alone, and with which the jury has no concern and nothing to do. It may be replied to this that the former conviction is a fact, and a very important one, which constitutes or goes to make up this aggravated offense, and, being a material fact in the case, necessarily it must be pleaded; and if issue be joined in reference thereto, either by plea of not guilty or by standing mute, which amounts to the same thing under the Penal Code, that material fact must be proven as any other material fact in the trial of the cause. In People v. King, 64 Cal. 340, 30 Pac. 1029, in a like case, this court says: "But the charge of the previous conviction which entered into and made part of the aggravated offense was one to which the accused had the right to plead, and for which he had the right to be tried as in other cases. In such a case he is not being tried for a separate offense as intimated by appellant's counsel, but, as already stated, the fact of the former conviction is a part of the offense upon which he is being tried." In People v. Stanley, 47 Cal. 114, 17 Am. Rep. 401, it was claimed, as here, that if the punishment for the second offense be increased because of a prior conviction for another offense the accused would be twice punished for the same offense, to which this court replies: "The ready answer to the proposition is that he is not again punished for the first offense, but the punishment for the second is increased, because by his persistence in the perpetration of crime he has evinced a depravity which merits a greater punishment, and hence to be restrained by severer penalties, than if it were his first offense." It is again contended on behalf of the appellant that it is a discrimination and destruction of the uniform operation of the general laws in the trial of a case like this, and that the jury is prejudiced in advance from the fact of the reading of the indictment charging him with the previous conviction, and that thereby defendant is compelled to be a witness against himself. To this it might be replied that the defendant has it in his power to avoid bringing before the jury the fact of a previous conviction, by confessing such previous conviction at the time of the arraignment before the court. Section 1093 of the Penal Code directs that, after the jury is impaneled and sworn, the indictment or information is read to the jury, "and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction."

The provisions of the Penal Code and the practice thereunder in reference to cases of previous convictions are not in conflict with the provisions of the Constitution of the United States or of this state.

In Moore v. Missouri, supra, the indictment charged that defendant, on the 11th day of January, 1877, in the city of St. Louis, in the criminal court therein, was duly convicted of the offense of grand larceny, and was sentenced by said court to imprisonment in the penitentiary for the term of three years, and was duly imprisoned in said penitentiary accordingly, and that thereafter he committed the offense of burglary and grand larceny on May 26, 1893. On being arraigned he pleaded not guilty. Among the grounds assigned on his motion for arrest of judgment was that the first offense was not included in the last offense, but was a separate and distinct offense, and that the statute upon which the indictment was founded was unconstitutional and void, in that it violated the fourteenth amendment of the federal Constitution, and the bill of rights of the Constitution of Missouri, in that it prescribed a second punishment for the same offense, and a different punishment for different persons for committing said offenses. The Supreme Court, however, held that these contentions were untenable; that the accused was not again punished for the same offense. "The punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." Citing with approval Ross' Case, 2 Pick. 165; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; Plumbly v. Commonwealth, 2 Metc. (Mass.) 413; Johnson v. People, 55 N. Y. 519; and a great number of other cases from various states.

In People v. Sickles, 156 N. Y. 548, 51 N. E. 290, 291, it is said in the opinion of the court: "Reason suggests that the persistent and hardened offender needs a severer punishment. The previous punishment having failed to reform him, his guilt, upon his further offending, is greater, and, being so, severer treatment is needed to compel him to reform his ways, and in furtherance of the effort to prevent crime. In enacting that, upon a conviction for a second offense, the punishment shall be one of greater severity, the Legislature has acted in accordance with the dictates of a wise policy and has invaded no constitutional right. How can it be said that the defendant has not had due process of law? The statute announced the enhanced penalty which he would incur by repeating his infraction of the laws against crime. The indictment charged him with the aggravated crime, and he was put upon his trial, under the charge of being for a second time an offender, and therefore liable to suffer a severer punishment. His sentence was pronounced after he had been tried and found guilty by the verdict of a jury. The course of the administration of justice was regular in all respects. When it is said that the presumption of the defendant's innocence was destroyed by the introduction of proof of his former conviction the proposition is based upon mere assumption, and it is the error in that assumption which affects the appellant's argument. The statute has not abrogated the rule as to the presumption of innocence."

The scope and meaning of the fourteenth amendment to the Constitution were considered in In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519. The Supreme Court says in that case: "The fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States." Citing a number of former decisions by the same court. And again, in Leeper v. Texas, 139 U. S. 467, 11 Sup. Ct. 577, 35 L. Ed. 225, it is said "that by the fourteenth amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." Citing a number of cases.

The defendant in this case, as appears from the record, was arraigned and tried in the same manner as any other defendant who has suffered a previous conviction is arraigned and tried, and therefore he was not discriminated against or deprived of due process of law, as shown by the decisions already cited and many others from the various states that might be cited to the same effect.

Judgment affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

145 Cal. 684

SHEEHAN v. SCOTT. (S. F. 2,309.)

(Supreme Court of California. Jan. 4, 1905.)

STATES—LEGISLATIVE POWER—CONSTITUTION—CONSTRUCTION — DELEGATIONS — MUNICIPAL CORPORATIONS — CHARTERS — OFFICERS — QUALIFICATIONS — TAX COLLECTOR — RESIDENCE—EVIDENCE — INTENTION — FINDINGS —APPEAL.

1. Under San Francisco City Charter (St. 1899, p. 274, art. 4, c. 5, § 1), providing for the election of a tax collector, who shall be an elector of the city and county at the time of his election, and who must have been such for at least five years next preceding such time, a person elected to such office, who had not been an elector of such city and county for five years next preceding the time the votes were cast for him, was ineligible.

2. Const. art. 4, § 1, vesting the legislative power of the state in a Senate and Assembly, includes all legislative power of the state, the exercise of which is not expressly prohibited to the Legislature or conferred on some other body.

3. Though the Legislature can never increase or diminish the constitutional qualifications prescribed for eligibility to any of the offices created by such instrument, it may prescribe additional qualifications for all offices which it is authorized to establish.

4. Const. art. 11, § 6, prohibiting the Legislature from creating municipalities by special laws, and section 8, giving to certain cities the right to frame charters for their own government, which, if approved by the Legislature, shall become the organic act of such cities and supersede inconsistent laws, withdrew from the state Senate and Assembly the legislative authority of the state with reference to municipal government for such cities until after the proposed charter was prepared for submission, and then limited such authority to the mere approval or rejection of the charter formulated.

5. The authority so withdrawn and conferred on such cities is none the less a part of the lawmaking power of the state because contained in the article on "Cities, Counties and Towns," rather than in the article on "Legislative Department."

6. San Francisco City Charter (St. 1899, p. 274, art. 4, c. 5, § 1), requiring a person to have been an elector of the city and county for five years at the time of his election, in order to be eligible to the office of tax collector, is not unconstitutional, as beyond the power of the state Legislature and the legislative department of the city, in prescribing additional qualifications for office to those prescribed for constitutional offices.

7. A determination by the superior court of an issue of fact on conflicting evidence is conclusive on appeal.

8. In an election contest for the office of city tax collector, evidence *held* to justify a finding that defendant had not been a resident of the city for five years next prior to his election, as required by San Francisco City Charter (St. 1899, p. 274, art. 4, c. 5, § 1), and was therefore ineligible.

9. Evidence of defendant's intention to take up his place of abode in a certain city, unaccompanied with acts calculated to carry such intention into effect, other than the mere placing of his wife in the home of her father, in such city, and defendant's occasional visits to her, was insufficient to establish his residence in such city.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Edward I. Sheehan against Joseph H. Scott. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Wal. J. Tuska and A. Ruef, for appellant. G. W. McEnerney and Jno. S. Drum, for respondent.

HARRISON, C. At the municipal election held in San Francisco November 7, 1899, the appellant received a plurality of all the votes cast for the office of tax collector of said city and county, and thereafter the board of election commissioners declared him to have been elected to said office for the term of two years from the first Monday after the 1st day of January, 1900, and issued to him a certificate of election therefor. The respondent herein—an elector of said city and county—contested his right to the office upon the ground that, under the provisions of the charter of San Francisco, he was not at the time of his election eligible to such office, and on December 22, 1899, filed with the county clerk a verified statement setting forth the particular grounds of such contest. Upon the hearing thereof the superior court found that from the 1st day of January, 1893, until subsequent to the 1st day of January, 1895, the appellant was an inhabitant, resident, and elector of the county of Santa Clara, and was not an inhabitant, resident, or elector of the city and county of San Francisco; that he was not an elector of said city and county for five years next preceding the date of the election held on November 7, 1899, nor for five years next preceding the first Monday after the 1st day of January, 1900, and that he was not at any time during the years 1893, 1894, or 1895, until subsequent to the 1st day of April, 1895, an inhabitant or resident of San Francisco for a period of 90 days, and was not an elector of said city and county until after April 1, 1895, and thereupon held that he was not eligible to the said office of tax collector, and was not duly elected to said office, and rendered judgment annulling and setting aside his said election, and canceling the certificate of election issued to him. From this judgment the present appeal has been taken.

The charter of San Francisco was framed by a board of freeholders elected therefor, and was approved by the Legislature January 26, 1899. St. 1899, p. 241. Section 1, c. 5, art. 4, declares (page 274): "There shall be a tax collector of the city and county, who shall be an elector of the city and county at the time of his election, and who must have been such for at least five years next preceding such time." Under this provision of the charter, unless the candidate for the office has the qualifications thus named "at the time of his election," he is not capable of being elected thereto, and will not be entitled to hold the office, even though he receive a majority of the votes cast at the election. The rule declared in Searcy v. Grow, 15 Cal. 118, that, if a person is not eligible at the time the votes were cast for him, he will not be entitled to hold the office by reason of becoming subsequently qualified, has never been modified in this state. In Ward v. Crowell, 142 Cal. 587, 76 Pac. 491, and in State v. Van Beek, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 622, 43 Am. St. Rep. 397, cited therein, the statute provided certain qualifications for holding the office, but none for rendering the candidate eligible to it.

The appellant, however, urges that the provision in the charter requiring him to have had such qualification for five years next preceding the election is unconstitutional; that it is not competent for the Legislature to prescribe any other qualifications for eligibility to an office than are prescribed in the Constitution as the qualifications of an elector; and that, even if it be conceded that this power exists in the Legislature, a municipality, which is but a subordinate creature of the Legislature, has not such power. The express declaration in section 1, art. 4, of the Constitution of this state, that "the legislative power of the state shall be vested in a Senate and Assembly," includes all the legislative power of the state whose exercise is not expressly prohibited to the Legislature or conferred upon some other body. In the face of this declaration, there can be no implication of the absence or nonexistence of such power, but whoever would claim that the power does not exist in any particular case, or has been improperly exercised, must point out the provision of the Constitution which has taken it away or forbidden its exercise. "The Constitution of this state is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the state, or delegated to the general government, or prohibited by the Constitution of the United States." People v. Coleman, 4 Cal. 46, 60 Am. Dec. 581.

It is not contended by the appellant that the Constitution contains any express inhibition upon the Legislature against prescribing qualifications for the officers whose appointment or election it may authorize, but he contends that the designation in the Constitution of the qualifications of certain officers named therein creates an implication therefrom that in all other cases no other qualification shall be required than those of an elector. It may be admitted that the Legislature can neither increase nor diminish the qualifications which the Constitution has prescribed for eligibility to any of the offices created by that instrument; but for all offices which the Legislature may authorize or establish, either by virtue of express authority therefor in the Constitution itself, or by virtue of its general legislative authority, it may prescribe such qualifications as, in its judgment, will best accord with public policy or subserve the interests of those affected thereby. That it is of public advantage that an officer shall be acquainted with the duties of his office needs no argument, and it is equally evident that the interests of a community will be better understood and subserved by one who has been identified with that community for a reasonable period of time than by a stranger, or by one whose introduction therein has been of recent date. Whether such qualifications shall be required, as well as their character and extent, and the particular offices for which they shall be required, are matters entirely of legislative policy. Such legislation is frequently found upon the statute book, and by section 54 of the county government act (Gen. Laws 1903, p. 143) itself the district attorney is required to have been admitted to practice in the Supreme Court of this state.

The authority to provide a municipal government for a city is referable to the lawmaking power of the state, and the enactment of the charter for a municipality is a legislative act. By section 6 of article 11 of the Constitution, the people have prohibited the Legislature of this state from creating municipalities by special laws; and by section 8 of the same article they have given to any city having a certain population the right to frame a charter for its own government, which, if approved by the Legislature, shall become the organic act of such city, and supersede all laws inconsistent therewith. The people have thus withdrawn from the Senate and Assembly the legislative authority of the state in reference to municipal government for cities, to the extent that neither of those bodies can exercise any legislative authority in the enactment of a charter for such a municipality until after its provisions have been formulated and approved by the city itself in the manner prescribed by section 8 aforesaid, and have limited their legislative authority to the mere approval or rejection of the charter so formulated. The authority thus withdrawn from the Legislature and given to the city is none the less a part of the lawmaking power of the state because it is contained in the article upon "Cities, Counties and Towns," rather than in the article upon the "Legislative Department," and the act of the city in formulating the charter and determining the provisions to be included therein has the same force and authority as would a charter with the same provisions enacted by a Legislature that was not restrained by any constitutional limitations. Its adoption by the city and approval by the Legislature in the manner prescribed by said section is the mode prescribed by the Constitution for its enactment, and has the same effect as that of a law which is passed by bill, under the provision of section 15 of article 4. It must be held, therefore, that the provisions of the charter of San Francisco in reference to qualifications for eligibility to the office of tax collector have been established by the legislative authority of the state, and are valid.

The finding of the court that the appellant had not been a resident or elector of San Francisco for the period of five years next preceding the date of the election is sustained by the evidence. Whether he had this qualification was an ultimate fact, depending upon certain probative facts; and the determination of the superior court upon these probative facts, so far as such determination was made upon conflicting evidence, or by reason of inferences from established facts, must be accepted as correct. After it had been shown that he had acquired a domicile in the county of Santa Clara, the burden of proof was upon him to show that he had acquired another domicile in San Francisco. It appears from the bill of exceptions that he became a resident of San Jose in the latter part of 1892, and engaged in business therein at that time, and continued to carry on the same until the latter part of February, 1895. In March, 1893, he caused himself to be registered as a voter in that county, and was not registered as a voter in San Francisco until July 31, 1896. His wife accompanied him when he first went to San Jose, and they furnished and occupied a house on St. James street, in that city, as their residence, and continued to live there until some time in the month of August, 1894, when they broke up housekeeping, and he went to live at another house, on North Fifth street, where he continued to live until the latter part of February, 1895. He packed up the furniture of their house on St. James street, and stored it in the basement of the house on North Fifth street, where it remained until he left San Jose. His wife was troubled with asthma, and found the climate of San Jose unfavorable to her health; and when they broke up housekeeping she went to the house of his father, in San Francisco, and occupied a room there for a while. As stated by her in her testimony: "Mr. Scott had some affairs to settle up his business, and he didn't like to leave me in the city alone, and, as I was ill, he thought the proper place for me was his parents' home; and so I stayed with them, and occupied the front room with Mr. Scott." The bill of exceptions does not show how long she remained at his father's house, or what amount of time she passed there; but during the summer months she visited several mountain resorts for her health, and from them appears from time to time to have returned to her husband at San Jose. She also testified that during the period between her going to his father's house and January 1, 1895, she visited San Jose at least once a week, and sometimes oftener, and at times remained there two or three days, during which she stayed with her husband at the house on North Fifth street where he was living. A witness who was a housemaid at this place until nearly the end of 1894 testified that the appellant and his wife lived there almost continuously during the time that she was there. The business of the appellant required him to visit San Francisco occasionally after he went to North Fifth street to live, and when he made such visits he would go to his father's house to see his wife, if she was then in that city, and at times he would pass the night there. He did not, however, take any house for himself in San Francisco until February, 1895, after he had closed out his business in San Jose. He then took a house on Haight street, and shipped his furniture to that place, and went there with his wife to live. Under this evidence the court was justified in finding that he did not become a resident of San Francisco prior to February, 1895.

There was evidence before the court that, when the appellant broke up housekeeping at San Jose, it was with the purpose of making San Francisco his place of residence, and many declarations by him of such intention were received in evidence; and it is urged in support of the appeal that, as the domicile or residence of a person depends upon the intention with which he selects his place of abode, the court should have held that this evidence of intention, coupled with his wife's taking up her abode at his father's house in pursuance of the agreement to that effect, and his subsequent removal there, made him a resident of San Francisco in August, 1894. The defect in this argument is that, however strong his intention may have been, it was not accompanied or followed by any immediate execution. These declarations all looked to the future, and were merely indicative of a purpose, but were not expressions giving character to the performance of an act. Declarations of the intention with which an act is done may illustrate the character of the act as a part of the res gestæ (Wright v. Boston, 126 Mass. 161; Code Civ. Proc. § 1850), but are entitled to but little, if any, consideration when made either as the narration of a past act, or as indicating the purpose with which an act is to be done in the future. The residence of a person will not be affected by such declaration until the intention is carried into effect by the completed act. "A change in the domicile of a person cannot be effected by an intention in the mind to make this change, unless it is accompanied by an actual change in the place of abode." Pickering v. Cambridge, 144 Mass. 244, 10 N. E. 827. "The residence can be changed only by the union of act and intent." Pol. Code, § 52 (7). "The mere intention to acquire a new residence, without the fact of removal, avails nothing; neither does the fact of removal without the intention." Id. § 1239 (9). See, also, State v. Frest, 4 Har. 558; Murphy v. Hunt, 75 Ala. 438; Foss v. Foss, 58 N. H. 283.

We advise that the judgment be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

(145 Cal. 691)

SCOTT v. SHEEHAN. (S. F. 2,875.)

(Supreme Court of California. Jan. 7, 1905.)

ELECTION CONTEST—TITLE TO OFFICE—TRIAL—DE FACTO OFFICER—POSSESSION—INJUNCTION—APPEAL—ACADEMIC QUESTIONS—REVIEW.

1. The possession of an office, as between two rival claimants, does not depend on the mere physical possession of the rooms and appurtenances ordinarily used in the performance of the duties thereof.

2. The title to an office, as between two conflicting claimants, cannot be tried in a suit to enjoin one of them from interfering with the possession of the incumbent, who is alleged to be in the possession of the office, and performing the duties thereof, as a de facto officer.

3. Where in a prior election contest it had been determined by the Supreme Court that complainant was not entitled to the office, an appeal from a judgment in another action by complainant, enjoining defendant from interfering with him in his possession of the office as a de facto officer, and finding that complainant was in possession of the office at the time of the commencement of the action, presented a purely academic question, and would not be reviewed.

Department 2. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Action by Joseph H. Scott against Edward I. Sheehan. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Garret W. McEnerney and John S. Drum, for appellant. Wal. J. Tuska, A. Ruef, and P. F. Dunne, for respondent.

HENSHAW, J. These appeals are from the judgment, and from the order denying defendant's motion for a new trial. The judgment enjoined the defendant from interfering with the position held by the respondent of the office of tax collector of the city and county of San Francisco, and awarding damages and costs of suit.

Sheehan was tax collector of the city and county of San Francisco. Scott was elected to succeed him. Sheehan, in good faith, believing that Scott was ineligible to fill the office, and that his election to fill the office was a nullity, and that he was entitled to hold the office until the election and qualification of a person eligible to hold the same, refused to surrender possession of the offices, books, and records therein contained, and commenced an action against Scott to contest his election, under section 1111, subd. 2, of the Code of Civil Procedure. The result of the judgment in that action was a declaration of the ineligibility of Scott, which judgment has been affirmed upon appeal to this court. Sheehan v. Scott (S. F. 2,309, filed January 4, 1905) 79 Pac. 350. Pending the determination of that action, however, Sheehan being advised that Scott proposed to take summary possession of the offices, barricaded the doors and entrances so as to protect himself in the possession; and it is found that all of the preparations which he made were reasonable and necessary, according to his information, to enable him to maintain the possession of the office, and made upon his part solely by reason and on account of the threats and preparations made by plaintiff; that at noon, upon January 8, 1900, the day and hour when the newly elected officer was to enter upon the discharge of his duties, Scott made demand upon Sheehan to surrender possession, and, upon his refusal so to do, Mr. Scott's legal adviser told him to take possession. The result is summed up in the finding of the court as follows: "That thereupon a number of persons in confederation with plaintiff, Joseph H. Scott, acting under the orders of said Scott, and the said Scott himself, jumped over the counters and chairs in the tax collector's office, and struck, beat, bruised, and maimed a number of men in the occupation of said office by the leave and upon the direction of the defendant, Edward I. Sheehan, and undertook to take possession of said office and maintain such possession by force, and to drive out said Sheehan, his deputies, and the other persons in said office by leave of said Sheehan. The said Joseph H. Scott, and a number of other persons acting under his orders and by his directions, did from shortly after noon until the surrender of the occupation of the rooms of tax collector, by and in pursuance of the injunction as hereinafter alleged, occupy and hold by force a portion of one of the rooms of said tax collector. Whatever possession the plaintiff had of either of said rooms or said office before the time of the service upon the defendant of the injunction was had and procured by force in the manner above stated, and against the will and contrary to the desire of the defendant." In this situation of affairs, Scott sued to enjoin Sheehan from interfering with him in the conduct of his office; averring that upon the 8th of January, at the hour of noon, he had entered upon the discharge of his official duties, and at the time of the commencement of the suit still was the incumbent of the office, and acting de facto tax collector. The court found that the plaintiff, Scott, was in possession of the office at the time of the commencement of the action. It is contended that this finding is contrary not only to the evidence, but to the finding above quoted. It is, of course, well settled that the possession of an office does not depend upon the mere physical possession of the rooms and appurtenances ordinarily used in the performance of the duties. Yet in many instances, as in this, such possession is convenient, if not necessary, to the orderly performance of the duties which pertain to the office. It is, of course, equally well settled that, in an action such as this, the title to the office is not involved, and cannot be inquired into. In view of the decision of this court, to which reference has been made, deciding that Scott was ineligible to fill the office, and in view of the further fact that the term of office has long since expired, it becomes a question purely of academic interest to review the conflicting evidence, and to decide whether or not Scott had such possession of the office as to have justified the court in enjoining Sheehan from interfering with him in the performance of its duties. Sheehan, having taken all proper steps to resist Scott's claim and attempted intrusion, has not, of course, imperiled or lost any of his legal rights. But as is said in Sullivan v. Haacke, 5 Ohio N. P. 26: "How futile, then, to urge the court to adjudge that the plaintiff has been removed. Can the court so adjudge without first trying the question of title, and determining that the title is in the defendant? Clearly no; to find that the defendant has been removed necessarily decides the question of title, and this cannot be undertaken here." So in this case it cannot be said that there was not sufficient evidence before the court to justify its finding that Scott had entered upon the discharge of the duties of the office, and, that being so, it was proper to enjoin the defendant from interfering with the plaintiff. While obeying the injunction, as has been said, the defendant sacrificed none of his legal rights.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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145 Cal. 671

ROPES v. JOHN ROSENFELD'S SONS.

(S. F. 2,947.)*

(Supreme Court of California. Jan. 4, 1905.)

SALES — BROKER — COMMISSION — RATIFICATION — EVIDENCE — SUFFICIENCY — OFFER — TIME LIMIT — CALCULATION OF TIME — SUNDAY — APPEAL.

1. Where an offer to sell was made on Sunday, with the understanding that the offer would expire on the following day, Sunday is included, in calculating the time limit, and such limit did not extend to Tuesday.

2. A broker received the purchase price of a ship, for the sale of which negotiations had been conducted between him and the owner, and a contract made, by which the owner agreed to pay the broker a commission of 5 per cent. on the purchase price if sale was made within a certain time. The broker failed to find a purchaser within the time limited, but, after the expiration of the time, made the sale; the ship having in the meantime been delivered to the purchaser under a contract of sale between the owner and another representative of the same purchaser subsequent to the expiration of the contract between the broker and the owner. In paying over to the owner of the ship the purchase price which was paid by the purchaser to the broker, he retained 2½ per cent. as commission; that sum being paid by the owner to him by way of compromise of the claim for full commission; both parties reserving their respective rights, and the owner disputing the broker's right to any commission. *Held* insufficient to show a ratification by the owner of the sale of the ship by the broker, so as to entitle the broker to commission.

3. Where a broker is given the right to sell within a limited time for a specified commission, but a purchaser is not found within the time limit, able and willing to buy, the broker is not entitled to his commission for the procurement of a purchaser subsequent to the expiration of the time limit.

4. Where plaintiff in an action for commission on a sale alleged to have been effected as broker joined with his complaint for breach of a special contract a second count for work and labor, but all of his evidence was addressed to the alleged contract, and sale under it, a failure to find on the second count is not cause for reversal.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by A. G. Ropes against John Rosenfeld's Sons, a corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Andros & Frank and Nathan H. Frank, for appellant. Goodfellow & Eells and W. S. Goodfellow, for respondent.

CHIPMAN, C. Action for commission alleged to be due plaintiff from defendant corporation on account of the sale by plaintiff of defendant's steamer Peter Jebsen. It is alleged in the complaint that plaintiff was at all times mentioned therein, and still is, doing business in the city of New York under the firm name of I. F. Chapman & Co., and that "R. J. Chapman, of San Francisco, doing business under the firm name and style of J. F. Chapman & Co., was the agent of said plaintiff." It is alleged that, on the date above named, R. J. Chapman, as such agent, entered into an agreement with defendant "whereby defendant promised and agreed to pay to said plaintiff a brokerage of five per cent. upon $215,000, provided the said plaintiff would secure the United States Navy Department as a purchaser for said sum of $215,000 of the Norwegian steamer Peter Jebsen"; that plaintiff secured the said United States Navy Department as a purchaser of said steamer at said figure, and defendant received the purchase price on May 26, 1898; that defendant thereafter paid plaintiff one-half of said commission, but refused to pay the balance thereof. A second cause of action is for this sum for work and labor performed in the same matter. Defendant denies that there was any agreement between plaintiff and defendant, other than as follows: That on May 22, 1898, defendant gave said R. J. Chapman a verbal offer to sell said steamer for the amount stated above, less 5 per cent., "subject to prompt reply," which the court found was understood by the parties to mean that the "offer would expire and cease to be binding unless the steamer was sold, and defendant notified thereof, on the following day." The answer avers that on May 23d "no prompt or other reply had been made to said offer, and on the afternoon of said 23d day of May the said offer was withdrawn, and the said R. J. Chapman was notified thereof, and thereto the said Chapman assented"; denies that plaintiff secured a purchaser for said steamer; denies the payment to plaintiff of any commission, or that any commission is still due plaintiff; and alleges that the defendant sold the steamer to the United States government for $215,000, "and that on the 26th day of May, 1898, the plaintiff herein paid to this defendant the sum of $209,625."

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*Rehearing denied February 3, 1905.

The court found as facts that on May 22, 1898, defendant gave R. J. Chapman, as agent of plaintiff, "a verbal offer to sell the steamer in plaintiff's complaint referred to for the sum of $215,000, U. S. gold coin, less 5 per cent. thereof, 'subject to prompt reply'" (the meaning of prompt reply already stated); that on May 23, 1898, "no prompt or other reply was or had been made to said offer, nor was said steamer on said day sold, nor had any purchaser therefor been found; that on the afternoon of May 23, 1898, the said offer of defendant was withdrawn, and the said R. J. Chapman, as such agent, was notified thereof, and thereto assented"; "that, save as hereinbefore set forth, there never was any agreement between the plaintiff or his said agent and the defendant respecting the said steamer"; that after the said 23d day of May, 1898, defendant sold the steamer to the United States government for $215,000, and that the sale was not made through plaintiff's agency, nor did plaintiff secure the United States Navy Department as a purchaser of said steamer; and that there is not due plaintiff, as commission or otherwise, any sum whatever. Defendant had judgment, from which, and from the order denying his motion for a new trial, plaintiff appeals.

The facts disclosed by the record are made up of verbal personal communications, messages by telephone, telegrams and letters of sundry persons, and testimony at the trial, and are somewhat voluminous. We will endeavor, without unnecessary prolixity, to state the established facts which appear to us to bear on the points raised in the briefs: Capt. Bradford, chief of the bureau of equipment of the Navy Department, at Washington, on Saturday, May 21, 1898, telegraphed plaintiff, in New York: "Am in the market for collier in the Pacific. Have you anything to offer?" Plaintiff thereupon replied by telegraph, "Will name you collier Monday," and also telegraphed to R. J. Chapman, plaintiff's agent at San Francisco: "Make us firm offer immediately if you desire the business. Colliers sale or charter give full description." Chapman called on defendant that afternoon to learn if it had a collier for sale, and was told it had. The parties agreed to meet next day, Sunday, May 22d, at 10 o'clock a. m., and they did so meet. There were present Chapman, Henry Rosenfeld, secretary of defendant corporation, and John and Louis Rosenfeld, the former president of the corporation. The steamer Peter Jebsen was then and there offered to Chapman for $215,000, less 5 per cent., or $205,000 net, "subject to prompt reply." Chapman did not inform defendant, nor did defendant know, for whom he was acting, or to whom he proposed to sell the steamer, but knew, in a general way, that Chapman was agent for plaintiff here, and that plaintiff was in the brokerage business. Chapman telegraphed plaintiff on Sunday, at 11 o'clock a. m., "Offer your firm Norwegian steamer Peter Jebsen" (describing her capacity, etc., briefly, and terms of sale, same as above). The time limit, however, was not stated in the telegram. On Monday, about 5 o'clock p. m., Henry Rosenfeld called up Chapman on the telephone, and inquired if they had any reply, who answered, "No; I have nothing yet," and Rosenfeld replied, "Our offer is withdrawn," to which, as testified by Rosenfeld, Chapman answered, "I am sorry," or "I cannot help it." "* * * He made one of those remarks." Thereafter, on Monday, May 23d, defendant offered the steamer to Lieut. Brooks, aide de camp of Admiral Kirkland, commandant of the Mare Island navy yard, "subject to prompt rely," for $215,000. On the next day, Tuesday, May 24th, about 2 o'clock p. m., a contract of sale and purchase was entered into in writing between defendant and Pay Inspector of the United States Navy Griffing, who was acting in the matter under the direct orders and by authority of Admiral Kirkland, and the steamer was delivered at the navy yard by defendant that evening. Defendant had no communication with Chapman on Monday, except as shown above; nor did Chapman, so far as appears, inform plaintiff on Monday that defendant had withdrawn its offer. While these events were transpiring at San Francisco, plaintiff, at New York, was dealing directly with the navy department, through Captain Bradford, and on Monday, May 23d, telegraphed him a short description of the Peter Jebsen, stating: "Will write full particulars." Receiving no reply to this telegram, one Murray, manager of plaintiff, at New York, went to Washington Monday night, arriving at Washington Tuesday morning, May 24th. On Tuesday plaintiff was telegraphing Chapman for further particulars about the steamer, and Chapman had also received another telegram in the morning: "Will report Jebsen soon." At 10:30 a. m. Tuesday, Chapman telegraphed, and, so far as appears, for the first time, that "the owners of the Jebsen have given refusal until to-night. Commandant navy yard here failing this vessel is still open for business" (giving further description of the vessel). Murray received at Washington from New York the following, dated May 24th: "Chapman wires Peter Jebsen telegraph immediately or we shall lose the business. Other parties are making her offer." Some time during that day, Tuesday, May 24th, Murray offered, in writing, the steamer to Bradford for $215,000, and Bradford accepted the offer in writing; and at 6:46 p. m. Tuesday a telegram was received at San Francisco from plaintiff, and was delivered to Chapman Wednesday morning, May 25th, stating the plaintiff had sold the steamer. Plaintiff had made no offer to sell the steamer prior to Tuesday. During that day some telegrams were exchange between Bradford and Kirkland; the latter informing the former that the pay office at San Francisco had purchased the steamer by his (Kirkland's) order, and the former informing the latter that he had purchased her from New York parties on that day, and informing the latter that he (Bradford) intended only that Kirkland should purchase the cargo. It does not appear in what sequence these messages were sent and received. Bradford, however, testified that the bureau gave Kirkland no authority to purchase the steamer, and he expressed the opinion that Kirkland had no such authority. What authority, if any, Kirkland had, does not appear. It only appears that he exercised it. There is in the record a letter of the Navy Department of April 8, 1898, authorizing the chief of the bureau of equipment to procure information about colliers, and, after inspection, to "recommend to the Secretary the purchase of those you deem advisable"; and Bradford testified that he reported the purchase of the Jebsen to the Secretary. It also appears that the vouchers were made out in the name of I. F. Chapman & Co., bearing date June 4, 1898, and payment was made to Chapman & Co. It also appears that each party persisted in claiming the sale, and that in the course of the controversy it came about that defendant agreed on Wednesday, the 25th day of May, by way of compromise, to accept payment from plaintiff, less 2½ per cent., if paid by 3 o'clock the next day. Chapman came to defendant on time with the money that had been transferred by telegraph to him by plaintiff. He paid defendant $209,625, and defendant receipted to him for this amount; i. e., "being $215,000 less 2½ per cent. commission," etc. It was, however, distinctly understood by both parties that defendant claimed that plaintiff was not entitled to any commission, and plaintiff claimed that he was entitled to full commission, and that the balance unpaid both understood was in dispute, and was not to be paid unless legally enforceable, in view of all the facts.

Construing the findings of the court to mean that the contract was one of brokerage, and accepting the finding as to the meaning of "prompt reply," but challenging the other findings unsupported by the evidence, plaintiff contends, first, that a purchaser was procured by plaintiff and presented to defendant within the time limited; second, that plaintiff was the procuring cause of the sale, and it is therefore immaterial (1) whether or not defendant knew that the party with whom it was dealing was induced to do so through plaintiff's instrumentality, or (2) whether plaintiff, during the negotiations, knew that he was the moving cause of the sale, or (3) whether the sale was actually consummated after the expiration of the time limited. Plaintiff also claimed that defendant ratified the sale by plaintiff; also that the time limit extended to Tuesday because the contract was made on Sunday. Defendant contends, first, that plaintiff's right, whatever it was—whether to earn commission or to purchase the steamer—expired on Monday, May 23d, and that the evidence is clear that there was no person able, ready, and willing to purchase the steamer at that time; and, second, that plaintiff, in any event, did not find the purchaser, and was not the moving cause of the sale.

As to the time limit, we think plaintiff had all of Monday in which to make the sale. His time had not expired when defendant attempted to withdraw its offer; and, had plaintiff on Monday found a purchaser then ready, able, and willing to purchase, he would have brought himself within the terms of the contract, and would have earned his right to the commission. Defendant could not deprive plaintiff of this right by revoking the authority given within the lime limit. The evidence as to the meaning of the condition "subject to prompt reply" brings the case within the principle discussed in Blumenthal v. Goodall, 89 Cal. 256, 26 Pac. 909, and distinguishes it from Brown v. Pforr, 38 Cal. 550. The distinction lies in the fact that in the latter of these cases there was no stipulation that the contract should remain in force for the time given in which to sell, while in the former there was such stipulation, as we think there was here, in effect. But in the former case it also appeared that the purchaser was found within the time limit, while in the present case defendant found no purchaser within that time limit then ready and willing to purchase this vessel.

Plaintiff's contention that, because the agreement was entered into on Sunday, the limit extended to Tuesday, cannot be maintained. If the agreement had been made on Saturday, there would be force in the argument that Sunday would be excluded under the statute. Code Civ. Proc. § 11. But the contract was not then made. On the contrary, the parties agreed on Saturday to meet on Sunday to make the agreement, and it was then made, and Chapman (plaintiff's agent) on that day telegraphed plaintiff the offer. Nor can plaintiff's contention that defendant ratified the sale by plaintiff, and thus waived the time limit, be sustained. The facts clearly show that, in accepting payment for the vessel through plaintiff, both parties reserved their respective rights as they related to the money now in question. And what money was paid as commission was paid by way of compromise; defendant distinctly disputing plaintiff's right to it under the contract, and with equal clearness disputing his right to anything further.

The question remains whether the procurement of a purchaser by plaintiff subsequently to the expiration of the time limit entitled him to commission. In Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642, the court quotes from Sibbald v. Bethlehem Iron Co., 83 N. Y. 382, 38 Am. Rep. 441: "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made; and, until this is done, his right to commission does not accrue." The court then adds this further rule: "It must appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commission, even though he made efforts to sell the property, and first called it to the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault, or fraud of the owner." Citing Fultz v. Mimer, 34 Kan. 576, 9 Pac. 316; Wilson v. Sturgis, 71 Cal. 226, 16 Pac. 772. See, also, Clark v. Cumming, 77 Ga. 64, 4 Am. St. Rep. 72, where the broker was given authority to sell "for a certain time and day only." The Kansas case cited is directly in point, and fully sustains the rule above stated. Mr. Mechem says: "For many cases no more satisfactory general rule can be laid down than to ascertain: (1) What did the broker undertake to do? (2) Has he completed that undertaking within the time and upon the terms stipulated? And (3) If not, is the default attributable to his own act or to the interference of the principal? * * * It will be seen, from this rule, that where the time is limited the performance must be within that time." Mechem on Agency, § 965. Plaintiff cites this same author (section 967), where it is said: "If the purchaser is found and negotiations are begun within the time limited, it is immaterial that they were not fully consummated until afterwards." The case cited in support of the text is Goffe v. Gibson, 18 Mo. App. 1. In that case a leasehold was the subject of the sale, the agent having 60 days in which to effect a sale; and it was further stipulated that the owner reserved the right to sell, but, if he made the sale "in any wise through their [the agents'] influence or instrumentality, then I [the owner] will pay the above commission." While the contract had yet some weeks to run, the agents brought the property to the attention of one Hastings, and pointed out to him that it was more valuable than similar property he was thinking of purchasing, whereupon Hastings, by reason of the fact of the agent's having called his attention to the property, entered into negotiations with the owner before the expiration of the time limit, and concluded the purchase shortly after the expiration of the limit. What the author probably had in mind is further illustrated by Wilson v. Sturgis, 71 Cal. 229, 16 Pac. 772. There the broker found a purchaser within the time limit, but the completion of the sale was, through the owner's fault, prolonged beyond the time limit, and apparently to avoid paying commissions. It is not easy to deduce a rule from the cases alike applicable to all of this class. The rule laid down in Zeimer v. Antisell, supra, has never been questioned or overruled by this court, so far as we know, and must control the question. There is no evidence that plaintiff's failure to find a purchaser was caused by defendant's "negligence, fault, or fraud." Defendant's notice of withdrawal did not in any wise prevent plaintiff from finding a purchaser, and, notwithstanding the persistent and uninterrupted efforts of plaintiff, he did not find a purchaser ready and willing to purchase until late on Tuesday.

The failure of the court to find on the second count of the complaint will not justify a reversal. It is not claimed in plaintiff's brief that there was any evidence addressed to this issue, and in fact it was all directed to the alleged contract, and sale under it. Eva et al. v. Symons et al. (Cal.) 78 Pac. 648.

The finding that plaintiff, through his agent, Chapman, consented to the withdrawal of defendant's offer to sell the steamer, rests upon very unsatisfactory evidence. But the view we have taken of the contract makes it immaterial whether plaintiff consented or not.

The judgment and order should be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

145 Cal. 646

In re BELL'S ESTATE. (S. F. 3,653.)*

(Supreme Court of California. Jan. 3, 1905.)

SPECIAL ADMINISTRATORS—ALLOWANCE FOR EXPENDITURES—TRUSTEES—DUTY OF ATTORNEYS—REMOVAL OF EXECUTORS—COSTS ON APPEAL.

1. Expenditures by a special administratrix in employing real estate and other agents to secure purchasers for property of a debtor of the estate, not being authorized by law, cannot be allowed, though made in good faith, and resulting in benefit to the estate.

2. A special administratrix is not within Civ. Code, § 2273, providing for repayment to a trustee of unlawful expenditures benefiting the estate; section 2250, limiting the provisions of the chapter to which both sections belong to express trusts, not including those of executors, administrators, and guardians.

3. A special administratrix, whose duty was to preserve the estate, is not entitled to allowance for expenditures in having an examination of a mine, in which the estate held stock, for the purpose of ascertaining its value.

4. A special administratrix is not entitled to allowance for an expenditure for a detective to watch the executors, who had been removed at her suit, because they had not turned over all the papers, and she believed them dishonest; they having never refused to produce any paper when asked.

5. An heir, who, as such, successfully prosecutes an action for removal of the executors, is not entitled to payment out of the estate of her expenditures in the removal, though she afterwards becomes special administratrix.

6. Where the attorney of a special administratrix in a suit defended by her is by the court allowed fees as such attorney, she is not entitled to allowance for a payment she made to the attorney's clerk for engrossing the bill of exceptions; such work being part of the strict legal duty of the attorney.

7. Costs will not be allowed on modification on appeal of an order for errors of inadvertence of the trial court, not called to its attention.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Thomas Bell, deceased. From an order, the special administratrix appeals. Modified.

See 67 Pac. 123, 75 Pac. 679.

T. Z. Blakeman, for appellant. Drown, Leicester & Drown, for respondents.

HENSHAW, J. This is an appeal by the special administratrix from the order of court settling her final account as special administratrix, and refusing to allow certain expenditures charged therein.

1. The court refused to allow certain items charged as expenditures in the matter of the collection of the claims of the Bell estate from the estate of Robinson. The circumstances, briefly, were these: L. L. Robinson had executed his promissory note to Thomas Bell in his lifetime for the sum of $29,000. This note Bell had deposited with the Bank of California as security for debts owing by him. The Bell estate had a separate claim against the Robinson estate for $1,287. Upon both of these claims there was accumulated interest. The Robinson note having been given to the Bank of California as security for the debt of Bell, it is apparent that it was to the interest of the estate of Bell to realize as much as possible upon that note, since for any deficiency the estate of Bell was responsible over to the bank. The principal asset of the estate of Robinson was the Los Medanos Rancho, in Contra Costa county, which was heavily incumbered by mortgage. It was important to secure a purchaser who would pay such price for the ranch as to leave sufficient funds over for the liquidation of the claims of the Bank of California and of the estate of Bell. Mr. Blakeman, the attorney for the special administratrix herein, had himself substituted as attorney for the Bank of California, and, as its attorney, undertook the collection of the claims. The result was that the rancho was sold for money enough to pay the claims of the bank and of the Bell estate in full. Mr. Blakeman testified that he proceeded to sell the Robinson rancho just the same as an owner would do, and for that purpose had to, and did, employ real estate agents, and agents to get special information, to search out prospective purchasers, to make maps, and the like. The payments for these purposes are the ones which the court refused to allow in settling this account. The court found, it should be added, that the special administratrix, in incurring the expenditures and in paying these sums, acted in good faith, and in accordance with what she believed to be the best interests of the estate of Bell, and believed the expenses to be necessary expenses in connection with her proceedings to collect and preserve the assets of the estate of Bell, and to collect the claims of the estate of Bell against the estate of Robinson. Notwithstanding the benefits which accrued to the estate of Bell, the court properly refused to allow these expenditures. They were not lawful expenditures for the special administratrix to make, and the court in probate well summed up the matter when it said: "The special administratrix of the estate of Bell had no authority, derivable from the statutes of this state, to engage in contracts with real estate or other agents for the payment from the funds in her charge of commissions on sales made of property belonging to the estate of Robinson." The matter of these expenditures is rigidly and properly governed by the express language of the Codes, and to say in this or in any case that an expenditure not authorized by the law could be allowed, because made in good faith, or because benefit resulted to the estate from it, would be not only to subvert the law, but it would substitute for the wise rule which the law has laid down the judgment, caprice, or whim of the court in probate. Nor can these claims be countenanced and allowed, as appellant seeks to have them under section 2273 of the Civil Code. That section provides that "a trustee is entitled

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*Rehearing denied February 2, 1905.

to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit to the estate." This, it is true, is the express rule of law made applicable to trustees generally; but the foundation of appellant's argument, namely, that a special administratrix, being a trustee, comes within the provisions of the section, is completely overthrown by section 2250 of the Civil Code, which, being a part of the same chapter as the section above quoted, declares: "The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators, and guardians as such." We have not considered it necessary to discuss separately each of the items growing out of the transactions of the Robinson estate which the court rejected. From what has been said, it is plain that, one and all, they were properly disallowed.

2. The estate of Thomas Bell owned shares of stock in the North Bloomfield mine. The special administratrix employed a Mr. Gassaway to examine and report upon the condition of the mine. He did so, and she paid him $565. The Robinson estate also owned stock in the North Bloomfield mine. The expenditure is justified by the special administratrix upon the ground that it was her duty to inform herself of the value of the stock, "because she was pushing the Robinson estate stock to sale, and there were parties seeking to purchase the Bell estate stock." This item was likewise properly rejected. It was no part of the duty of the special administratrix, nor, indeed, was it within her power as special administratrix, to sell this property. Her duty, so far as the Bell estate was concerned, was to preserve it; and, for the reasons heretofore given, the expenditure was not authorized as being an effort to determine the value of the stock of the Robinson estate.

3. The court refused to allow an item of $120 paid to a detective agency for services in watching the office occupied by Mr. Staacke and Mr. Maxwell, the former executors of the will of Bell, who had been removed at the suit of Mrs. Bell. The special administratix testified that Staacke and Maxwell had not yet turned over all the papers to her, and that she believed that they were criminals; but she failed to cite any instance in which either of them ever endeavored to conceal or make away with any of the papers, and the utmost shown in this regard was that certain letters addressed to George Staacke, and relating to some of the property in which the Bell estate was interested, were handed to one of the detectives by Mr. Maxwell when demand was made. She admitted that Mr. Staacke had readily given her all of the papers that she called for, and that he never refused to produce any paper when asked. In this state of the evidence, it cannot be said that the court was not justified in refusing to allow this item as a necessary or proper expenditure.

4. In her account as special administratix, Mrs. Bell charged the estate with expenditures incurred by her in her successful efforts to remove the executor George Staacke from office. The amount so charged was $12.50 by way of taxable costs, and more than $500 for expenses in no sense taxable as costs, and consisting of $220 paid to a bookkeeper for examining the books of the executor, $126.60 to the stenographic reporter of the court for transcribing notes of testimony, $55.80 paid H. S. Crocker & Co. for printing briefs, and the oral argument in the Supreme Court. These items were one and all properly rejected. Mrs. Bell's action for the removal of the executor was prosecuted by her "as the widow and an heir of the said deceased, and as a creditor of his estate." It matters not that the effect of the proceeding was beneficial to the estate. The attorney's fees, costs, and expenses are chargeable to the heir or creditor who prosecutes the proceeding. Says Woerner (2 Woerner's Administration, § 516): "Nor are the fees of an attorney employed by the heirs, or a portion of them, to contest the settlement, or hasten the administration; nor can the estate be charged with any part of the fees of an attorney who is employed by one of the creditors or beneficiaries, though thereby a fund is realized which is distributable among all the creditors or beneficiaries." The heir or legatee seeking the removal of an executor has no power to deal with, and no control over, the assets of the estate, and cannot make contracts which in any way will bind the estate; nor can the fact that such heir afterwards becomes special administratrix justify the payment out of the assets of the estate of any such item of expense.

5. The suit of John S. Bell v. Staacke was defended by the special administratrix. She employed Mr. Blakeman as her attorney, and the court allowed him fees as such attorney. It refused, however, to allow an item of $69 paid to Mr. Worley for engrossing the bill of exceptions in that case. Mr. Worley was a clerk in the office of Mr. Blakeman, but it is said that the evidence shows that the attorney for the administratrix was much pressed for time in preparing the bill of exceptions, that Mr. Worley was compelled to work beyond office hours, and that, as the fees allowed the attorney for his services were exceedingly small, they should be construed to include nothing but strict legal services. But the answer to this is that it is the duty of the attorney to engross, or cause to be engrossed, the bill of exceptions, and in this sense it is a part of the strict legal duty of the attor-

ney. A special remuneration to his clerk is no more a legal charge against the estate for such services than would be a claim for his salary during the time that he was actually employed upon the work.

In appellant's reply brief, for the first time, she makes mention of the fact that the court, in disallowing the item of $1,000 paid to Baldwin & Howell, as real estate agents, in and about the sale of the Robinson Ranch, failed to credit her back with $107.45 and $87.79 with which she had charged herself, and which moneys were paid to her by other creditors of the estate of Robinson as their proportionate share of the $1,000 commission which she had paid to Baldwin & Howell, and, again, that, in disallowing the amount paid to Gassaway for his report upon the North Bloomfield mine, the court failed to allow her the item of $150 for which she had sold a copy of the Gassaway report, and with which she charged herself. It is manifest that these were errors of inadvertence by the trial court, and would at once have been corrected upon application to it. It follows, therefore, that the order of the court should be modified as to these items in the respects indicated, and that in all other respects the order stands affirmed; and as these errors of inadvertence should, in the first instance, have been called to the attention of the court in probate, appellant, upon this modification, should not be allowed to recover her costs. It is ordered accordingly.

We concur: McFARLAND, J.; LORIGAN, J.

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145 Cal. 629

DENNINGER v. RECORDER'S COURT OF CITY OF POMONA. (S. F. 3,801.)

(Supreme Court of California. Dec. 31, 1904.)

MUNICIPAL CORPORATIONS — REGULATION OF GAS RATES — CONSTITUTIONAL AUTHORITY — SELF-EXECUTING PROVISIONS — MUNICIPAL ORDINANCES—PUNISHMENT FOR VIOLATION—FINE AND IMPRISONMENT.

1. Recorder's courts in cities of the fifth class have by St. 1883, p. 265, c. 49, a strictly limited criminal jurisdiction, and a conviction on a complaint which fails to allege facts constituting one of the offenses to which their jurisdiction is confined may be reviewed and annulled upon certiorari, or, in case of actual imprisonment, upon habeas corpus.

2. Const. art. 11, § 11, authorizing cities to make and enforce local police and sanitary regulations, and other regulations not in conflict with general laws; and section 19, providing that in cities having no municipal lighting plant any individual or corporation shall have the privilege of using the streets for the purposes of laying pipes upon condition that the municipality shall have the right to regulate the charges thereof—give to every municipal corporation the right to regulate the charges of any person or corporation supplying gas to the city or its inhabitants through pipes laid in the public streets; and fifth-class cities are given the power to carry the right into effect by St. 1883, p. 250, c. 49, providing such cities with a board of trustees who are empowered to pass ordinances not in conflict with the federal or state Constitution or laws.

3. Const. art. 4, § 33, providing that the Legislature shall pass laws for the regulation and limitation of charges for services performed and commodities furnished by gas corporations, does not require or authorize the Legislature to take away the right given incorporated cities by Const. art. 11, §§ 11, 19, to regulate the charges of gas companies within their limits, nor does the failure of the Legislature to pass the prescribed laws suspend or hold in abeyance the right of such cities to regulate gas rates; but until the Legislature has acted the right of the cities to act exists unhampered, except so far as restricted by general principles or specific provisions of the fundamental law.

4. St. 1883, p. 254, c. 49, empowering boards of trustees of fifth-class cities to impose fines, penalties, and forfeitures for any and all violations of ordinances, is in no respect unconstitutional, and an ordinance passed in pursuance thereto, carrying out the authority given to such cities by Const. art. 11, §§ 11, 19, and St. 1883, p. 250, c. 49, to regulate charges for gas, which fixes a maximum rate of $1.50 per 1,000 feet, and declares it a misdemeanor punishable by fine and imprisonment to collect more, is valid.

5. Whatever the Legislature may punish as a misdemeanor it may authorize a municipal corporation to punish as a misdemeanor.

6. One who, acting for a corporation, collects more than the maximum rate fixed by ordinance for gas service, is guilty of a violation of the ordinance declaring it a misdemeanor to "collect or receive" a sum in excess of the prescribed rate.

In Bank. Paul J. Denninger was convicted in the recorder's court of the city of Pomona of violating an ordinance of said city, and brings certiorari. Affirmed.

Herbert Cutler Brown and Garret W. McEnerney, for petitioner. Robert G. Loucks, City Atty., for respondent.

BEATTY, C. J. The petitioner was convicted in the recorder's court of collecting from a resident of Pomona more than $1.50 per 1,000 feet for gas, contrary to the provisions of a municipal ordinance establishing that as the maximum rate, and declaring it a misdemeanor to collect or receive more. He seeks in this proceeding by certiorari a review of the judgment of fine and imprisonment, and the sole question to be determined is whether the recorder's court exceeded its jurisdiction.

Pomona is a city of the fifth class, and the recorder's court, in cities of that class, has a jurisdiction in criminal cases strictly limited in character (St. 1883, p. 265, c. 49); so that, if the complaint upon which a defendant is arrested and tried fails to allege facts constituting one of the offenses to which its jurisdiction is confined, a judgment of conviction may be reviewed and annulled upon certiorari, or, in case of actual imprisonment, upon habeas corpus.

The petitioner contends that the complaint upon which he was arrested and tried charges no offense: First, because the municipality has no power to limit gas rates by ordinance; and, second, because, even if it has the power to establish a maximum rate, it has no power to make the violation of such an ordinance a misdemeanor, punishable by fine or imprisonment. Upon these two propositions the argument has taken a very wide range, but to them it has been confined. Whatever question may have arisen at any stage of the proceedings as to the sufficiency of the complaint to state a case within the penal clauses of the ordinance, no such question has been raised here, and we shall therefore confine ourselves to a consideration of the two propositions above stated.

Regarding both propositions, it is contended by the respondent that, in the absence of any other statutory or constitutional grant of power, every provision of the ordinance is fully supported by section 11 of article 11 of the Constitution, which reads as follows: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." By this section the people have made a direct constitutional grant of the police power of the state to every municipal corporation for local purposes. It is conceded by the petitioner that the general grant of legislative power in the Constitution of a state includes the power to regulate gas rates by statute, and that this power may be delegated by statute to municipal corporations. If this is so, and if the regulation of gas rates by the state is an exercise of the police power, it would be difficult to say why, in the absence of more specific provisions in our Constitution relating to this matter, the municipal corporations of the state could not, by virtue of the section above quoted, adopt and enforce within their local limits ordinances as comprehensive, both as to the establishment of rates and the infliction of penalties, as the statutes which the Legislature is competent to enact for the state at large. But these are questions which we do not find it necessary to decide. The Constitution contains specific provisions relating to the matter of limiting the charges for gas furnished to cities and their inhabitants, provisions which in and by themselves furnish a complete answer to the petitioner's first proposition, and, in connection with others, an equally satisfactory answer to the second.

By section 19 of article 11 of the Constitution it is provided: "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and for indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing and supplying such city and its inhabitants either with gas light, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof." This section very clearly gives to every municipal corporation the right to regulate the charges of any person or corporation supplying gas to a city or its inhabitants through pipes laid in the public streets, and, in the absence of any other provision relating to the matter, would be held to imply the power to exercise the right by the same methods by which its legislative power is exercised generally, so that nothing would be required to make the section completely operative beyond a law for the organization of municipal corporations and prescribing a mode of exercising their legislative power. In other words, a right to regulate, coupled with a lawful method of exercising the right, is all that is requisite to give validity to a regulation; and here we have the right conferred by the Constitution, and a mode prescribed by the Legislature for its exercise. That is to say, cities may be organized—as the city of Pomona has been organized—under the general municipal corporations act, by which they are empowered to pass ordinances. In cities of the fifth class they are provided with a board of trustees, who are empowered to pass ordinances not in conflict with the Constitution or the laws of this state or of the United States, and the forms to be observed in the passage of ordinances are definitely prescribed. St. 1883, p. 250, c. 49. This would seem to be conclusive as to the validity of that part of the ordinance establishing the maximum rate, and it would be entirely so if it were not for the fact that section 33 of article 4 of the Constitution provides as follows: "The Legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use; and where laws shall provide for the selection of any person or officer to regulate and limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stockholder in any such corporation."

It is contended that this section would be rendered entirely inoperative and meaningless if section 19 of article 11 should be held to be self-executing; that, the framers of the Constitution having enjoined upon the Legislature the duty of passing laws for the regulation and limitation of gas rates, no valid ordinance can be passed under section 19 of article 11 until the Legislature has first obeyed the mandate which required it to regulate the mode of regulation. In answer to this it may be said that we have not held that said section is in itself absolutely self-executing. It merely conferred or secured a right without the power of exercising or enforcing it, outside of those municipal corporations then in existence, and armed with powers similar to those which Pomona and all cities of the fifth class have since acquired by organizing under the general municipal corporation act. But for the fact that the enactment of this law was specifically enjoined by section 6 of article 11, it might perhaps have been deemed a compliance with the mandate of section 33 of article 4. Evidently, however, if that section is to have any operation, it must be construed in some other sense. What exactly it does mean it is difficult to say. It may mean, as held by Judge Wilbur of the superior court, that the Legislature was to pass a law for the organization of some board or commission to fix gas rates for rural districts not incorporated, but supplied with gas; and the wording of the last part of the section gives countenance to this view. Or it may mean that the Legislature must enact laws making it compulsory upon the governing bodies of our municipal corporations to establish rates at frequent intervals, and prescribing penalties for failure to do so, as the Constitution has itself done in regard to persons supplying water. Certainly, if the Legislature had passed a law of either character here suggested, there would have been no ground upon which this court could have held that something more was requisite to carry out the purpose of the Constitution. Petitioner's claim is that the purpose of this section was the protection of persons supplying gas and other commodities by leaving section 19 of article 11 inoperative as to the fixing of gas rates until the Legislature had enacted a code of procedure for the city councils, providing, among other things, for notice and hearing, and prescribing the period during which a rate once fixed should endure. But all this is purely conjectural. We do not know, and can hardly surmise, what the precise purpose of section 33 of article 4 was. We can be very certain, however, of one thing that was not its purpose. Without bringing it in direct and irreconcilable conflict with section 19 of article 11, it cannot be held to have required or authorized the regulation of gas rates in any incorporated city to be taken away from the governing body of such city and given over to any person, board, or officer to be selected outside of such governing body. And yet it does contemplate (in its last clause) the enactment of laws under which some person or officer is to be chosen (specially) to fix rates. This, as above stated, tends very strongly to sustain the view of Judge Wilbur that the laws contemplated and enjoined by said section 33 are laws applicable solely to districts outside of incorporated cities, and, if so, the failure to enact such laws—due, no doubt, to the absence of any actual occasion for applying them—can have no effect upon the operation of a provision of the Constitution relating exclusively to municipal corporations.

But waiving this view, and assuming that the intention of section 33 of article 4 was to lay a mandate upon the Legislature to enact such laws as might be deemed necessary to secure fairness in fixing and reasonable permanence in maintaining rates when fixed, it cannot be denied that the whole matter was committed to the discretion of the Legislature as to the time for action and the scope of action. It was assumed that when action was called for the Legislature would act, and that all safeguards found to be necessary would be provided, the municipalities being subject in the meantime to supervision and restraint by the courts if they should attempt anything in the nature of confiscation. What the framers of the Constitution assumed in committing this matter to the discretion of the Legislature the courts are justified in assuming. When further regulation is needed, it will be provided, but in the meantime the failure of the Legislature to act will not render nugatory a right granted by the Constitution and reenforced by a prescribed method for its exercise. The right and the power to regulate being conjoined, the duty to impose limits or conditions to the exercise of the right—supposing it to rest upon the Legislature—so long as it remains unperformed, simply leaves the right unhampered except so far as it may be restricted or qualified by the general principles or specific provisions of our fundamental law. The doctrine of this court is that all constitutional provisions are self-executing when they can be given reasonable effect without the aid of legislation, unless it clearly appears that such was not the intention (Winchester v. Howard, 136 Cal. 440, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153); and a necessary corollary to this proposition is that a constitutional provision not strictly self-executing becomes operative just as soon as it is supplemented by so much legislation as is absolutely necessary to supply its deficiencies; which is the case here.

As to the right of all persons to lay gas pipes in the streets of incorporated cities, subject only to its express conditions, section 19 of article 11 has been held to be self-executing (Re Johnston, 137 Cal. 115, 69 Pac. 973), and to hold that the correlative right of the municipalities to fix rates must remain in abeyance until the Legislature passes some law in obedience to the supposed mandate of section 33 of article 4 of the Constitution might forever deprive the municipalities of the state of a protection which the Constitution clearly designed to afford; for the Legislature, as to this matter, cannot take the place of the municipal bodies. It cannot regulate the charges for gas within municipal boundaries, though, according to the claim of petitioner, it can, by merely ignoring the supposed mandate of the Constitution, tie the hands of those upon whom the Constitution has conferred the right. We find nothing in the decisions of this court which leads to such a conclusion, and if, in the long array of cases cited by counsel from other jurisdictions, there may be found reasoning tending to support their contention, we do not feel constrained to follow it. We hold, on the contrary, that the two rights—the right to supply gas to cities and the right to fix rates—go hand in hand. Each exists by force of the Constitution, and each becomes effective upon the organization of a municipal government. If it be argued that the right to fix rates may be abused in the absence of restraining legislation, it may be answered that so also may the right to dig up and obstruct streets for the purpose of laying pipes be abused; but for any transgression of this sort the courts may be supposed to afford a sufficient remedy. In this instance we see nothing savoring of abuse in the provisions of the ordinance establishing the maximum rate. It was passed in March, 1903, was to take effect on the 1st of July following, and the rate was to stand for one year.

Petitioner's second proposition requires less extended discussion. Subdivision 16 of section 764 of the municipal corporation act empowers the board of trustees in cities of the fifth class to impose fines, penalties, and forfeitures for any and all violations of ordinances, etc. St. 1883, p. 254, c. 49. The ordinance in question, so far as it fixes the rate, is a valid ordinance, adopted not in pursuance of merely implied power, but in the exercise of a right specially secured by the Constitution; and unless the law empowering the city to punish its violation as a misdemeanor is unconstitutional, or is inapplicable to an ordinance of this character, the penal clauses are also valid. We know of no ground upon which this law can be held unconstitutional. The Legislature has made it a misdemeanor to ask or receive more than the sum allowed by law for the carriage of freight or passengers by rail. Pen. Code, § 525. An overcharge for gas cannot be distinguished in principle from an overcharge for a railway fare, and therefore it cannot be said that the penal clauses of this ordinance are in conflict with the policy of the state, as was said in Ex parte Ah You, 88 Cal. 99, 25 Pac. 974, 11 L. R. A. 408, 22 Am. St. Rep. 280. In that case an ordinance was held unreasonable and invalid because it authorized a fine of $1,000 for an offense, when the statute of the state limited the punishment of grosser offenses of the same category to a fine of $500. No such objection can be urged against this ordinance, which limits the penalty to $300. Besides the case last cited, we are referred to a number of decisions of this court where municipal ordinances not passed in pursuance of expressly delegated power have been held invalid because unreasonable. Ex parte Hodges, 87 Cal. 162, 25 Pac. 277; Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, etc. These cases, involving not the right to punish an infraction of the ordinance, but the right to enact its substantive provisions, manifestly have no application to an ordinance the substantive provisions of which are held valid.

The question whether the Legislature can delegate to a municipal corporation the power to determine what shall constitute a criminal offense was considered by this court in Ex parte Guerrero, 69 Cal., at page 95, 10 Pac. 266. The decision of the point was, perhaps, not necessary in that case, where the validity of the ordinance in question might have been rested wholly upon the direct grant of the police power contained in section 11 of article 11; but the court sustained the ordinance on both grounds, citing with approval a Connecticut case where the only authority of the municipality was that conferred by its charter. Not only that case, but many cases decided in other jurisdictions, as well as the text of Dillon and other commentators on the law of municipal corporations, sustain the doctrine that whatever the Legislature may punish as a misdemeanor it may authorize a municipal corporation to punish as a misdemeanor. In this state, as we have seen, there is a law making the receipt of illegal railway fares or freights a misdemeanor—an act no more to be characterized as malum in se than the exaction of an excessive charge for gas. The constitutionality of this law, it is true, has never been passed upon; but no reason for holding it unconstitutional has been suggested, and none occurs to us. It would seem, indeed, that the exaction of excessive rates in a business charged with a public use is an offense of the same essential quality as extortion by public officers (Pen. Code, § 70), an offense clearly within the police power of the state. The ordinance, we conclude, is in no respect invalid.

There is an objection—not distinctly made, but suggested—to the sufficiency of the complaint upon which the petitioner was tried. It shows that he collected and received the excessive rate, not for himself, but for the corporation holding the franchise. But a corporation must act through the agency of natural persons, and the ordinance by its express terms applies to any person who collects or receives.

The judgment of the recorder's court is affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

145 Cal. 638

DENNINGER v. RECORDER'S COURT OF CITY OF POMONA. (S. F. 3,860, 3,861.)

(Supreme Court of California. Dec. 31, 1904.)

MUNICIPAL CORPORATIONS—REGULATIONS OF GAS RATES—VIOLATION OF ORDINANCE —COMPLAINT—SUFFICIENCY.

1. Under Const. art. 11, § 19, authorizing corporations to use the streets of a city to supply "gaslight or other illuminating light" upon condition that the municipality shall have the right to regulate the charges thereof, a complaint under an ordinance fixing the maximum rate for gas, and making it a misdemeanor to collect more, which charges defendant with having collected an excessive bill for gas furnished for cooking, heating, "and illuminating" purposes, charges an offense within the jurisdiction of the recorder's court of the city, whether the city has the right to fix a rate for gas furnished for cooking and heating purposes or not.

In Bank. One Denninger was convicted in the recorder's court of the city of Pomona of violating an ordinance of said city, and brings certiorari. Affirmed.

Herbert Cutler Brown and Garret W. McEnerney, for petitioner. Robert G. Loucks, City Atty., for respondent.

BEATTY, C. J. These cases are in all respects like the case of the same title (S. F. No. 3,801), just decided, 79 Pac. 360, except that in one of them the petitioner is charged with collecting the excessive rate for gas furnished for cooking, heating, and illuminating purposes. Section 19 of article 11 does not directly confer upon any individual or company the right to lay pipes and conduits in the streets of a city in order to supply gas for cooking and heating purposes, but only so far as may be necessary for supplying the city and its inhabitants with gas light. The same gas, however, which furnishes light also serves for cooking and heating, and the pipes and connections necessary for the one purpose make the gas available for the other purposes without subjecting the streets to any additional burden. It was accordingly held in Ex parte Johnston, 137 Cal. 122, 69 Pac. 973, that an intention to permit the use of gas for other than illuminating purposes afforded no ground for prohibiting the laying of the pipes by a party claiming the benefit of the constitutional grant. For the same reasons it must be held that the right of the city to fix the rate for gas is unaffected by the use which is made of it. It covers all gas furnished through the pipes laid in the street.

The judgments are affirmed.

I concur: VAN DYKE, J.

ANGELLOTTI, J. I concur in the judgments. The determination of the question as to whether the municipality had the right to fix a rate for gas furnished for cooking and heating purposes is not necessary to a decision of either case, and I therefore express no opinion thereon. The complaint against petitioner in the recorder's court charged him with charging, collecting, and receiving the excessive rate for gas furnished to one Witman, not only for cooking and heating purposes, but also for illuminating purposes. As it thus charged the collecting and receiving of the excessive rate for gas furnished for illuminating purposes, it charged a public offense, within the jurisdiction of the recorder's court. Denninger v. Recorder's Court (S. F. No. 3,801) 79 Pac. 360. It cannot, therefore, be held that the recorder's court has exceeded its jurisdiction, and this proceeding must fail.

We concur: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

SHAW, J. I concur in the judgments. I do not think it necessary to resort to a somewhat difficult construction of section 19, article 11, of the Constitution, in order to give to a municipality the power to regulate the charges of a corporation or natural person in charge of works devoted to the public use of supplying inhabitants thereof with gas solely for heating, which includes cooking. That section applies only to water and light, and does not specifically include any materials used for heating alone. The power of a municipality in such cases comes from the general grant of authority to make such local, police, and other regulations as are not in conflict with general laws found in section 11 of article 11 of the Constitution, in connection with the general power to pass ordinances given by section 764 of the municipal corporation act (Gen. Laws 1903, p. 871). Every corporation or person who, by reason of privileges received from the state such as the right to use the highways, or the right to exercise the power of eminent domain, is in the business of supplying the general public with any commodity or service necessary or convenient for the general comfort and welfare, is subject to the dominion and supervision of public authority, so far as may be necessary to prevent such business from being carried on unjustly or oppressively by the imposition of excessive charges for such commodity or services. This dominion is exercised for the general good, and it is one form of what is known as the police power. 1 Tiedeman on State Control, §§ 96, 97; Cooley, Const. Lim. (7th Ed.) 870; Munn v. Ill., 94 U. S. 125, 24 L. Ed. 77; Budd v. N. Y., 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757. There was much dissention among the judges of the United States Supreme Court upon the question how far private business affected with a public use, but not the recipient of any privileges from the state—such as warehouses—could be interfered with in the exercise of this power, but all were agreed as to the nature and character of the power itself. Nor can there be any serious question that the business of supplying gas to the inhabitants of a city is subject to such regulation by the proper public authority in charge of this power. In this case, by virtue of the constitutional grant, the city of Pomona has the exercise of the power for all purposes local to the city, and has the proper public authority to make the regulations here in question.

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145 Cal. 626

HIBERNIA SAVINGS & LOAN SOC. v. BOLAND et al. (S. F. 2,983.)

(Supreme Court of California. Dec. 31, 1904.)

MORTGAGES—FORECLOSURE—LIMITATION—STATUTE—CONSTRUCTION—COMPLAINT—EVIDENCE—SUFFICIENCY.

1. Under Code Civ. Proc. § 337, providing that an action on any contract founded on an instrument in writing executed in the state must be brought within five years, the bar of the statute as to a mortgagor is not affected merely by the death of a co-mortgagor before the note given with the mortgage is barred.

2. In an action to foreclose a mortgage, where the complaint showed on its face that the action was barred as to a surviving mortgagor because the suit was not commenced within five years, as required by Code Civ. Proc. § 337, and the only evidence offered by the plaintiff, except as to nonpayment, was the note and mortgage, the cause of action was shown by the evidence to have been barred; and hence error in overruling a demurrer to the complaint on the ground that the action was barred was not cured by the subsequent proceedings.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by the Hibernia Savings & Loan Society against P. Boland, administrator of the estate of Annie Lennon, deceased, and others. From a judgment for plaintiff, defendants appeal. Reversed.

A. Boyer, for appellants. Tobin & Tobin, for respondent.

SMITH, C. Appeal of the defendants from a judgment foreclosing the mortgage to the plaintiff of the defendant Lennon and his deceased wife, Annie Lennon, the defendant Boland's intestate. The mortgage was made February 21, 1893, to secure the joint and several promissory note of the mortgagors for the sum of $400, with interest, due one year from date, and was recorded the same day. The suit was brought May 16, 1900. The case, as shown by the pleadings and findings, is as follows: The allegations of the complaint, so far as material, are that the note was made and the mortgage executed and recorded as above stated, and that it has not been paid; that the defendants Lennon and Boyer "have interests in or liens upon said real property, but the same, whatever they may be, are subsequent and subject to the lien of said mortgage"; that the said Annie died intestate on or about March 29, 1893; and that the defendant Boland was appointed her administrator March 1, 1900. A demurrer was interposed to the complaint by the defendants Lennon and Boyer on the ground that it appeared on the face of the complaint that the plaintiff's cause of action was barred by the provisions of section 337, Code Civ. Proc., and there was also a demurrer by the administrator, but both were overruled. The answer of the defendants Lennon and Boyer alleges that on or about January 9, 1892 (a little over a year prior to the mortgage), and afterwards until January 27, 1900, the defendant Lennon was the owner of the mortgaged premises under a deed of the former date, recorded January 27, 1900, and that on the latter date he conveyed the same to the defendant Boyer; that neither the defendant Boland nor his intestate in her lifetime ever had any interest in the mortgaged premises since the mortgage was made; and that the plaintiff's action is barred by the provisions of the above-cited section 337, Code Civ. Proc. All the allegations of the complaint are found to be true, except the allegation as to the interests of the defendants Lennon and Boyer in the mortgaged land; and with regard to this, and the corresponding allegations of the answer, it is found that at the date of the mortgage the mortgaged property "stood of record in the name of [Mrs.] Lennon," who by deed of grant of date January 9, 1892, had conveyed the same to the defendant Lennon, and "that the defendant Lennon acquired said real property by said deed," and the said Boyer by conveyance from him, as alleged in the answer. There is no finding upon the plea of the statute, nor of facts from which such finding may be inferred. But it is claimed by the respondent that certain of the conclusions of law are to be regarded as findings of fact, and that these are sufficient to defeat the plea. These are "that the said decree [referring to the deed of Mrs. Lennon to her husband] was void as to the plaintiff up to the time of recording the same," and, in effect, that the defendants Lennon and Boyer thereby acquired an interest in the mortgaged property "subsequent and inferior to the lien of plaintiff," and "subject" thereto. But obviously these propositions are in their nature what they purport to be—that is, mere conclusions of law based on the specific facts found, which, it appears from the bill of exceptions, were the only facts put in evidence. A personal judgment was entered against the defendant Boland as administrator for the amount due on the note, and a judgment of foreclosure against the defendants generally.

It is admitted that under the provisions of section 353, Code Civ. Proc., the plaintiff's cause of action is not barred as to the defendant administrator. But the contrary is claimed as to the defendants Lennon and Boyer, and whether this contention can be sustained is the only question involved in this appeal. It will be considered first as presented by the demurrer to the complaint, and afterwards as affected by the subsequent proceedings:

As to the former aspect of the question, it appears on the face of the complaint that the suit was brought more than six years after the note and mortgage became due, and nothing appears in the complaint to rebut the defense of the statute, unless it be the bare fact of the death of Mrs. Lennon before the note was barred. But this, it is clear upon principle, could not affect the bar of the statute as to the surviving mortgagor, and it has been so held. Vandall v. Teague, 142 Cal. 471, 76 Pac. 35; Sichel v. Carrillo, 42 Cal. 493. On the facts alleged, therefore, all that the plaintiff was entitled to was a judgment against the administrator of Mrs. Lennon only, and such as "in no wise to prejudice the title of" her co-mortgagor. Vandall v. Teague, 142 Cal. 471, 76 Pac. 35. This decision does not conflict with the decision in Estate of Bullard, 116 Cal. 355, 48 Pac. 219, cited by the respondent's counsel.

Nor was the error in overruling the demurrer cured by the subsequent proceedings. The plaintiff was, perhaps, entitled to controvert the affirmative defense set up in the answer, and, without pleading, to prove any facts tending to rebut it (Code Civ. Proc. § 462, and cases cited, Pomeroy's Ed.), and a finding in its favor on sufficient evidence upon the issue of the statute would have been sufficient to support the judgment. But as appears from the bill of exceptions, the only evidence offered by the plaintiff, except as to nonpayment, was the note and mortgage, which were admitted over the objection that it appeared on their face that they were barred by the statute as pleaded. On the evidence, therefore, as well as on the complaint, the plaintiff's cause of action appears to be barred, and there is no finding, express or implied, to the contrary.

We advise that the judgment appealed from be reversed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion the judgment appealed from is reversed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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145 Cal. 623

FOUR OIL CO. v. UNITED OIL PRODUCERS et al. (S. F. 3,102.)*

(Supreme Court of California. Dec. 31, 1904.)

CONTRACT FOR PURCHASER—CONDITIONAL ACCEPTANCE OF OFFER.

1. There is no contract for purchase where plaintiff in its letter offers to sell oil of a guarantied gravity of 15 degrees, and defendant in its letter, in which it states it accepts the proposition, says that it wishes it to be distinctly understood that the 15 degrees gravity is to be at a temperature of 60 degrees.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the Four Oil Company against the United Oil Producers and others. Judgment for defendants. Plaintiff appeals. Affirmed.

W. F. Williamson, Livingston Jenks, and J. A. Elston, for appellant. James G. Maguire, Houx & Barrett, and A. L. Weil, for respondents.

HENSHAW, J. Plaintiff sued defendant corporation and its stockholders, seeking a recovery for alleged breach of contract for the purchase of oil. Upon trial plaintiff sought to prove the contract by the introduction in evidence of the following letters:

"San Francisco, Cal., Dec. 19, 1900.

"United Oil Producers, Phelan Bldg.—Gentlemen: We beg to offer you crude petroleum of a guaranteed gravity of not less than 15 at the rate of 2 cars per day, as a minimum, to 3 cars, as a maximum, for one year from February 1st, 1901, to February 1st, 1902, at the price of 52½c, f. o. b., Bakersfield. In case this offer meets with your acceptance and you desire to include January next within the contract, we shall be pleased to supply you during that month at the same rate and at the same terms. Yours truly,

"Four Oil Company,
"Charles Musaus, Secty."

"San Francisco, Dec. 20, 1900.

"Number Four Oil Company, Mills Bldg, City.—Gentlemen: Replying to your favor of the 19th inst., would say that we accept your proposition therein contained for fuel oil for one year at 52½ cents, f. o. b., Bakersfield, on 2 cars per day minimum, and 3 cars per day maximum. The gravity of the oil to be 15 degrees Beaume, as you state, but we wish this distinctly understood under this agreement to be 15 degrees Beaume at a temperature of 60 degrees Fahrenheit. We presume that all oil will be of this grade, as it has been thus far, but we do not wish any oil below that gravity at that temperature. Yours truly,

"United Oil Producers,
"By Shafter Howard, Secretary."

It accompanied its offer with an additional offer to prove the meaning of certain technical terms and abbreviations understood by the parties. The court sustained defendants' objection to the introduction in evidence of the letters, and judgment followed for the defendants, from which plaintiff appeals.

The rules for determining whether or not a proposal and acceptance constitute a binding contract are well settled, and by this court have been expressed in the following language: "To constitute a binding contract made in this form [letters] there must be a proposal squarely assented to. If the acceptance be not unqualified, or go not to the actual thing proposed, then there is no binding contract. 1 Wharton on Contracts, § 4. A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer. National Bank v. Hall, 101 U. S. 51, 25 L. Ed. 822. An offer imposes no obligation, unless it is accepted upon the terms upon which it was made. Tilley v. County of Cook, 103 U. S. 161, 26 L. Ed. 374. An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal. Civil Code, § 1585." Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; and see, also, Yore v. Bankers' Mut. Life Ass'n, 88 Cal. 609, 26 Pac. 514. Under these principles of law it is clear that the court's ruling was correct, and that the minds of the parties had not met in the creation of a legal obligation, and this for the reason that the acceptance of the defendant was conditional and imported into the contract a term not found in the original proposal, and one requiring the assent of the plaintiff before either could be bound. This term is found in the following sentence: "But we wish this distinctly understood under this agreement to be 15 degrees Beaume at a temperature of 60 degrees Fahrenheit." The original proposition contained no limitation upon the temperature at which gravity was to be determined. That the matter of temperature was regarded as of importance is not only shown by the condition expressed in respondent's answer, but is further shown by a copy of another contract made by plaintiff, where it is specified that the gravity shall be determined at a temperature of 70 degrees Fahrenheit. Plaintiff having failed to prove its acceptance of the new condition imposed by defendant's letter, it follows that the acceptance was not absolute and unqualified, but was conditional, amounting to a new proposal upon the part of the defendants to which the plaintiff never assented. There was thus no completed contract between the parties, and the judgment appealed from is therefore affirmed.

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*Rehearing denied January 30, 1905.

We concur: McFARLAND, J.; LORIGAN, J.

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145 Cal. 659

PEOPLE v. WOOD. (Cr. 1,168.)

(Supreme Court of California. Jan. 3, 1905.)

HOMICIDE—CORPUS DELICTI—ADMISSION OF EVIDENCE—ESCAPE OF CONVICTS—INSTRUCTIONS.

1. Evidence that deceased was shot through the body, and died within a few moments, is sufficient to establish the corpus delicti, though there was no autopsy to discover what particular organs of the body were pierced by the bullet.

2. On the trial of a convict for murder in trying to prevent recapture, it was proper to admit evidence of a conspiracy among the prisoners, including defendant, to escape, and of declarations by defendant and others that they would not be taken alive, and that, if the militia sought to recapture them, they would ambush and kill a few, and in the confusion thus caused manage to escape.

3. On a trial for murder it appeared that defendant and other convicts escaped, and that a pursuing posse surprised them at a camp; that deceased was shot by some of the convicts, and that they then fled. *Held*, that articles found at such camp, identified as having been previously in defendant's possession, were admissible as evidence that defendant was himself present when deceased was shot.

4. Where it appeared that thirteen convicts escaped, and that four of them were present when one of them killed deceased, an instruction that, "if several persons confined in the state's prison conspire to escape, and, if necessary, to kill any person who shall lawfully attempt to arrest or recapture them, and the death of a person so engaged in the attempt to lawfully arrest or recapture them ensue in the prosecution of said common design, it is murder in all who are present aiding and abetting in the common design," is not subject to the objection that defendant could be found guilty if he was one of the thirteen who originally conspired to escape, though he was not one of those present at the time of the homicide.

5. Under Pen. Code, § 105, which makes it a crime for a person confined in the state prison for a term less than for life to escape therefrom, if defendant, with others, conspired to effect the escape of himself and others, some of whom were imprisoned for a term less than life, all engaged in such conspiracy are engaged in a conspiracy to commit a crime, though defendant was serving a life sentence.

6. On the trial of a convict for murder in resisting arrest after his escape, where the evidence showed that defendant, with 12 others, conspired to effect their escape, and a part of the case of the prosecution consisted of proof that the 13 convicts had been convicted and sentenced to the state prison, and were at the time of the escape serving their sentences, it was proper for the jury to consider the evidence of such trials and convictions, including that of defendant.

In Bank. Appeal from Superior Court, Eldorado County; N. D. Arnot, Judge.

John H. Wood was convicted of murder, and appeals. Affirmed.

John P. G. Miller (W. F. Bray, of counsel), for appellant. U. S. Webb. Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

SHAW, J. The defendant was convicted of murder in the first degree, and sentenced to death. From the judgment of conviction and from an order denying a motion for a new trial he appeals to this court.

He was one of thirteen convicts who attempted to escape from Folsom Prison on July 27, 1903. On August 1st, according to the theory of the prosecution, he, with four other of the convicts, were at a place called "Manzanita Hill," in Eldorado county, and encountered a posse in pursuit for the purpose of recapturing them. In the conflict that ensued, one of the posse, J. Festus Rutherford, was killed, and for his death the defendant was convicted of murder.

It is contended that the corpus delicti was not proven, because, it is said, there is no proof that the wound inflicted upon the deceased caused his death. There is no merit in this contention. The deceased was a young man, nearly 19 years old, a member of the state militia, apparently in good health, and was actively engaged, at the time he was shot, in pursuing the convicts to rearrest them. He received a wound from a bullet which entered on his right side, and, passing through the body, came out on the left side some two inches higher than the point at which it entered. Its course was such that it would probably pass through a part of the heart. Immediately on receiving the wound the deceased dropped, and within a few moments was dead. There was no autopsy, and hence it cannot be said with certainty what particular organs of the body were pierced by the bullet. An autopsy is not necessary as a part of the proof that death was caused by a wound of this character. The circumstances above detailed are sufficient to satisfy any reasonable mind that the deceased came to his death by reason of the wound.

It is further contended that the proof of corpus delicti is defective because it has not been shown that the bullet which killed the deceased was fired by the defendant or either of the convicts with him. It is true that no witness testified that he saw the defendant on that occasion, but there is sufficient circumstantial evidence to show that the defendant and four other convicts were camped on Manzanita Hill at the time the posse arrived there in pursuit, and that when the deceased and several others of the posse were within 25 or 30 feet of the convicts' camp, and before they had perceived the convicts, they were fired on by the convicts themselves, and that the deceased fell at the first fire. There is much confusion in the testimony, as given in the transcript, as to the whereabouts of the other divisions of the posse at the time this first firing occurred. The defense claims that this first shooting was by some other division of the posse, who fired on the division in which the deceased was engaged. The uncertainty in the evidence as given arises from the fact that the witnesses had before them a large map, upon which was designated the topography and the location of the physical objects to which they referred, and that in testifying they would point to the places on the map and designate them by the words "here" and "there." From the manner in which the testimony is reported, we cannot determine what places they were referring to, or the relative positions of the different places. This uncertainty is caused primarily either by the manner of preparing the bill of exceptions or by the failure of the witnesses to describe in words the places referred to at the time they were pointed out on the map. These motions of the witnesses were, however, a part of the evidence, and the failure to report them or describe them in the bill of exceptions does not lessen the force and effect of the evidence as given to the jury, nor authorize us to conclude that it must have been uncertain, or that it required a different conclusion from that reached by the jury. The map was before them also, and it does not appear that they did not fully perceive and understand the relative positions of the different places. There is nothing in the record indicating to us that the pursuing posses fired on each other. The evidence, so far as it can be understood, clearly points to the convicts as the persons who fired the fatal volley. In this condition of the record we must assume that the jury understood the evidence, and properly concluded that the deceased was killed by the fire of the convicts, and not by a shot from one of the other divisions of the pursuing party.

It is claimed that there is no evidence that the defendant was present with the other convicts at the time, but this claim is manifestly untenable. Numerous articles were found at the place from which the shots were fired towards the deceased, indicating that there had been a camp at that place, which had been hastily broken up and many articles left on the ground. Among these several were found which had been previously in the possession of the defendant. It is unnecessary to state the evidence in detail. There were numerous circumstances, and, taken together, they were sufficient to prove that the defendant was one of the party encamped on the hill, and that it was this party that fired the shot which killed the deceased.

There was no error in admitting evidence of the conspiracy among the prisoners confined at Folsom, including the defendant, to escape, nor the declarations of the defendant and others of the conspirators that they would never be taken alive, and that, if the militia came after them, they would ambush them, and kill a few, and in the confusion thus caused manage to escape. These threats and plans were made by the defendant himself, with the others. and the fact that afterwards he and four others separated themselves from the remainder of the party does not destroy the effect of these plans and threats as evidence tending to show a guilty intent on the part of the defendant, and a common purpose, in the accomplishment of which the fatal shot was fired.

We do not clearly understand the point of the objection to the evidence of the tracks leading from the place where the convicts were last seen up to the camp on Manzanita Hill where the shooting occurred, and other tracks found the next day leading away from the spot. They were admitted for the purpose of showing that the convicts had been on Manzanita Hill. They were clearly competent for that purpose.

The several exhibits taken from the camp on Manzanita Hill were properly admitted in evidence. They consisted of tin cans, a spoon, a barley sack, hat, and various other articles commonly found about a camp. Their presence at the camp after the party using them had departed indicated a hasty departure, and supported the theory of the prosecution that the convicts had been surprised at their camp, and immediately after the shooting had departed without gathering up these articles. In addition to this reason, as several of them were identified as having been previously in the possession of the defendant, they were competent as evidence that the defendant was himself present on that occasion.

The court instructed the jury as follows: "If several persons confined in the state's prison conspire to escape therefrom, and, if necessary, to kill any person who shall lawfully attempt to arrest or recapture them, and the death of a person so engaged in the attempt to lawfully arrest or recapture them ensue in the prosecution of said common design, it is murder in all who are present aiding and abetting in the common design. The law makes no distinction or difference between any of the parties so engaged." As we understand the appellant's contention, it is that this is erroneous because, as he claims, it informs the jury that they could find the defendant guilty if he was one of the thirteen who originally conspired to escape, although he was not one of those present at the time of the homicide. We do not think it can be so construed. The entire case of the prosecution consisted of an effort to prove that the defendant was present at the scene of the conflict in which the homicide occurred. It was never contended that he could be convicted if he were proven to be one of the thirteen who escaped, although not of the number present at the conflict on Manzanita Hill. The jury could not have so understood the instruction, and it is not fairly susceptible of that meaning. Its application is limited by its terms to those who were present aiding and abetting, and this could only be understood to refer to their presence at the time of the attempt to make the recapture. The same objection is made to other instructions, but, taking all of the instructions together, we think the jury could not have supposed that the defendant could be convicted unless they were satisfied from the evidence that he was one of those present at the time of the death of the deceased.

There was an instruction to the effect that under section 105 of the Penal Code it is a crime for any person confined in the state prison for a term less than life to escape therefrom, and that, if two or more persons confined in the prison, only one of whom was sentenced to a term less than life, should conspire together and agree to a scheme to escape from the prison, all the persons engaged in the conspiracy are engaged in a conspiracy to commit a crime. We can see no error in the instruction. It is immaterial that the defendant was confined for the term of his natural life, and that there could be no criminal conspiracy, under the section of the Code referred to, with reference to his escape. If he, with others, conspired to effect the escape of himself and the others, some of whom were imprisoned for a term less than life, such conspiracy would be a crime within the meaning of the law.

After the argument was concluded, and the court had formulated its charge, the defendant asked the following instruction, which was refused: "You are further instructed that you are not to consider any other trials or convictions of this defendant as having any bearing on this case. It is your duty to consider no other matters except the evidence and the instructions of this court." The court instructed the jury at great length that they must consider no other matters except the evidence and the instruction of the court. So far as the instruction asked required the jury not to consider evidence of other trials and convictions, it was erroneous, and the court properly refused it. Part of the case of the prosecution consisted in proof that the thirteen convicts had been convicted and sentenced to the state prison, and were at the time of the escape serving their said sentences. It was proper, therefore, for the jury to consider the evidence of such trials and convictions, including that of the defendant.

We have carefully read the evidence and the briefs of counsel, and can find no error in the record. It is true, as counsel says, that many objections made by the defendant's attorney were overruled, and many objections to testimony offered by him were sustained. But in each case we think the rulings of the court below were proper.

The judgment and order are affirmed.

We concur: VAN DYKE, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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145 Cal. 641

ABNER DOBLE CO. v. McDONALD. (S. F. 2,968.)*

(Supreme Court of California. Jan. 3, 1905.)

FINDINGS OF FACT—SUFFICIENCY OF EVIDENCE—CURING PLEADINGS.

1. The evidence in an action for goods sold and work done *held* sufficient to support a finding as to there being a contract.

2. Failure of the cross-complaint to allege that the amount demanded had not been paid is cured by the answer thereto denying the original indebtedness, and by failure to object to evidence on this ground, and by the findings.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; Wm. R. Daingerfield, Judge.

Action by the Abner Doble Company against M. C. McDonald. Judgment for defendant. Plaintiff appeals. Affirmed.

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*Rehearing denied February 2, 1905.

Jese W. Lilienthal and William F. Gibson (Frohman & Jacobs, of counsel), for appellant. Edward Lynch, for respondent.

SMITH, C. The plaintiff sues to recover the sum of $7,269.75 as balance due on an account for goods sold and delivered to the defendant, and for work and labor done for him at his request. The allegations of the complaint are denied, and a counterclaim is set up by the defendant, by answer and cross-complaint, for the sum of $383.60 paid by the defendant to the use of the plaintiff at its request. The goods in question consisted of mining machinery, and the work and labor counted on by the plaintiff was done in installing the same in the Gover mine, the property of the Gover Mining Company. The money expended by the defendant was expended in the installment of the same machinery. The findings were for the defendant on all the issues, and judgment was entered in his favor for the sum demanded in the cross-complaint, with costs. The appeal is by the plaintiff from the judgment and from an order denying its motion for a new trial. The questions involved are as to the sufficiency of the evidence to justify the findings of the court.

At the time of the transactions in question the Gover Mining Company was heavily indebted, and without assets except the mine, and this had been attached, and was in imminent danger of being ruined for lack of funds to keep it free of water. The plaintiff was heavily interested in the company as a stockholder and creditor, and was also its surety for an indebtedness of $15,000 (secured by mortgage on the mine), and for other indebtedness, to the Anglo-American Bank. It was represented in the management of the mine by two of its own managers, Robert and William Doble, who were directors of the mining company, and, with its president, Emery, appear to have had the management and control of it.

Under these circumstances, in the early part of September, 1894, the defendant McDonald—who prior to the transactions in question had no interest in the mine—was applied to by Emery and Robert Doble, as the former says, "to take hold of the mine" and to "keep (it) clear of water so that we could sell it," for which purpose it was proposed to put the mine "in his hands to sell." Robert Doble's account of the matter is somewhat different. It is, in effect, that he proposed to McDonald to purchase the bank mortgage and to acquire the mine by foreclosure, and he assured him that the plaintiff would not spend any more money on the mine. The implication seems to be that the plaintiff abandoned its interest in the mine to McDonald; but the evidence does not go to this extent. The last conversation between this witness and McDonald took place on September 7th or 8th, and on the 13th William Doble approached McDonald on the same subject, referring to the previous interview between Robert and McDonald, but the latter "had not arrived at a definite conclusion." But on the next day, the 14th, the witness says McDonald told him "that he had considered the matter favorably, and had decided to take up the Gover matter, and requested (the witness) to send a telegram to (his) brother Robert," which was done accordingly, the telegram being written or dictated by McDonald. The witness adds: "Before I went McDonald had stated that he had decided to take up the Gover proposition, and I completed my mission when I sent the telegram which he requested," etc. The telegram alluded to, which is of date September 14, 1894, and addressed to Robert Doble and signed by William, is as follows: "McDonald has authorized Hale to keep water out of Gover under your directions." Hale was the superintendent of another mine for McDonald, and was instructed by telegram of same date: "Take charge under Robert Doble of Gover Mine. Keep water out at my expense. Will write." At the same time McDonald wrote him: "I have wired you this P. M. to take charge of Gover under Doble, to keep water out. Bank will not do it, and they will get into more trouble if the mine fills with water, so I will do it for awhile until something is agreed upon. I really don't know if the mine is worth anything or not. You don't want to promise to deliver wood to the Gover, unless you are sure what they will do for paying for it. * * * Yours truly. That Gover has broke everybody that has fooled with it yet, so I want to be careful."

It was under these circumstances that McDonald took hold of the mine, and it is clear that up to and including this date all that he had undertaken had been to keep the water out of the mine, and that there was no obligation on his part to do this any longer than he should choose. But, according to the testimony of William Doble, there was another interview between him and McDonald on the 17th of September, on which occasion Doble says he was instructed by McDonald to purchase the machinery in question and have the same put up at the mine, for and on account of the latter; and this, the witness says, was done accordingly. But it is denied by McDonald that he gave such an order, or that it was understood or agreed that the machinery was to be purchased or put up on his account, or that he was in any way interested in the purchase, and there were no witnesses as to what passed between the parties other than themselves.

Under the circumstances of the case the plaintiff's account of the matter presents some points of difficulty that require explanation. McDonald, according to his own account, was willing, for reasons stated, to go to some expense to assist Emery and the plaintiff, and it is not improbable that he anticipated making some profit in the future from his expenditures. But he did not have nor did he acquire any interest in the mine. Nor did he seek to acquire any, unless his attempt to purchase the mortgage to the bank can be so regarded; and had the proposed purchase entered seriously into his calculations, it would seem that before investing so largely, as it is claimed he did, he would at least have taken an option on the mortgage or otherwise secured himself. This could easily have been effected; and without this, and in the absence of any contract with the mining company or the plaintiff securing him an interest, there is an intrinsic improbability in the theory that he would have been willing to make so heavy a purchase on the mere chance of purchasing the claim against the mine. This it was equally open to any one to purchase, and the plaintiff itself, as the surety of the mining company, had the option to acquire it by mere payment. Whatever advantage, therefore, there was in the privilege of acquiring the claim was peculiarly the plaintiff's; and without an option from it, or from the bank, the defendant's chance of acquiring it was dependent entirely upon the plaintiff's future consent. On the other hand, there is no improbability in the supposition that the plaintiff should be willing to go to the expense of the machinery in order to save its large investment, and it is to be noted, in this connection, that it retained all its rights in the mine intact. The transaction, as detailed by William Doble, was therefore simply that McDonald consented to expend upon the property of the mining company, in addition to about $4,000 expended under the original understanding, the further sum of over $7,500, without acquiring any interest in, or security upon, the property, and without any motive that could be reasonably ascribed to a man of average intelligence.

The court below was therefore justified in finding for the defendant on the main issues, and also on the cross-complaint; and, indeed, it would have been justified in doing so, even if the probabilities of the case had been more equally balanced. Other points made by appellant relate to matters not affecting the result. The failure of the defendant to allege in his cross-complaint that the amount demanded had not been paid was cured by the plaintiff's answer, which denies the original indebtedness, and also by the failure to object to the evidence on this ground at the trial, and by the findings. We see no material error in the record.

We advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J

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145 Cal. 666

ALLEN v. STOWELL et al. (L. A. 1,300.)

(Supreme Court of California. Jan. 4, 1905.)

MANDATORY INJUNCTION—CONSTRUCTION OF DAMS—DIVERTING WATER.

1. Mandatory injunction to remove dams constructed by defendants, diverting water onto and injuring plaintiff's lands, may be granted without any finding as to damages.

2. Defendants cannot justify their construction of dams diverting water onto and injuring plaintiff's land on the ground that they were endeavoring to obviate mistakes of a railroad company in locating culverts, the dams not having reinstated natural conditions, but created new ones.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Benjamin F. Allen against Sheridan A. Stowell and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Frank Burnett, for appellants. Jas. Burdett, for respondent.

CHIPMAN, C. Defendants appeal from a judgment for plaintiff granting a mandatory injunction compelling defendants to remove a certain dam erected by defendants which caused the flow of water to be diverted from its natural course onto plaintiff's land. The bill of exceptions does not pretend to bring up all the evidence, but, as stated in appellants' brief, "is intended only to present two questions of law adopted by the court and applied to the case." These questions are: (1) Will the remedy of mandatory injunction lie where the evidence is conflicting on the point at issue, unless there first be a verdict of a jury or decision of the court finding that actual, at least nominal, damages have been awarded plaintiff? (2) Did the court err in its ruling that defendants had no right to build the obstruction for the purpose of correcting a mistake of the railroad company in locating its culverts?

It appears from the findings of the court that plaintiff's land is planted to orange trees in full bearing. Prior to the commencement of the action, and when defendants commenced the construction of the dam complained of, "plaintiff demanded of them that they desist and cease from said work and protested against the construction thereof, and explained to them the nature of the damages that said dam would cause him and his said lands and orchards, but defendants refused to abandon said work, or to cease the construction of said dams, and continued the same to completion." It appears from the bill of exceptions, and is substantially found as the facts by the court also, that the evidence of plaintiff tended to show that the dams referred to, which were erected after the railroad company had built its track, were so constructed that "all water flowing down said ancient way * * * would be diverted by said dams from its natural course, and caused to flow in one accumulated body southerly along the east of these dams through said railroad culverts, and thence in a like body through the lands of S. A. Stowell to the northeasterly corner of plaintiff's land, and would then flow in said accumulated volume with great force southwesterly and diagonally across plaintiff's lands, the natural effect of which would be to destroy a great number of his trees growing upon said land, and to excavate deep gulches and water courses diagonally through the same; that the construction of said dams would and did arrest and divert water, and cause the same to flow upon the lands of plaintiff as last above found, which would not naturally flow there in times of flood and high water;" and this the court found "would cause him [plaintiff] and his said land and orchard great and irreparable injury and damage."

There was a certain part of the dam and wing dam erected by defendants which the court, "in the absence of results from actual experience," was unwilling to order removed on the evidence then before it, but found certain other portions of the dam to be a nuisance, "and should be removed and leveled to the original and natural surface of the ground."

Relief by injunction will be given to prevent a deprivation of ancient rights, and if it be shown that plaintiff's house is, by the obstruction which he seeks to enjoin, rendered in a substantial degree less fit for purposes of occupation than before, "equity may interfere, even to the extent of making its injunction mandatory by directing the restoration of matters to the condition in which they were before defendant's erection was begun." High on Injunction, § 860. A trespass irreparable in its character and of a continuing nature may be restrained by a mandatory injunction, thus restoring things to their original condition; health officers may be restrained by mandatory injunction from allowing a sewer to remain open. Id. § 708. Trespass upon public lands may be enjoined by the United States, and the injunction be made mandatory to compel the defendant to remove obstructions such as fences (Id. § 723a); and in a case of a nuisance to a dwelling house the injunction will be made mandatory if the circumstances of the case require it (Id. § 792).

It has been held that a bill to enjoin the erection of a nuisance in close proximity to plaintiff's buildings, which contains allegations of irreparable injury to complainant, is not demurrable, because it fails to show that the rights of the parties have been settled at law. Id. § 791. This court said in Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11, that the right to an injunction in a case like the present one "does not depend upon the extent of the damage measured by a money standard; the maxim de minimis, etc., does not apply. The main object is to declare a nuisance and to prevent the continuance by a mandatory injunction."

The court found that the waters, diverted upon plaintiff's land by the dam erected by defendant, would not flow there if allowed to take their natural course. To thus wrongfully cause water to flow upon another's land which would not flow there naturally is to create a nuisance per se. "It is an injury to the right, and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes." Id. Mr. Wood says: "Every such act is an invasion of another's right, and is actionable because of the injury to the right, whether the damage be great or small. Indeed, the act is wrongful per se and in its inception, and is actionable without any special damage." Wood on Nuisance, § 376. See, also, section 782. An obvious distinction between "injury" and "damage," not always observed in dealing with the question before us, is clearly pointed out by Mr. Wood. Id. § 783. Speaking of a man's right of dominion over his property, and the jealous care with which courts have guarded this sacred right, the author says: "Whatever invades this right is a *legal* injury, whether damage ensues or not. It is a *right*, for the violation of which the law 'imports damage to support it,' and courts of equity have *always* interposed, in a proper case, to protect the right, without any reference to the question of *actual* damage, the motive which instigated the party to invoke its aid, or the benefits that he derives from the act." Id. (Italics the author's.)

The principles upon which mandatory and prohibitory injunctions are granted do not materially differ. The courts are perhaps more reluctant to interpose the mandatory writ, but in a proper case it is never denied. It was said in Johnson v. Superior Court, 65 Cal. 567, 4 Pac. 575: "The jurisdiction of the court to grant a preliminary injunction, restraining the defendant from interfering with the flow of water pending the litigation, cannot be doubted, and we cannot see that its jurisdiction is exceeded when it requires the removal of the means by which the diversion is made. The ultimate aim of the injunction is the undisturbed flow of the water. The objections to the removal of the means by which the diversion is made are no more cogent than the objections to preventing the diversion of the water itself." As the court has jurisdiction, the only question is, has it properly exercised its jurisdiction? We need not pursue the subject further. On the showing made in the bill of exceptions it clearly appears that "the construction of said dams (by defendants) would and did arrest and divert water, and cause the same to flow upon the lands of plaintiff as last above found, which would not naturally flow through in times of flood and high water"; and by the finding of the court, presumably on sufficient evidence, the effect of these dams in so diverting the water would be to "destroy a great number of his (plaintiff's) trees growing upon said lands, and would excavate deep gulches and water courses diagonally through plaintiff's land," rendering a considerable portion of it and the orchards thereon useless, and cause plaintiff and the said land irreparable injury. This was quite sufficient, in our opinion, to warrant the court in granting the relief given by the judgment. Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400.

The second point may be briefly disposed of. Whatever was the effect on plaintiff's land from any defective construction of the railroad company's roadway, or locations of its culverts, defendants cannot justify or defend their acts on the ground that they were endeavoring to obviate the mistakes of the railroad company and failed. Conceding their right to go on their own land for this purpose, the fact remains, as found by the court, that it was defendants' dams that were the cause of the injury. The dams did not merely reinstate natural conditions; they created new conditions. What the court stated it would have held had the facts been otherwise is immaterial, and presents no question now for review.

We advise that the judgment be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

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145 Cal. 680

SHEA et al. v. PACIFIC POWER CO. (S. F. 3,058.)*

(Supreme Court of California. Jan. 4, 1905.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—BOILERS—EXPLOSION—DEATH OF FIREMAN—NEGLIGENCE OF ENGINEER—VICE PRINCIPAL—EVIDENCE—FINDINGS.

1. In an action for the death of a fireman by the blowing off of the mud drum of defendant's boiler, evidence *held* to sustain a finding of defendant's negligence in failing to apply a bursting test to the boiler, which had been in use for some four years at the time of the accident, after the nipple connecting the mud drum to the boiler had been repaired.

2. The negligence of defendant's engineer in charge of its engine and boiler in failing to see that it was in a safe condition, by reason of which a fireman in defendant's employ was killed by the bursting of the boiler, was the negligence of the defendant.

3. The owner of an engine and boiler is not absolved from liability for injuries to a servant, caused by the bursting of the boiler while in use, merely because he had procured an independent contractor to repair it.

4. In an action for the death of a servant by the explosion of a boiler, evidence as to the condition of the packing rings, and their efficiency to prevent oil from getting into the boiler, a year or two before the accident, coupled with the declaration on plaintiff's part that it would be shown that the condition continued to the time of the accident, was admissible.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Hugh L. Shea and others against the Pacific Power Company. From a judgment in favor of plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Van Ness & Redman, for appellant. Mullany, Grant & Cushing, for respondents.

GRAY, C. This action is brought by the heirs of John H. Shea to recover damages for his death; he having been scalded to death while in the employ of defendant as a fireman, as the result of the blowing off of the mud drum from defendant's boiler. The plaintiffs had a verdict for $25,000. Rather than have a new trial of the case, plaintiffs consented that the judgment should be for $10,000 only. The defendant appeals from the judgment, and from the order denying it a new trial.

The main contention of appellant is that there is no evidence that the blowing off of the mud drum was in any way the result of defendant's negligence, and hence nothing to show that the death of Shea was caused by the negligence of defendant. It is argued that the parting of the mud drum from the boiler was occasioned altogether by a structural weakness in the latter, and that it was caused by the failure on the part of the constructor of the boiler to properly bell or expand the nipple which connected the mud drum with the headers of the boiler tubes. It would serve no useful purpose to here recite the evidence. It is sufficient to say that, in our opinion, there was some substantial evidence tending to support the theory that the excessive amount of oil that was allowed to enter the boiler, and accumulate there from month to month, in some way weakened the holding power of the nipple, and caused it to pull out of the mud drum. The evidence also tended to show that allowing so much oil to enter the boiler might have been avoided by proper care, and that its presence in such large quantities was evidence of a want of ordinary care in handling the engine and boiler. Aside from this, it also appears that the boiler had been in use for some four years at the time of the accident. When it was first set up, a 300-pound pressure hydrostatic test was applied to it; otherwise called the "bursting test." A few weeks before the accident it had been discovered that the boiler needed repairing. One of the nipples was leaking—apparently the one that subsequently pulled off. The repairs were made; consisting, among other things, in expanding the end of the nipple which was inserted in the mud drum. Subsequent to these repairs the bursting test was not applied to the boiler. Two certain witnesses testified that it was not usual or customary to apply this test, but that the test for leaks at a pressure of about 200 pounds to the square inch was the customary one. Smith, the engineer in charge of the engine and boiler, on the contrary, testified, in substance, that the bursting test should have been applied, but that he applied only the leaking test after the repairs. A short time thereafter the mud drum blew off, when the boiler was being worked at no greater pressure than 200 pounds to the square inch. It is apparent that, if the bursting test of 300 pounds had been applied after the repairs, the mud drum would have thereby been blown off, revealing the defective holding power of the nipple, and Shea would not have lost his life in the subsequent explosion. The jury was not bound to take the statement of the two witnesses that the bursting test was not usual or customary, as against the one witness, corroborated by the circumstances showing that it had been treated as the usual and proper test of this very boiler. We do not feel warranted in holding that, as a matter of law, the evidence and circumstances developed in this case established that it was not necessary or customary to apply the bursting test. The negligence of the engineer of defendant who ran the engine, in failing to see that it was kept in a safe condition, was the negligence of the defendant. Tedford v. Los Angeles Electric Co., 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85. We think the jury were warranted in finding, as we have a right to infer they did find, that the engineer whose duty it was to look after the engine and boiler was negligent in not seeing to it that the bursting test was either applied by himself, or some other person, after the repairs were completed. If it was necessary to apply this test after the boiler had been originally set up and the mud drum had been coupled to it, it was equally necessary to apply the same test after the repairs were made as disclosed by the evidence.

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*Rehearing denied February 3, 1905.

It is not, and never has been, the law in this state that the owner of an engine and boiler is absolved from all liability on account of the bursting of the boiler while in his use, simply by procuring an "independent contractor" to repair it. It is plain that, in addition to this, he must use reasonable diligence to see that it is kept in repair. Whether he has used reasonable diligence is almost always a question of fact for the jury. And it was for the jury, aided by the trial judge, to measure the evidence, not only as to what witnesses testified to directly, but as to the circumstances developed, and the inferences to be drawn therefrom, and the conclusions of fact to be reached, and thus solve the ultimate question as to whether the death of Shea was the direct and proximate result of the want of ordinary care on the part of defendant's engineer. Pacheco v. Judson Manufacturing Co., 113 Cal. 541, 45 Pac. 833. We see no ground for interfering with the decision of the court and jury as to the facts in the case. Nor do we find any material error of law in any action of the trial court.

The evidence as to the condition of the packing rings, and their efficiency for preventing the oil from getting into the boiler, a year or two before the accident, was coupled with a declaration on the part of respondent that it would be shown that this condition of things continued down to the time of the accident. In view of this declaration, there was no error in overruling the objection to the evidence.

Some other objections are urged to the rulings of the court in the admission and rejection of evidence, but the evidence excluded or admitted was not of sufficient importance to affect the result in the case, and for this reason we deem it unnecessary to separately discuss each one of these objections.

We see no error of the court in giving or refusing instructions. Indeed, the appellant fails to specifically point out any error in this direction.

We advise that the judgment and order appealed from be affirmed.

We concur: HARRISON, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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144 Cal. 639

SAN FRANCISCO SAV. UNION v. RECLAMATION DIST. NO. 124. (Sac. 1,010.)

(Supreme Court of California. Sept. 13, 1904.)

SWAMP LANDS — RECLAMATION — DISTRICTS — QUASI PUBLIC CORPORATIONS—RIGHT TO SUE — STATUTES — CONSTRUCTION—PROSPECTIVE OPERATION—DEBTS — MANDAMUS — LIMITATIONS—EXECUTION.

1. A reclamation district organized as provided by St. 1867–68, p. 515, c. 415, § 30 et seq., cannot be sued except as authorized by law.

2. Act March 10, 1885 (St. 1885, p. 77, c. 102), provides that all reclamation districts now legally existing formed under the provisions of any statute of the state prior to January 1, 1873, which are now, and have been ever since their creation, prosecuting the objects for which they were created, shall be subject to the provisions of the Political Code, etc. *Held,* that where a complaint in an action against a reclamation district organized as provided by St. 1867–68, p. 515, c. 415, § 30 et seq., did not allege that at the time of the passage of the act of 1885 it was prosecuting the objects for which it was created, and that it had been so doing ever since its creation, it did not show that such district was within the act of 1885, so that authority to sue the same was conferred by such act.

3. St. 1885, p. 77, c. 102, in force March 10, 1885, authorizing certain reclamation districts to be sued, provides that nothing in the act shall affect any proceedings that shall have been already commenced for the levy or collection of assessments in such districts when the act takes effect, nor shall it affect any act done or performed in relation to the affairs of the district prior to January 1, 1873, nor the indebtedness

of the district theretofore incurred. *Held*, that such act did not render such reclamation districts subject to the provisions of the Political Code as to suits for debts existing on March 10, 1885, nor change the sole pre-existing remedy of mandamus for the enforcement thereof.

4. St. 1885, p. 77, c. 102, providing that certain existing reclamation districts shall be subject to the provisions of the Political Code providing that nothing in the act shall affect any proceeding that shall have been already commenced for the levy and collection of assessments in such district when the act takes effect, nor shall it affect any act done or performed in relation to the affairs of the district prior to January 1, 1873, nor the indebtedness of the district theretofore incurred, was prospective in its operation only, and did not revive rights of action against a district barred by limitations when the amendment was enacted.

5. Where claims against a reclamation district organized under St. 1867–68, p. 515, c. 415, § 30 et seq., were allowed by the trustees, and warrants were drawn, payment of which was refused for want of funds, the creditor was entitled at once to bring mandamus either against the county treasurer to compel payment, if there were funds available, or against the trustees and supervisors to compel an assessment to raise funds if there were none, and hence limitations at once began to run, and barred the creditor's right thereto at the expiration of five years thereafter.

6. Since a reclamation district has no right to acquire property except to carry on the work of reclamation and matters incidental thereto, property devoted to such use is not subject to levy to satisfy judgments against the district.

In Bank. Appeal from Superior Court, Colusa County; Jno. F. Ellison, Judge.

Action by the San Francisco Savings Union against Reclamation District No. 124. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

H. C. Campbell, Donald Y. Campbell, and Campbell, Fitzgerald, Abbott & Fowler, for appellant. E. A. Bridgford, J. F. Bowie, Sullivan & Sullivan, Bishop, Wheeler & Hoefler, and Hudson Grant, for respondent.

SHAW, J. This is an action to recover money due the plaintiff on warrants drawn by order of the board of trustees of the defendant on the county treasurer, approved by the board of supervisors, presented for payment, and not paid for want of funds. The complaint consists of 89 distinct counts upon a like number of warrants, amounting in the aggregate to $18,169.63. The defendant's demurrer to the complaint was sustained, and judgment entered accordingly. The only ground of demurrer necessary to mention here is the general one that neither the complaint as a whole nor any count thereof states facts sufficient to constitute a cause of action. The reclamation district was organized in 1871, under the act of March 28, 1868. St. 1867–68, p. 515, c. 415, § 30 et seq. The contention of the appellant is that the defendant is not a corporation, but a "public agency," as it has been termed, charged with the local administration of some of the functions of state government, and that as such it was not subject to an action until the passage of the amendment of 1899 to section 3453 of the Political Code, declaring that "from and after the election and qualification of said trustees said district shall be deemed organized, and shall have power to sue and be sued"; that, as it could not be sued, the statute of limitations could not run against the cause of action until an action was authorized; and that this action was begun within the time limited and after the amendment aforesaid.

There is considerable discussion in the briefs upon the question whether a reclamation district is or is not a corporation. We do not think it necessary to decide this question. If it is a corporation, it is necessarily a quasi public corporation, similar to a county or school district, and therefore it could not be sued until such time as an action against it was authorized by law. People v. Reclamation District, 117 Cal. 114, 48 Pac. 1016; Whittaker v. County of Tuolumne, 96 Cal. 100, 30 Pac. 1016; Skelly v. School District, 103 Cal. 652, 37 Pac. 643; Colusa County v. Glenn County, 117 Cal. 434, 49 Pac. 457; Gilman v. County of Contra Costa, 8 Cal. 57, 68 Am. Dec. 290. The same rule would apply if it should be declared to be a public agency of the state. Hensley v. Reclamation District, 121 Cal. 96, 53 Pac. 401.

In the petitions for rehearing and upon the reargument a question was presented which was not urged upon the first hearing, and which we think is fatal to all the causes of action stated in the complaint. In Reclamation District v. Kennedy, 58 Cal. 124, this court decided that the Political Code did not apply to districts organized under prior statutes. Under the decision in Swamp Land District No. 121 v. Haggin, 64 Cal. 209, 30 Pac. 631, a reclamation district formed under the act of March 26, 1868, could not reorganize under the Political Code. It was held in that case that section 3478, allowing districts formed under laws in force prior to May 27, 1868, to reorganize under the Code, did not apply to districts formed under the act of 1868, and that the Code provisions did not, of their own force, apply to such districts. This decision was rendered in September, 1883. In 1885, which was the next ensuing regular session of the Legislature after that decision, a law was enacted declaring that certain districts should be subject to the provisions of the Political Code, and it is by virtue of this statute only that the appellant can claim that section 3453 of the Code applies to the defendant. The act took effect March 10, 1885, and is as follows: "All reclamation districts, now legally existing in the state, which were formed under the provisions of any statute of the state prior to the first day of January, eighteen hundred and seventy-three, which are now, and have been ever since their creation, prosecuting the objects for which they were created, shall, after this act takes effect, be subject to the provisions of the Political Code of the state relating to reclamation districts for reclamation purposes, the same as though such districts had been formed and created under the provisions of article two of said Code, relating to 'swamp and overflowed, salt, marsh, and tide lands': provided, that nothing in this act shall affect any proceeding that shall have been already commenced for the levy or collection of assessments in such districts when this act takes effect; nor shall it affect any act done or performed in relation to the affairs of the districts prior to said last mentioned date, nor the indebtedness of the districts theretofore incurred." St. 1885, p. 77, c. 102. We are of the opinion that under the facts stated in the complaint the defendant district does not come within the scope of this act. The act, by its terms, applies only to reclamation districts which at the time the act was passed were, and ever since they were formed had been, "prosecuting the objects for which they were created." The presence of this express limitation in the statute raises the necessary implication that there were, at the time the act was passed, some reclamation districts in existence formed prior to January 1, 1873, which were not then, or had not been since their formation, prosecuting the objects for which they were created, and that this qualification was inserted in the act to carry out the legislative intention to exclude these districts from the operation of the act. The effect of the clause is that districts of that class are not subject to the provisions of the Political Code, and that the amendment of 1899 to section 3453 does not authorize the maintenance of an action against them. It is the general rule that actions cannot be maintained against such organizations. The right to maintain such an action is an exception, existing only when the right is expressly or by necessary implication authorized by law. Hence the rule of pleading applies to this case that a party who would bring himself within an exception to a general rule or condition must state the facts which take his case out of the general rule and place it within the exception. The rule is well stated in Clough v. Shepherd, 31 N. H. 494, as follows: "Where any qualification or exception is stated in the enacting clause of a statute, the declaration or plea founded upon it must allege the facts which are necessary to bring the case within the qualification or to exclude it from the exception." Or, as stated in Gould on Pleading, c. 4, §§ 19, 20: "Where matter is introduced by way of exception into a general clause, the pleader must show that the particular case does not fall within such exception." The following authorities are to the same effect: McGlone v. Prosser, 21 Wis. 273; Gould v. Kelly, 16 N. H. 562; Harris v. White, 81 N. Y. 546; Commonwealth v. Hart. 11 Cush. 135; People v. Board, 40 Barb. 626; Baptist Church v. Utica, etc., Ry. Co., 6 Barb. 313; U. S. v. Cook, 17 Wall. 168, 21 L. Ed. 538; Steele v. Smith, 1 Barn. & Ald. 99; Jones v. Axen, 1 Ld. Raym. 120; Stephen, Pl. 443; Bliss, Code Pl. § 202. In order to state a cause of action, the complaint must show that the defendant is subject to an action, and to do this it is necessary in this case to state that at the time of the passage of the act of 1885 the defendant was prosecuting the objects for which it was created, and that it had been so doing ever since its creation. The object of its creation was the reclamation of land, and keeping in repair the works necessary for that purpose. The complaint contains no averment to the effect that any such work had been or was being prosecuted, and for that reason it fails to state a cause of action against the defendant.

There is another clause of the act which affects the first 77 counts of the complaint, all of which relate to warrants drawn prior to its passage. The act provides that nothing therein contained shall affect "the indebtedness of the districts theretofore incurred." The effect of this provision is that, although the districts embraced in the act were thereafter subject, generally, and as to future proceedings, to the provisions of the Political Code relating to reclamation districts, the same as if originally organized thereunder, yet with respect to the debts then existing they were not subject to the Code, or, in other words, that the provisions of the Code should not in any respect apply to existing debts. We think this limitation upon the operation of the Code upon these districts must be held to apply to future amendments of the Code as well as to the provisions in force when the act of 1885 was passed. In effect, it is the same as if the law had declared that such districts, with relation to debts then existing, should remain subject to and be governed by the act of 1868, under which it was organized. Under the act of 1868 the only means available to a creditor of the district for the collection of his debt was by mandamus to compel the trustees to levy an assessment to raise the funds necessary for that purpose, or to compel the county treasurer to pay any warrants presented while there were funds applicable to its payment. A new law giving a new remedy to the creditor, a right to obtain payment by an ordinary action against the district on the debt, would clearly be a law affecting the debt. The act declares that, although the district shall be subject to the Code in general, yet that it shall not be subject to that Code so as to affect any pre-existing debt. Consequently, when the Code was amended so as to give a new remedy for the collection of the debts due from districts subject to its provisions, the effect of this limitation in the act was that this new remedy could not apply to debts of this district incurred prior to March 10, 1885, the reason being that this district, so far as those debts were concerned, was not subject to the Code. It follows that the amendment of 1899 to section 3453 does not authorize an action against this district to recover a debt incurred before March 10, 1885. The demurrer to the first 77 counts of the complaint was, therefore, properly sustained on this ground.

A more comprehensive objection to the right of the plaintiff to maintain this action is that the amendment of 1899 to section 3453 of the Political Code is not retroactive in operation so as to apply to the claims of the plaintiff. The general rule is that statutes should not be so construed as to give them a retroactive operation, unless it is clearly apparent that such was the intention; that, if there is nothing in the terms of the act to indicate a different construction, it should be given only a prospective operation. Gates v. Salmon, 28 Cal. 320; People ex rel. Thorne v. San Francisco, 4 Cal. 127; Allen v. Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646. A statute general in its terms will not be construed to apply to a particular class of past transactions as to which it would be futile or practically ineffectual, unless the language necessarily requires such a construction. There is nothing in the language of the amendment, nor in the context, evincing an intention to make the amendment applicable so as to revive rights of action which had been barred by the statute of limitations at the time the amendment was enacted. The preceding part of the section provides for the election of trustees of the districts, and prescribes some of their duties. The amendment consists simply of an addition to the effect that after the election and qualification of the trustees the "district shall be deemed organized, and shall have power to sue and be sued." Taken in connection with the context, this would seem to be intended to have a prospective operation only. When considered in connection with the nature of the transactions to which it is here sought to make it applicable, it will be seen that the amendment would be absolutely ineffectual, unless it is given an exceedingly unnatural and strained construction. There does not appear to have ever been any dispute between the holders of the claims in question and the officers of the district concerning the validity of the claims, and there was no necessity for legislation to establish them. They were all allowed without objection, and warrants therefor drawn upon the county treasurer. The difficulty has not been in obtaining an allowance or recognition of the claims, but it has arisen entirely from the failure of the trustees to provide funds with which to pay the same. The claims accrued during the period from 1872 to 1887. They were all allowed, warrants drawn, payment refused for want of funds, and all existing remedies to compel payment barred by the statute of limitations, many years prior to the enactment of the amendment. If the amendment is construed to give the right to maintain an ordinary action at law upon these allowed claims, it will still be of no benefit whatever to the plaintiff. Its right to a mandate, either against the county treasurer to compel payment if there were in fact available funds, or against the trustees and supervisors to compel an assessment to raise funds if in fact there were none, became complete and perfect upon the original refusal to pay the claims. The statute of limitations at once began to run against this right, and became barred within five years thereafter, if not sooner. Barnes v. Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153. A judgment against the defendant in an action upon these claims would be of no direct benefit to the plaintiff, and would set him no further on the road to recovery of his money than he was at the time the claims were originally allowed. The judgment could not be collected on execution. The district has, and under ordinary circumstances could have, no property subject to execution. Hensley v. District, 121 Cal. 96, 53 Pac. 401. It has no right to acquire property except for the purpose of carrying on the work of reclamation and matters incidental thereto. Property devoted to that sort of public use, and belonging to a public corporation or public agency, cannot be levied on and sold to satisfy judgments against such corporation or agency. The only means by which the plaintiff could obtain payment of such a judgment would be by resort to the remedy which he had in the first instance; that is to say, a suit in mandamus to compel the levying of an assessment whereby money could be raised with which to pay the same. But this remedy, as we have seen, has been long since barred. It would be an impossible construction of the amendment of 1899 to hold that it not only gives the right to maintain an action against the district upon these stale claims, but also revives the right to maintain the suit for a writ of mandate to compel an assessment, which had been previously barred by the statute of limitations. Such a construction could never be based upon implication merely, but would require express and distinct words to that effect. It must be admitted that, if the Legislature had intended such results, it would have expressed its meaning in terms fitly appropriate to describe a proposition so remarkable and unusual. Moreover, such construction would undoubtedly be productive of injustice and oppression. For many years these claims had been considered as outlawed. The owners of land within the district have no doubt considered their property free from any liability on account of the burden of these debts. During this period numerous transactions must have been made upon the belief that no such burden existed. There is nothing to indicate that the Legislature intended to re-establish this burden, and thus disturb long-settled conditions. The natural interpretation of the amendment, so far as it is retroactive at all, is that it was intended to give a right of action against the district upon unliquidated or disputed claims not barred by the statute of limitations, whereby the indebtedness of the district could be settled. In view of these considerations, we have no doubt that the power to sue and be sued given and imposed by this amendment was not intended to apply to causes of action against the districts, which were already barred by the statute of limitations at the time the amendment was passed, and, consequently, that it has no application whatever to the claims here sued on.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

144 Cal. 656

PEOPLE v. GALLANAR. (Cr. 1,198.)

(Supreme Court of California. Sept. 14, 1904.)

CRIMINAL LAW—APPEAL—PROBABLE CAUSE—CERTIFICATE—ALLOWANCE—REFUSAL—APPLICATION TO SUPREME COURT—BILL OF EXCEPTIONS—STAY—TIME.

1. A certificate of probable cause for appeal, required by Pen. Code, § 1243, should be granted by the trial judge whenever there is room for an honest difference of opinion as to the existence of any prejudicial error in the proceedings leading to the conviction, regardless of his own opinion that the record is free from error, and unless the appeal is clearly frivolous.

2. Where a judge trying a criminal case refuses a certificate of probable cause for appeal, defendant was entitled to renew his application for such certificate before a justice of the Supreme Court.

3. Since an application for a certificate of probable cause for a criminal appeal made to a justice of the Supreme Court can be made only on the bill of exceptions duly settled, of which application notice must be given to the district attorney, defendant is entitled to a stay of execution during the time allowed by law for preparing such bill of exceptions, and for such further time as may be necessary for its settlement by the exercise of proper diligence, and for a reasonable time thereafter.

In Bank. George W. Gallanar was convicted of manslaughter, and he applies for a stay of execution pending an application for a certificate of probable cause for appeal. Granted.

C. F. Kimball and Shanahan & Braynard, for petitioner.

PER CURIAM. The defendant was convicted of manslaughter, and has appealed to this court. The trial judge refused a certificate of probable cause, and refuses to stay execution of the sentence until an application for such certificate can be made here. A criminal appeal, except in capital cases, does not stay execution unless a certificate is filed by the trial judge or a justice of the Supreme Court that in his opinion there is probable cause for the appeal. Pen. Code, § 1243. When there is probable cause the defendant is clearly entitled to the certificate as matter of right, and there is probable cause whenever there is room for an honest difference of opinion as to the existence of any prejudicial error in the proceedings leading to the conviction. In all such cases it is the duty of the trial judge to grant the certificate, notwithstanding his own opinion that the record is free from error. Matter of Adams, 81 Cal. 163, 22 Pac. 547. The defendant, in other words, is entitled to a stay of execution where his appeal is not clearly frivolous. But although the duty of granting the certificate devolves primarily upon the trial judge, his refusal to grant it does not conclude the matter. The defendant has a clear legal right to renew his application before a justice of this court, and his right to make the application here includes the right to a stay of execution until he can, exercising proper diligence, procure the settlement of a bill of exceptions; such record being the essential basis of any action by any other judge than the trial judge. Here the trial judge refused any stay of execution beyond the time for proposing a bill by the defendant. Defendant has filed a proposed bill within the time allowed for that purpose, but it has not been settled, and, as matters now stand, the stay of proceedings granted by the trial judge having expired, it has become the duty of the sheriff to transport the prisoner to the state prison before he could possibly have the hearing before a justice of this court to which he is clearly entitled. To prevent this injustice, and to secure the defendant in his right to a stay of execution pending his appeal, if in the opinion of a justice of this court there is probable cause, as above defined, it is obviously necessary that there should be a further stay until a reasonable time has elapsed after settlement of the bill of exceptions, for without that record we can have no means of determining whether there is probable cause or not. In a case in all substantial respects the same as this, it was said by Beatty, C. J., that: "It was the plain duty of the superior court to stay the proceedings during the time allowed by law for preparing the bill of exceptions, and for such further time as might be necessary for its settlement, provided the defendant exercised proper diligence in its preparation." People v. Lane, 96 Cal. 597, 31 Pac. 580. We approve this statement, and would say in addition that since the defendant is required to give notice to the district attorney of his application here for a certificate of probable cause, the stay, if demanded, should be extended to a reasonable time after the bill has been duly certified.

In this case, in default of a proper order by the trial judge, we have made the order ourselves.

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2730.

144 Cal. 659

BANK OF WOODLAND v. STEPHENS et al.

(Sac. 1,089.)

(Supreme Court of California, Oct. 17, 1903. On Rehearing, Sept. 15, 1904.)

MORTGAGES — HOMESTEAD — EXEMPTION—COMMUNITY PROPERTY—CLAIM AGAINST ESTATE—FAILURE TO FILE—EFFECT.

1. Under Code Civ. Proc. § 564, providing that, in foreclosure, a receiver may be appointed where the mortgaged property is probably insufficient to discharge the mortgage debt, the court has no jurisdiction to appoint a receiver in foreclosure of a mortgage providing that, on the filing of a complaint to foreclose, the plaintiff should be entitled to a receiver, in the absence of an allegation that the property was probably insufficient to pay the debt, interest, and costs.

2. Where community property mortgaged was duly selected as the homestead of the mortgagors, and, in the settlement of the husband's estate, proceedings were taken, under Code Civ. Proc. §§ 1476–1486, whereby 100 acres of the mortgaged property was set apart to the widow as a homestead, and the balance was freed from its homestead character, the fact that the mortgagee failed to prove the mortgage as a claim against the husband's estate did not deprive him of his right to foreclose the same, as against the property found in such probate proceedings not subject to homestead.

On Rehearing.

3. An allegation in a complaint to foreclose a mortgage that the mortgaged premises are insufficient to discharge the mortgage debt, without an allegation as to the value of the property, etc., constitutes a mere conclusion of the pleader, and is insufficient to authorize the appointment of a receiver.

Beatty, C. J., dissenting.

Department 1. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Action by the Bank of Woodland against J. J. Stephens, as administrator of the estate of M. R. York, deceased, and another. From a judgment in favor of plaintiff, defendant Stephens appeals. Modified.

See 70 Pac. 293.

R. Clark, for appellant. Wm. M. Sims and Reiver & Sims, for respondent.

SHAW, J. This is an appeal by J. J. Stephens, as administrator of the estate of M. R. York, deceased, from a judgment foreclosing a mortgage executed by M. R. York and Susan F. York in their lifetime. The case is presented upon the judgment roll alone.

1. The mortgage contains a covenant that, upon the filing of a complaint to foreclose the same, the plaintiff would be entitled to have a receiver appointed to take possession of and lease the premises, collect the rents, and hold the same as security for the debt secured. The complaint in the action avers this covenant, but contains no showing that the property is insufficient to pay the debt. Upon this complaint an application was made to the court for a receiver, which was granted, and a receiver appointed, who took charge of the property accordingly. The decree appealed from provides that the receiver theretofore appointed should continue to act as receiver, and receive from the tenant in possession the rents and profits until a sale and redemption, and hold the same as security for the debt. The appellant objects to this portion of the decree upon the ground that the court did not have jurisdiction, under the facts of the complaint, to appoint a receiver, and therefore that it had no power to continue him in office after the making of the final decree. This contention must be sustained. In the cases of Scott v. Hotchkiss, 115 Cal. 94, 47 Pac. 45, and Baker v. Varney, 129 Cal. 565, 62 Pac. 100, 79 Am. St. Rep. 140, it was decided by this court that jurisdiction to appoint a receiver could not be conferred by a stipulation of the character here in issue, and that, notwithstanding the stipulation, the party who desired a receiver must state facts sufficient to show that the premises mortgaged are probably insufficient to pay the mortgage debt, with interest and costs, as provided in section 564, Code Civ. Proc. Upon the authority of those cases, which we fully approve, we hold that the part of the decree referred to is erroneous.

2. The mortgagors were husband and wife, and the property described in the mortgage was community property. Prior to the execution of the mortgage, the property was duly selected as a homestead by the mortgagors. Upon the death of M. R. York, the husband, an administrator was duly appointed, and thereafter an inventory was returned in the estate, showing that the homestead property was of the value of $15,000. Upon the return of the inventory, proceedings were taken, under sections 1476 to 1486, inclusive, of the Code of Civil Procedure, whereby the said homestead premises were admeasured, and a portion thereof, consisting of 100 acres, was set apart to Susan F. York, as the widow of said M. R. York, as a homestead, leaving the remaining 220 acres of the mortgaged premises, from that time forward, free from the homestead character. The mortgagee did not at any time present his mortgage debt as a claim to the administrator of the estate of M. R. York for allowance. The court found these facts, and gave a decree refusing a foreclosure as to the 100 acres set off as a homestead, but decreeing foreclosure upon the remaining part of the premises.

Upon these facts the appellant contends that the decree is erroneous, upon the ground that the entire property, at the death of the deceased, was a homestead, and that the mortgage cannot be enforced unless a claim therefor had been duly presented to the administrator for allowance. The general proposition that a mortgage upon the homestead cannot be enforced, unless a claim therefor had been duly presented to the administrator, has been settled ever since the case of Camp v. Grider, 62 Cal. 20. See, also, Wise v. Williams, 72 Cal. 547, 14 Pac. 204; Bollinger v. Manning, 79 Cal. 11, 21 Pac. 375;

Building Ass'n v. King, 83 Cal. 442, 23 Pac. 376; Hearn v. Kennedy, 85 Cal. 57, 24 Pac. 606; Rosenberg v. Ford, 85 Cal. 612, 24 Pac. 779; Perkins v. Onyett, 86 Cal. 350, 24 Pac. 1024. But we are of the opinion that this rule applies exclusively to the property described in the mortgage, which is impressed with the character of the homestead. At an early date in this state it was held that the homestead character applied only to so much of the property as did not exceed $5,000 in value. In Gregg v. Bostwick, 33 Cal. 228, 91 Am. Dec. 637, the court say: "If what is actually used as a homestead is of greater value than five thousand dollars, the excess is not a homestead, under the statute, though so in fact." In Estate of Delaney, 37 Cal. 180, the court says: "At its inception it is limited to five thousand dollars in value, and, when the property is enhanced in value so that it exceeds the statutory limit, the excess does not constitute a part of the statutory homestead. After the premises are worth five thousand dollars, every increase in value works a reduction in the area of the homestead." In the latter case the court held that under section 121 of the probate act, as amended in 1868 (St. 1867–68, p. 172, c. 192), which required the court to set off to the survivor the homestead selected under the general homestead law, but did not contain any provision for determining the area of the homestead, where the selected premises exceeded $5,000 in value, it was the duty of the court, nevertheless, to ascertain the amount of land necessary to make up the value of the exemption, and set off that amount alone as the homestead. It is the homestead only which is exempt from execution and forced sale. With regard to sales on execution during the lifetime of the homestead claimants, the process by which the excess can be reached by the creditor is prescribed by the Civil Code (sections 1245 to 1259, inclusive). Where, upon the death of the homestead claimant, the inventory shows that the premises claimed exceeded $5,000 in value, the method of determining what part is homestead and what part is subject to the debts of the deceased is prescribed by sections 1476 et seq. of the Code of Civil Procedure, which sections were followed in this case. The effect of this procedure was that the portion not set off to the widow was then ascertained to be no part of the homestead, and it thereupon became subject to all debts of the deceased, including the mortgage in question. The rule which requires a mortgage upon the homestead to be presented to the administrator as a claim is based upon the provisions of section 1475 of the Code of Civil Procedure, and is limited to cases in which the homestead does not exceed $5,000 in value, or in which the mortgagee seeks to proceed in foreclosure of his mortgage against the property which is eventually set off as a homestead, where the premises described in the homestead declaration exceed $5,000. It does not apply at all to a probate homestead. McGahey v. Forrest, 109 Cal. 68, 41 Pac. 817. The purpose of the provision, as stated in the leading case on the subject (Camp v. Grider, supra), is to preserve the homestead to the parties entitled thereto, if possible. It was not intended to have any application whatever to lands which, by the proceedings prescribed in that chapter of the Code, were eventually determined not to be a homestead, and there is no reason why it should be construed to apply to such land. We are of the opinion that it was not necessary for the mortgagee in this case to present his claim to the administrator, as a condition precedent to his right to foreclose the mortgage on the excess.

For the reasons herein stated, it is ordered that the decree be modified by striking therefrom the provisions relating to the continuance of the receiver in his office subsequent to the final decree, and that, as so modified, the judgment be affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

On Rehearing.

In Bank.

Hudson Grant, Arthur C. Huston, Harry L. Huston, and North & Lovejoy (H. G. W. Dinkelspiel, of counsel), for appellant. N. A. Hawkins and Phil Bruton, for respondent.

SHAW, J. Upon a further consideration of this case we adhere to the opinion heretofore rendered in department 1. It is proper to state further that there is an allegation in the complaint that "the mortgaged premises are insufficient to pay and discharge the mortgage debt," and the court finds that this allegation is true. On the authority of Scott v. Hotchkiss, 115 Cal. 94, 47 Pac. 45, it is claimed that this is a sufficient statement to uphold the part of the decree continuing the receivership. An inspection of the transcript in that case shows that there was in the complaint there under consideration a similar allegation. The entire discussion of the point in the opinion is as follows: "No stipulation can confer jurisdiction upon the court to appoint a receiver in a case where the court has no such authority given by law. It is not necessary to decide the matter in this case, however, because there is an averment that the security is insufficient." It is obvious that the subject of the sufficiency of such an averment as an allegation of fact was not fully considered in that case. Such a statement is no more than a conclusion. It is no better than the statement, sometimes contained in a complaint for an injunction, that, if the acts threatened are committed, "the plaintiff will suffer irreparable injury, which cannot be compensated in damages." This is always held insufficient to authorize or support an injunction. The same rule should be applied here. The appointment of a receiver involves the taking of the defendant's property from his possession—a measure more violent and drastic than an injunction. It should never be allowed in cases of mortgage foreclosure except upon a statement of facts showing that the actual value of the mortgaged premises is less than the debt secured, with interest and costs, and that resort to the rents and profits is necessary.

Subdivision 2, § 564, Code Civ. Proc., states the various conclusions which must be made by the court before it can appoint a receiver in foreclosure suits. The complaint or affidavit on which the application for a receiver is based must state facts which support one or more of these conclusions. It is not enough to state the conclusions alone. The value must be alleged. A mere averment that its value is insufficient, or that the premises are insufficient, will not do. Allegations of this character may be sufficient to uphold an order where the attack is collateral, but this cannot be allowed where, as in this case, there is a direct attack upon appeal. We do not think Scott v. Hotchkiss, supra, should be considered as holding such an allegation sufficient in form.

It is ordered that the decree be modified by striking out the part thereof relating to the continuance of the receiver in his office after the final decree, and that, as so modified, the judgment be affirmed.

We concur: HENSHAW, J.; LORIGAN, J.; ANGELLOTTI, J.; VAN DYKE, J.; McFARLAND, J.

BEATTY, C. J. I dissent. The allegation of insufficient value in Scott v. Hotchkiss was less precise and less positive than the allegation in this complaint, yet it was held sufficient in form and in substance to warrant the appointment of a receiver. That decision made a precedent which this plaintiff has followed, and it ought to protect him.

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144 Cal. 650

SADDLEMIRE et al. v. STOCKTON SAVINGS & LOAN SOC. (Sac. 1,247.)*

(Supreme Court of California. Sept. 13, 1904.)

QUIETING TITLE — HOMESTEAD — COMPLAINT — SUFFICIENCY—STATUTES—HUSBAND AND WIFE—WAIVER—DISMISSAL.

1. In a complaint by plaintiffs, as children and heirs at law of a deceased owner of real estate, to quiet title in plaintiffs thereto, the property was described as occupied by deceased and his family at the time of his death under a declaration of intent to claim the same as a homestead. It was alleged, also, that deceased left a widow surviving, in favor of whom, on her petition, the court set apart the property to the use of the family of deceased and adjudged that the property should not be subject to administration, and that the widow thereafter borrowed money from defendant and executed a deed of trust on the property to secure the loan, which deed the plaintiffs were induced to sign through fraudulent representations. The widow was not made a party. *Held*, that as, under Code Civ. Proc. § 1474, providing that, where a homestead is selected by the husband and wife during coverture and recorded, it vests on the death of either absolutely in the survivor, plaintiffs showed no right to maintain the action.

2. Under Code Civ. Proc. § 1474, an order of court, made on the petition of the survivor after the death of a spouse who had declared a homestead conformably to the statute, setting apart the property as a homestead to the survivor, can have no effect on the title of the survivor, which vests through such selection.

3. Civ. Code, § 3513, providing that any one may waive the advantage of law intended for his benefit, has no application to show a waiver by a surviving widow of her homestead right, which vested through selection, under Code Civ. Proc. § 1474, where, on her petition to the court after the death of her husband, the same homestead was declared to be set apart to the use of the family of deceased and withdrawn from administration.

4. Under Code Civ. Proc. § 581, stating the causes for which a dismissal or a judgment of nonsuit may be entered, but not expressly authorizing a dismissal for refusal of plaintiffs to amend after demurrer sustained, a judgment of dismissal is nevertheless proper, even in the absence of motion therefor, where plaintiffs were notified of the sustaining of a demurrer to their complaint and neglected for 30 days to amend their complaint.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Birdie E. Saddlemire and others against the Stockton Savings & Loan Society. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. F. Ramage and C. H. Fairall, for appellants. Nicol & Orr, for respondent.

CHIPMAN, C. A demurrer to the second amended complaint for insufficiency of facts and for uncertainty was sustained, and, plaintiffs failing to amend, judgment was entered dismissing the action, and for defendant's costs. It is alleged in the complaint that D. J. Saddlemire died testate July 1, 1881, leaving Lavina, his widow, and plaintiffs, Birdie, Mary, and Frank, his children; that after due proceedings Lavina and Mary were appointed executors of the will; that the real property described in the complaint was, at the death of deceased, occupied by him and his family as a homestead (and the facts set forth in the complaint show that his declaration of intention to claim the premises as a homestead was conformable to the statute and was duly acknowledged and recorded); that on September 27, 1881, Lavina petitioned the said court "to set apart to the use of the family of said deceased [naming the widow and said plaintiffs] the real property selected as a homestead by said deceased, with the dwelling house thereon, and at the date of said petition occupied by the said family of said deceased [description follows]"; that on September 29, 1881, "the said superior court proceeded to hear said petition, * * * and duly gave and made its judgment and decree setting apart to the use of the family of said * * * deceased the above-described real property, and further ordered and adjudged that the said real property should not be subject to administration"; that ever since said date plaintiffs have been and now are the owners and in actual possession of said property (except about 10 acres sold and conveyed). This latter allegation seems to be a conclusion of law from the foregoing averments. It is then alleged that the defendants claim some interest in the property, but said claim is false and fraudulent, and is based on a certain instrument in writing of date September 23, 1901, the history of which is alleged to be as follows: On October 6, 1881, Lavina borrowed from defendant bank the sum of $2,600, and to secure the payment executed a conveyance by deed of trust of the said property, naming Shippee and West as trustees. On April 23, 1897, she executed another conveyance of the property to defendants Fred M. West and W. W. Westbay, as trustees, to secure the payment of her promissory note for $11,401.75, given to defendant bank. On the 23d of September, 1901, "in response to a request made to Lavina Saddlemire by said West, Lavina Saddlemire and Birdie Edna Saddlemire met said West at the office of defendant bank, and said West stated the object of the business was to have the mortgage renewed, and thereupon said West presented to Lavina Saddlemire for her signature, and she signed the same without reading or having read to her, an instrument in writing reciting [then follows what purports to be a deed of trust between Lavina and plaintiffs, as the parties of the first part, said West and Westbay, trustees, second parties, and defendant bank, third party, given to secure $14,468.22 borrowed by Lavina from defendant bank for which she executed her promissory note]." The remaining allegations relate to the representations alleged to have been made by said West, by means of which plaintiffs were induced to sign said deed of trust. The view we take of the case renders it unnecessary to consider these allegations. The prayer is that plaintiffs be decreed the owners in fee of said real property, and said defendants have no right or interest therein, and that they be restrained from asserting any claim thereto, and for general relief.

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*Rehearing denied October 10, 1904.

Unless plaintiffs had some interest in the property when the complaint was filed, they cannot maintain the action. Our conclusion is that from the allegations of the complaint it appears that at the death of her husband the property vested absolutely in Lavina as survivor, and, as she is not a party to the action, it becomes unnecessary to consider the alleged fraudulent representation made to plaintiffs. Section 1474, Code of Civil Procedure, provides as follows: "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor." The complaint does not state whether the property was community or separate property. But if it was community property, or the separate property of the husband, his declaration brought the homestead within the meaning of the statute, and the property vested absolutely in the surviving wife. If the land was the separate property of the wife, it was no part of the estate of the deceased husband, and the court sitting in probate had no jurisdiction over it, and could not deal with it as belonging to the estate. It does not appear when the homestead was selected, but this is immaterial, as it does appear that at the death of the declarant the statute above referred to was in force, and controls in the devolution of title. Tyrrell v. Baldwin, 78 Cal. 474, 21 Pac. 116. It was held in Estate of Fath, 132 Cal. 609, 64 Pac. 995, that the title of the widow, acquired by survivorship under section 1474, is not affected by a subsequent order of the court setting the property apart to her as a homestead—citing Sanders v. Russell, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26; In re Croghan's Estate, 92 Cal. 370, 28 Pac. 570; Estate of Young, 123 Cal. 337, 55 Pac. 1011. "The effect of that order was to withdraw the property therein named from administration, and to this extent relieve the executor from the necessity of accounting therefor; but it did not qualify or affect the title that had vested in Mrs. Fath at the instant of her husband's death"—citing Rich v. Tubbs, 41 Cal. 34; Bollinger v. Manning, 79 Cal. 7, 21 Pac. 375; In re Ackerman, 80 Cal. 208, 22 Pac. 141, 13 Am. St. Rep. 116.

Appellants' contention is that the order setting apart the homestead was a judicial determination that no valid recorded homestead existed upon the premises on September 29, 1881, and vested the title in the minor children and the mother, and the decree cannot be collaterally attacked—citing section 1468, Code Civ. Proc.; Kearney v. Kearney, 72 Cal. 591, 15 Pac. 769; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Hoppe v. Hoppe, 104 Cal. 94, 37 Pac. 894; In re Walkerly's Estate, 108 Cal. 655, 41 Pac. 772, 49 Am. St. Rep. 97; Estate of Hamilton, 120 Cal. 428, 52 Pac. 708; Estate of Matheny, 121 Cal. 268, 53 Pac. 800; Otto v. Long (Cal.) 77 Pac. 885; Freeman on Judgments, § 319f. Kearney v. Kearney was an action to set aside a probate homestead, which had been set apart to the widow, where there had been no homestead selected in the lifetime of the deceased. What was there said had reference exclusively to the rights of the widow under the decree, and did not involve the question as to the effect of a probate homestead, where one had previously been selected under the statute. In Sheehy v. Miles the court stated the settled law to be the same as shown in Estate of Fath, supra, and other cases. It was said, however, in the opinion of Mr. Justice Garoutte, that "the decisions are founded upon the previous determinations of the court that a valid recorded homestead upon community property is in full life at the date of such decree." Appellants assume that this justifies the conclusion that the decree of the probate court in setting apart the homestead in the present case adjudged conclusively that there was no valid selection of a homestead, and that the whole world, including, we suppose, creditors, mortgagees, and grantees of the survivor, is bound by such decree, no matter what rights may have accrued under the selected homestead. The incorrectness of this assumption is made very clear by the concurring opinion in the case. The point really decided in the Sheehy Case was that the purchaser, under his covenant of title, was not bound to accept the recorded homestead as importing a perfect title. Hoppe v. Hoppe, was a probate homestead, where no homestead had been selected in the lifetime of the husband. What was there said related only to such homestead as the court was dealing with. So, also, in Re Walkerly's Estate, and Estate of Matheny. In the recent case of Otto v. Long the action was to quiet title acquired by foreclosure sale under mortgage executed by Mary Wood, to whom the property had been set apart as a homestead. It was held that the order could not be attacked collaterally, and that the pleadings furnished no foundation for a direct attack. The question we have here was not before the court. If the order was not open to attack, its invalidity could not be urged on the ground that there had been a homestead selected in the husband's lifetime. The question as to the effect of the homestead selected prior to the husband's death did not arise.

It is suggested that Mrs. Saddlemire had a right to waive the provisions of section 1474, under the provisions of Civ. Code, § 3513, which provides that "any one may waive the advantage the law intended for his benefit." This maxim has no application to the facts here. The court was without jurisdiction to make an order affecting the title of Mrs. Saddlemire, which vested in her through the selected homestead under section 1474. The effect of the order pursuant to the petition, as we have seen, was merely to withdraw the property from administration.

It is claimed that the judgment of dismissal was unauthorized under any subdivision of section 581, Code Civ. Proc.; citing Pacific Paving Co. v. Vizelich et al., 141 Cal. 4, 74 Pac. 352. The judgment reads in part as follows: "* * * There having been no application for leave to file an amended complaint in said action, and no amended complaint having been filed therein, now, therefore, it is hereby ordered," etc. It appears that plaintiffs were notified of the ruling on the demurrer March 20, 1903, and the judgment was not entered until April 19, 1903. Plaintiffs manifestly stood upon their second amended complaint, and by neglecting, after notice of the ruling, to further amend the complaint, they in effect refused to amend, and there was nothing left for the court to do but render judgment for defendants, either dismissing the action or that plaintiffs take nothing by the action. In the case cited by the appellants, supra, the court held that the insufficiency of the complaint is not available on motion to dismiss the action, and cannot be considered upon appeal from an order granting the motion. That is not the case here. There was no motion to dismiss. An issue of law involving the sufficiency of the complaint was presented by the demurrer. The demurrer was sustained, and, plaintiffs refusing to amend, judgment of dismissal was proper.

It is advised that the judgment be affirmed.

We concur: COOPER, C.; HARRISON, C.

For the reasons given in the foregoing opinion the judgment is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

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144 Cal. 665

GUTTER v. DALLAMORE et al. (S. F. 3,852.)

(Supreme Court of California. Sept. 16, 1904.)

ADMINISTRATORS — SETTLEMENT OF ESTATE — SALE OF LAND—MORTGAGE BY HEIR—EFFECT OF SALE—PROCEEDS—LIEN — FINDINGS—CONSTRUCTION.

1. Where the interest of an heir in land belonging to an estate in process of administration was mortgaged by him, and thereafter, in an action to foreclose the mortgage, it was answered that the land had been sold by order of the court in the administration proceedings, and purchased for a certain sum, and that the sale had been confirmed, and the court found "that the property was sold at private sale by the administrator to the defendants P.," such finding should be construed as a finding that the property was sold by the administrator under order of the court.

2. Where the interest of an heir in land belonging to an estate was mortgaged pending administration, and the land was sold under order of the court in probate proceedings, the purchaser's title related back to the time of the death of the deceased owner, and conveyed her title as it then existed, freed from the mortgage, under Code Civ. Proc. § 1555, providing that conveyances so made shall convey all the right, title, interest, and estate of the deceased in the premises at the time of his death.

3. Where an heir mortgaged his interest in certain real estate pending settlement of his ancestor's estate, and the land was sold in the administration proceedings to pay debts, the mortgagee was only entitled to a lien on the interest of the mortgagor in the surplus proceeds in the hands of the administrator.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Rachael Gutter against George C. Dallamore, as administrator of the estate of Elizabeth Dallamore, deceased, and others. From a judgment in favor of plaintiff, defendants Henry Pausman and another appeal. Reversed.

B. S. Wilkins, for appellants Henry Pausman and Annie Pausman. Geo. W. Schell, for respondent Rachel Gutter. J. E. Barry, for respondent Geo. C. Dallamore, administrator, etc. R. F. Mogan and Leon Samuels, for respondent Mark Dallamore.

SMITH, C. This is an appeal by the defendants Pausman from a judgment foreclosing a mortgage of defendant Mark Dallamore to plaintiff. The case is: Mark Dallamore, one of the heirs of the deceased Elizabeth Dallamore, and as such entitled to one-third of her estate, by writing of date November 18, 1901, mortgaged to the plaintiff his interest in a lot belonging to the estate, to secure his promissory note for the sum of $200, with interest thereon at the rate of 10 per cent. per month, and for further security also assigned to him his whole interest in the estate, with power as his attorney to demand and receive the same from the administrator. Afterwards (it is alleged in the answer of the defendants Pausman), by an order of the superior court in which the matter of the estate was pending, the lot referred to in the mortgage was sold to the Pausmans by the administrator for the sum of $5,500, and, the money having been paid, the sale was confirmed by the court, and a deed executed to them by the administrator. Since then it appears there has been an order of final distribution of the estate, and there is now in the hands of the administrator, to be distributed to the heirs of the deceased, the sum of $5,009.50, being, it is found, proceeds of the sale; and of that amount one-third ($1,669.69) belongs to the defendant Mark Dallamore. The amount due on the note is found to be the sum of $200, with interest at the rate of 10 per cent. per annum, and costs of attorney's fees, aggregating $314.66; of which amount the sum of $280.26 (the aggregate amount less costs) is found to be a lien on the mortgaged land, and also "upon the money in the hands of the defendant (administrator) belonging to the defendant Mark Dallamore." The judgment is for the foreclosure of the mortgage, and for payment of the deficiency, if any, by the defendant administrator, out of the money of the mortgagor in his hands. No specific mention of the rights of the defendants Pausman is made in the decree or in the conclusions of law, unless it be that it is recited in the decree that they had appeared by counsel, and that it was ordered that "judgment be entered in favor of the plaintiff and against the defendants" generally. But from the general terms of the decree it can hardly be construed otherwise than as foreclosing their rights. No briefs are filed on behalf of the respondents Dallamore, and the rights of the plaintiff will not be substantially affected by the result of the appeal, provided the sum due her is paid either by foreclosure, or out of the fund in the hands of the administrator. There is, therefore, no question as to the substantial rights of the parties. But some embarrassment arises from the indefinite character of the findings of the court with regard to the probate sale set up by the defendants Pausman. With regard to this, as stated above, it appears from the specific allegations of the answer that the land in question was sold to the Pausmans for the sum of $5,500, under order of the probate court; and that the sale was confirmed, the purchase money paid, and the deed executed and recorded. But the finding is simply "that the property was * * * sold at private sale by the administrator to the defendants Pausman" for the sum named; and the question is whether this is to be construed as an affirmative finding upon the issues presented. If so, we think, the judgment should be modified; otherwise there is an entire absence of findings upon the defense presented in the answer, and the judgment should be reversed on that account. The question is, therefore, immaterial except as affecting the form of the judgment to be rendered here. On this question it is assumed by the counsel of both parties in their briefs that the finding is to be construed as above indicated; and, comparing it with the other findings and the answer, this, we think, is the correct position. For, properly speaking, to say that the land was "sold" by the administrator is to say that it was sold under the order of the court, for in no other way could the administrator have sold it. And that this was what was intended by the court is indicated by the reference to the administrator's petition for sale immediately preceding, and also by the findings as to the payment of the purchase money, and its distribution by final decree, and as to the lien of plaintiff on the mortgagor's share of the money in the hands of the administrator; from which it is also to be inferred that the sale was confirmed and the deed made as alleged. Nor is it to be presumed unnecessarily that the court did not intend to find upon the issues presented. We are of the opinion, therefore, with the counsel of both parties, that the findings are to be construed as indicated.

Upon this assumption the position of the appellants is that under the provisions of section 1555 of the Code of Civil Procedure the title acquired by the Pausmans related back to the time of the death of the decedent, and conveyed her title as it then existed; from which it would follow that the interest of the mortgagor in the mortgaged premises is now vested in the Pausmans, free of the lien of the mortgage. The contrary is claimed by the respondent on the authority of the decision in the Estate of Packer, 125 Cal. 396, 58 Pac. 59, 73 Am. St. Rep. 58, and upon the principle asserted in Brenham v. Story, and other cases cited, that the title of the heir becomes vested upon the death of the ancestor, subject only to "liens of creditors, * * * expenses of administration, and the temporary right of possession of the administrator." The position assumes that the provisions of section 1536 of the Code of Civil Procedure, as amended in 1893, in so far as they authorize a sale "for the advantage, benefit, and best interests of the estate," are unconstitutional. It was so held in the Estate of Packer, supra, as to titles vested prior to the date of the act, but the decision was limited to such cases; and the question of the validity of the section with reference to titles of heirs vesting after the amendment took effect is expressly left untouched. Nor do we think it necessary to determine it in the present case, for it appears from the findings that the sale was in fact made for debts and expenses of administration; and, though the aggregate of these was small compared with the value of the property sold—which was a city lot—we cannot inquire as to the propriety of the action of the court in ordering a sale of the whole of the lot instead of a part only. We are of the opinion, therefore, that the contention of the appellants on this point should be sustained, and that their title must be regarded as vested as of the date of the death of decedent, as provided in section 1555 of the Code of Civil Procedure. It follows that the judgment of foreclosure was erroneous for the double reason that the interest of the mortgagor has become vested in the appellants free of the lien, and that —there being no longer any interest in the mortgagor to be sold—a sale would be an idle act. Civ. Code, § 3532; Toby v. Oregon Pac. Co., 98 Cal. 495, 33 Pac. 550; Merced Bank v. Casaccia, 103 Cal. 641, 37 Pac. 648; Savings Bank v. Central Market Co., 122 Cal. 33 et seq., 54 Pac. 273, and authorities cited.

It is, however, found by the court that the plaintiff has a lien on the funds of the mortgagor in the hands of the defendant administrator; and for the purpose of securing the amount due her she is the assignee of the mortgagor's interest therein, with power as his attorney to demand and receive the same. She is therefore entitled to recover of the administrator, payable out of the share of Mark Dallamore in said estate, the amount due her, with costs as found by the court, and it should be so adjudged. Code Civ. Proc. §§ 1666, 367; Curtis v. Schell, 129 Cal. 208, 61 Pac. 951, 79 Am. St. Rep. 107; Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459. The defendants Pausman are entitled to their costs in the lower court.

We advise that the judgment be reversed, and the cause remanded, with directions to the lower court to modify the judgment as indicated in this opinion, and that the judgment as thus modified shall stand affirmed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the cause remanded, with directions to the lower court to modify the judgment as indicated in this opinion, and that the judgment thus modified shall stand affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

144 Cal. 207

PEOPLE v. CORONADO. (Cr. 1,086.)

(Supreme Court of California. July 23, 1904.)

CRIMINAL LAW — APPEAL — REVERSAL — JUDGMENTS—DIRECTIONS—ERRORS—SURPLUSAGE —PROCEEDING BY TRIAL COURT.

1. Where on appeal in a criminal case it was held that the information was insufficient, and the trial court, on reversal, was directed "to sustain the demurrer" thereto on the erroneous assumption that the objection was raised by demurrer, when in fact it was raised by motion in arrest, the direction to sustain the demurrer should be treated as surplusage by the trial court, which should enforce the judgment by dismissing the information.

In Bank. On rehearing. For former opinion, see 76 Pac. 1127.

BEATTY, C. J. The opinion delivered by the court in deciding this case is reported at page 1127, 76 Pac. After the remittitur had been regularly issued our attention was called to the fact that we were mistaken in stating that the defendant had demurred to the information; his objection having been raised, not by demurrer, but by motion in arrest of judgment. As a result of this mistake, we added to the judgment of reversal and order remanding the cause a direction to the superior court to sustain the demurrer. A motion is now made for an order recalling the remittitur and revising the judgment upon the ground that the superior court cannot follow the mistaken direction to sustain a demurrer which has no existence; and cannot, therefore, do anything further in the case.

There may be a question of our power to recall a remittitur issued under the circumstances of this case, but this is a question which it is unnecessary to decide; there being nothing to prevent the superior court from proceeding as it could and ought to have proceeded if the direction to sustain the demurrer had been omitted from the order remanding the cause. The direction is no part of the judgment, and was wholly unnecessary; the judgment itself being a sufficient guide to the superior court in its further proceedings. There is no difference between a motion in arrest of judgment and a demurrer based upon the same grounds, except the time at which the objection is interposed, and the effect of sustaining the motion is the same as the effect of sustaining the demurrer; i. e., the information or indictment must be dismissed. Here the grounds of the decision and the judgment of reversal, if they had been followed by no specific direction, would have required a dismissal of the information, accompanied by such order or direction as to the filing of a new information as the superior court may have deemed proper. The direction, therefore, which is no part of the judgment, and was wholly unnecessary, may be treated as surplusage. The court cannot obey it, because there is no demurrer, but it can dismiss the information, and it can make all other proper orders called for in that connection.

The motion is denied.

We concur: SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

145 Cal. 375

HOOPER et al. v. FLETCHER et al. (S. F. 2,890.)

OLMO et al. v. SAME.

(Supreme Court of California, Nov. 14, 1904. On Rehearing, Dec. 14, 1904.)

NEW TRIAL—DISCRETION OF COURT—QUESTIONS REVIEWABLE—MECHANICS' LIENS —ATTORNEY'S FEES.

1. The order of the trial court granting a new trial will not be disturbed on appeal unless an abuse of discretion in making the order clearly appears.

2. Where the only question raised by the answer of the landowner in an action to enforce mechanics' liens is decided in his favor, it is improper to impose a lien on his land for attorney's fees in addition to the balance due on the contract, unless the answer was interposed to delay and harass the lien claimants.

3. In an action to enforce mechanics' liens, the court found that the landowner "participated in the trial, and entered into a contest in favor of certain lien claimants and against certain other lien claimants, and generally contested as to the disposition of the fund deposited

as the balance due on the contract, and delayed and harassed the lien claimants in the collection of their claims out of the fund," and imposed on such owner additional attorney's fees. *Held*, that the question disposed of by the finding was properly before the court, and presented an issue of fact, the determination of which is reviewable on a motion for a new trial.

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Two actions, one by S. A. Hooper and others against L. N. Fletcher and others, and another by Frank Olmo and others against L. N. Fletcher and others, which were consolidated and tried together. Judgment was rendered for plaintiffs and certain defendants, and on motion of defendant Simas a new trial was granted, from which certain parties appeal. Affirmed in part.

Wickliffe Matthews, William H. Jordan, Wilmer Muma, Richard P. Henshall, Barna McKenna, C. L. Dam, J. S. Macks, and William Tomsky, for appellants. Stafford & Stafford, W. F. Sawyer, Daniel C. Deasy, and Hu Jones, for respondents.

McFARLAND, J. These are consolidated cases brought to foreclose mechanics' liens against a house and lot of land on which it stands owned by the defendant Henry Simas. Judgment was rendered for plaintiffs and certain defendants and cross-claimants, but afterwards a motion of defendant Simas for a new trial was granted, and from the order granting the new trial certain parties have appealed.

Simas, the owner of the land, entered into a written contract with the defendant Fletcher for the construction of the house in question for $2,050, payable in four equal installments. The appellants are persons who furnished labor and materials for Fletcher. Simas made the first two payments, but retained the last two, amounting to $1,025, and this last-named sum was the only amount in which he was liable to the lienholders, provided the said contract with the original contractor, Fletcher, was a valid one under the mechanic's lien law. The contract, in form and substance, was in compliance with the law; but it was averred in the complaints that it was void because it had not been recorded, in which event the lienholders would be entitled as against Simas to the full amounts of their liens, which greatly exceeded the said $1,025. Simas answered, denying that the contract had not been recorded, and averring that it had been so recorded and was a valid contract. This was the only issue he made in his answer. He admitted that he had the said $1,025 in his hands, averred his readiness to apply it to the payments of the liens, and that he had paid it into court, and asked the court to determine the shares of each lienholder in the fund, and that his property be released from the liens. He had not then in fact paid the money into court as averred, but he did so before the trial. The court found in his favor as to the issue of the validity of the contract with Fletcher, that it had been duly recorded, and was a valid lien, and that "the amount of the contract price that is liable to the liens and claims of plaintiffs and defendants who are cross-complainants herein is the sum of * * * $1,025, and the said property is subject to said liens for said sum." But the court found in finding 12 "that said defendant Henry Simas answered to the complaints of plaintiffs and cross-complaints of defendants herein, and participated in the trial herein, and entered into a contest in favor of certain defendants and lien claimants and against certain other defendants and lien claimants, and generally contested as to the disposition of said fund so deposited, and delayed and harassed plaintiffs and defendants, who were lien claimants, in the collection of their claims out of said fund." And the court decreed that, in addition to the said balance of $1,025 unpaid on the contract price, there should also be a lien on the said premises of Simas for a large amount of attorney's fees amounting to $500, and also interest on the $1,025 from January 30, 1900, which was the thirty-fifth day after the completion of the building; and judgment was so entered. Defendant Simas moved for a new trial on various statutory grounds, and, among others, the insufficiency of the evidence to justify the decision, and specified its insufficiency to sustain the finding 12, above quoted. The court granted the motion for a new trial, but had made a previous order to the effect that such motion would be granted unless within a stated time "counsel fees and interest are remitted," which was not done. From this order granting a new trial this appeal is taken.

Of course, the general rule is that the order of the trial court granting a new trial will not be disturbed here unless an abuse of discretion in making the order clearly appears; and we see no such abuse in this case. The court was clearly warranted in holding that the said finding 12 was not supported by the evidence, and upon that finding alone could the lien for the attorney's fees be sustained. As to the only question which the respondent Simas raised by his answer he was the prevailing party, and there was no ground for imposing a lien on his land for these onerous attorney's fees, in addition to the balance due on the contract, unless the facts found in finding 12 were true. That finding was obviously made in view of the decision in De Camp Lumber Company v. Tolhurst, 99 Cal. 631, 34 Pac. 438, which was a mechanic's lien case, and in which the court said that: "The appellants, however, retained the money, and apparently without cause or right raised a contest on every point, and fought the case through to the end. By so doing they delayed the respondents in recovering money to which they were justly entitled, and put them to unnecessary expense. Under such circumstances, we think the respondents' costs and attorney's fees were properly allowed and made payable out of the proceeds of the property ordered to be sold."

Appellants contend, however, that the question whether the attorney's fees were properly allowed was a pure question of law, and could not be reached on a motion for a new trial. The position taken is that there can be a new trial only on an issue of fact; that, under former decisions, the trial court may award attorney's fees in a mechanic's lien case whether or not there is any averment, or prayer, or traverse on that subject in the pleadings, and may allow such fees in excess of the amount prayed for; that, as pleadings on the subject are not necessary, there can be no issue of fact involved; and that, therefore, finding 12 is outside of the issues, and should be entirely disregarded. In answer to this technical point of view it might, we think, be properly said that, as appellants made no such point in the court below or in the proceedings on motion for a new trial, they are equitably estopped to raise it here for the first time. But however that may be, we think that the question disposed of by finding 12 was properly before the court for adjudication, and presented an issue of fact the determination of which is reviewable on a motion for a new trial. It is true that issues of fact are generally raised by specific averments and denials in the pleadings; but in a case like the one at bar the law imposes upon the court the duty of determining whether attorney's fees should be allowed, and, if so, for what amount; and upon this question each party has the right to introduce evidence. It cannot be said, therefore, that a finding of fact as to attorney's fees is really outside the issues in the sense that it has nothing to do with the case and is to be totally disregarded. The law itself brings the question of attorney's fees into the case for adjudication, and when, as in the case at bar, the court makes a finding of fact on this subject, which finding is necessary to the support of the judgment, such finding, like any other finding of fact, is reviewable on motion for a new trial. Under these views it is not necessary to inquire if the alleged error of awarding interest can be reviewed on the motion here appealed from.

The order appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

On Rehearing.

In Bank.

PER CURIAM. The petition for rehearing is denied. The opinion and judgment heretofore rendered herein is modified by striking out the concluding sentence of the opinion and the mandate, and inserting in lieu thereof the following:

We are of the opinion that the defendant was not liable for interest or costs. The order granting a new trial is affirmed, so far as it grants a new trial upon the issue as to attorney's fees. In all other respects said order is reversed, and the cause is remanded for retrial solely upon the issue as to attorney's fees and costs; the respondents to recover costs of appeal.

145 Cal. 441

ELLIOTT v. SOUTHERN PAC. CO. (S. F. 2,988.)

(Supreme Court of California, Nov. 25, 1904. On Rehearing, Dec. 24, 1904.)

CARRIERS — PASSENGERS — TICKETS—VALIDITY —TIME LIMIT—DEFAULT OF CARRIER—FRAUDULENT CONCEALMENT—REMEDY OF PASSENGER —EJECTION FROM TRAIN.

1. In an action against a railroad for the wrongful ejection of a passenger, evidence *held* insufficient to support findings that the conductor received plaintiff's ticket as entitling him to travel, or without notifying him that it was of no value, or that plaintiff intimated in any way that he would pay his fare or present a valid ticket if the ticket which was taken up should be returned.

2. Where a railroad sold special excursion tickets limited to three days, which expired on July 6th, and could not be used within the prescribed time, owing to a strike and interruption of train service, an extension of the time limit for six days from July 13th was a reasonable period of extension; nor was it rendered unreasonable, as to a particular passenger, by reason of his having no occasion to use his ticket until August 13th.

3. A railroad may limit the time within which a ticket sold at reduced rates may be used.

4. The fact that a railroad which sold limited return-trip tickets failed, owing to a strike, to carry the passengers on the return trip within the period prescribed by the ticket, and thereby put them to the trouble, inconvenience, and expense of returning by other means, while it might give rise to liability for damages proximately caused by its failure to perform its contract according to its terms, did not give the passengers the right to enforce a passage under the original contract, and on another journey taken by them within a reasonable time subsequent to the time specified in the contract.

5. Fraudulent concealment by a railroad company of the fact that it might not be able to carry a passenger on his return trip within the time prescribed in a ticket which is sold to him does not give the passenger a right to use the ticket at a time subsequent to that limited in the contract, and thereby make a new and different contract.

6. Under Civ. Code, § 1568, providing that consent to a contract is deemed to have been obtained through fraud only when it would not have been given, had fraud not existed, concealment by a railroad ticket agent of the fact that the railroad might not be able to return a passenger within the time limited by the ticket sold him is not such a fraud as to vitiate the contract, where it is not shown that, if the passenger had known the fact so concealed from him, he would not have purchased his ticket.

7. A statement by a railroad employé, two days after the sale of a ticket, that it would be good as soon as trains began to run, was not a waiver of the time limit on the ticket, where the employé making the statement was not the one who sold the ticket, and he was not shown to have any authority to make the waiver.

8. Under Civ. Code, §§ 487, 2188, providing that a passenger who refuses to pay his fare or exhibit or surrender his ticket when reasonably requested so to do may be ejected, a

passenger who exhibited a limited ticket, which had expired and was void, and refused to pay his fare, was properly ejected, although the conductor wrongfully retained the void ticket presented by the passenger.

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Samuel W. Elliott against the Southern Pacific Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

A. A. Moore, for appellant. George Lezinsky, for respondent.

ANGELLOTTI, J. Defendant appeals from a judgment rendered in favor of plaintiff for the sum of $700, and from an order denying its motion for new trial. The action was for damages alleged to have been suffered by plaintiff by reason of his alleged wrongful and forcible expulsion from a train of defendant on August 13, 1894, on which train, it was alleged, the plaintiff was a passenger. The case was tried without a jury.

The record shows the following facts: On August 13, 1894, the plaintiff boarded defendant's train at the Oakland Pier, Alameda county, for the purpose of being transported thereon to Pleasanton, in the same county. He presented to the conductor for his passage on such train a round-trip ticket, "From Pleasanton to San Fran. and return," which he had purchased from defendant's ticket agent at Pleasanton on July 3, 1894, at a reduced rate, to wit, one fare for the round trip, viz., $1.10, and which he had used on July 3d in traveling from Pleasanton to San Francisco. This ticket was distinctly marked upon its face, "Void after July 6, 1894," and this limitation, and the fact that the ticket was sold at a reduced rate, were known to plaintiff at the time he purchased the ticket. The conductor at once handed the ticket back to plaintiff, informing him that it was no good; that it had expired. The plaintiff told the conductor that he thought he was entitled to ride on it; that he had bought and paid for it; and that it was no fault of his that he had not ridden on it. The conductor then left the plaintiff, but, returning presently, said, "Let me see that ticket," and, upon plaintiff handing it to him, said, "That is no good," and put it in his pocket. He further said, "You will either have to pay your fare or get off the train at San Leandro." Plaintiff said, "Then give me back my ticket." The conductor said, "Well, I will look out for that ticket." When near San Leandro, he returned and said, "Now you will have to get off here or pay your fare." The plaintiff said, "I don't propose to do either until you give me back my ticket." The conductor said, "I will take care of the ticket. You will have to get off the car." The plaintiff said, "I don't propose to do either." The conductor said, "I will put you off," and plaintiff said, "Bring your crowd." The foregoing statement as to what took place on the train is from plaintiff's testimony, and is as favorable to him as any of the evidence given. The plaintiff forcibly resisted all attempts to eject him, and was by means of force ejected by defendant's servants from the train, but no more force or violence was used than was reasonably necessary to effect the ejection. "Neither his [plaintiff's] bodily suffering nor his mental suffering were very great, nor were his bodily injuries serious."

The foregoing statement of facts is in accord with the findings of the court, except in so far as certain findings may be capable of being construed as showing that the conductor received the ticket as in any degree entitling plaintiff to travel, or without notifying plaintiff that it was of no value and that he could not honor it, or that plaintiff intimated in any way that he would pay his fare or present a valid ticket if the other ticket should be returned. In so far as the findings may intimate any of these things, they are not supported by the evidence, as is fully shown by plaintiff's testimony on this subject, which has already been stated. The case in this respect is simply one where the conductor repudiated as absolutely void, and expressly refused to honor for passage, a ticket that was absolutely void, but, after so expressly refusing to honor it, nevertheless took it into his possession and retained it.

It was further found by the court substantially as follows: From July 5, 1894, to July 13, 1894, defendant, notwithstanding its desire and attempts to operate its passenger trains between Oakland Pier and Pleasanton, was absolutely prevented from doing so by the forcible violence of a large body of men; the trouble having been caused by a "strike" of "engine firemen in its employ." On July 5 and 6, 1894, it did not operate any of its ferryboats between San Francisco and Oakland Pier. It did, however, operate a ferryboat between San Francisco and a place in Oakland near a station on the railroad from Oakland Pier to Pleasanton. On both days, the plaintiff went to the proper place in San Francisco for the purpose of taking passage, and learned that defendant was not operating its boats or trains. He however, on July 6th took passage on the ferryboat running to Oakland, using his ticket for that purpose, and, having arrived at the landing place in Oakland, proceeded upon his journey to Pleasanton, where he arrived the same day, walking a part of the way, and riding the remainder of the way upon conveyances not operated by the defendant. Train service was resumed on July 13, 1894, and defendant, by its order to its conductors, extended the time within which plaintiff and others similarly situated might use tickets of like character for return passage about six days, which period elapsed in the month of July, 1894, but the fact of such extension was not communicated to plaintiff. The court further found that such period of extension was not a reasonable period; that the first opportunity that plaintiff had of using said ticket for transportation between Oakland Pier and Pleasanton was on August 13, 1894; and that this was a reasonable time within which to use the same. These findings are attacked as not being sustained by the evidence, and the attack is, in our opinion, well founded. Six days was twice the original life of the ticket, and certainly much more than sufficient to enable one who had come from Pleasanton to San Francisco upon such a ticket to make his return journey. August 13th was not the first opportunity that plaintiff had of using said ticket, for the train service had been resumed on July 13th, and continued uninterrupted thereafter. The only basis for a finding that August 13th was the date of plaintiff's first opportunity to use the ticket is the evidence of plaintiff that after July 6th he was not again in San Francisco or Oakland until August 13th; in other words, that he did not again have occasion to go from San Francisco or Oakland to Pleasanton until that time. This cannot, in a case of this character, be the criterion as to what was a reasonable time or the first opportunity. The court further found that, at the time defendant sold the ticket to plaintiff, it knew, or had good and sufficient reason to know, from facts and circumstances then existing and within its knowledge, that it would be or might be unable to transport plaintiff upon said railroad on July 5th or 6th; that it did not communicate these facts and circumstances to plaintiff; that plaintiff did not know thereof; and that, if he had known thereof, he would not have purchased the ticket. There is absolutely no evidence to sustain the finding embraced in the last clause. The court also found that, in selling the ticket under such circumstances, the defendant committed a fraud upon plaintiff. The plaintiff testified that on July 5th, when at San Francisco, he found that the trains were not being operated, he asked a man who was stationed at the ticket window of defendant to give him his money back. The man told him that his ticket was good until the next day, and, in response to plaintiff's inquiry as to what would happen if the trains were not then running, said: "It will be good when they do start." It further appears that on August 13th plaintiff, in San Francisco, purchased a ticket from San Francisco to Pleasanton, which, however, he never showed or offered to the conductor.

The foregoing statement presents all the facts necessary to a discussion of the legal questions involved.

There can be no question as to the right of a railroad company to limit the time within which a ticket sold at reduced rates may be used. As has been said, the passenger, by accepting and using such a ticket, makes a contract with the company according to the terms stated, and the reduction in the fare is the consideration for the contract. The passenger cannot take advantage of the reduction of the rate, and reject the terms on which alone the reduction was made. See 1 Fetter's Carriers of Passengers, §§ 285, 289; 4 Elliott on Railroads, § 1598, and cases cited therein. Plaintiff's counsel, recognizing this now well-settled doctrine, admitted on the trial that defendant had a right to limit the ticket; that, under ordinary circumstances, the ticket in question would have expired on July 6th, and that, if on July 5th and 6th defendant had been ready to carry the plaintiff, he would have had no rights under the ticket if he had failed to avail himself of the opportunity to be transported according to its terms. It is, however, contended that the inability and failure of the defendant to perform its contract of carriage within the time limited extended the time, and gave to the plaintiff the right to demand performance "at a reasonable subsequent time," and also that the limitation was void by reason of fraudulent concealment by defendant of facts and circumstances which it knew or ought to have known at the time of the making of the contract, and which it failed to communicate to plaintiff, and that therefore plaintiff was entitled to use the ticket within a reasonable time, "the same as if no such limitation was set upon the ticket at all." We know of no principle of law or decision of any court that would warrant the application of these suggested rules to the circumstances of this case. The contract on the part of defendant railroad company was that it would, in consideration of the $1.10 paid, not only carry the holder of the ticket from Pleasanton to San Francisco, but also carry him back from San Francisco to Pleasanton, on any day not later than July 6th. Under its terms, the holder was entitled to be transported by the railroad company when he presented himself for passage on July 6th, the last day of the life of the ticket. The company failed to perform the obligation imposed on it by the contract, and it may well be that this failure on the part of the company constituted a breach of contract on its part, and that it became liable to the holder of the ticket for all damages proximately caused by such breach of contract. Defendant being unable to perform its contract, the holder of the ticket thereupon made his return trip to Pleasanton without the aid of the company and by other means. He thus completed his journey and measured his damages. Whatever damages were caused by the failure of the railroad company to carry him back on or before that day had then accrued, and his cause of action against the company by reason of the breach of contract was then complete. It had failed to perform its contract to transport him from San Francisco to Pleasanton, and could not thereafter perform it according to its terms. The railroad company had never undertaken to carry him on any other journey than that for which the contract was expressly made, and no such liability could be imposed upon it in the face of its express contract to the contrary. The plaintiff could not, because of the failure of the railroad company to perform its contract, make a new contract for the company. This was not his remedy for the breach of contract. The law gave him a full and adequate remedy by way of action for damages for such breach, and this, under the circumstances of this case, was his sole and exclusive remedy.

In this connection, it would seem entirely immaterial whether or not there was any fraudulent concealment by the company at the time of the making of the contract of facts from which it might be inferred that it might not be able to fully perform the contract according to its terms. Such concealment could not operate to make a new contract between the parties. For it, if it existed, the law gave plaintiff certain remedies, but the making of a new and different contract by him alone was not one of them. The record, however, does not show that plaintiff's consent to the contract was induced by any fraudulent concealment. The finding to that effect in response to the issue made by the pleadings finds no support whatever in the evidence. By express provision of our Civil Code, consent to a contract is deemed to have been obtained through fraud "only when it would not have been given had such cause not existed." Section 1568. See, also, Colton v. Stanford, 82 Cal. 351, 399, 23 Pac. 16, 16 Am. St. Rep. 137. So the question as to the effect of fraud is entirely eliminated.

It has been frequently said, in effect, that a limitation as to the time within which the passage contracted for must be made must, in view of all the facts and circumstances existing at the time the contract is entered into, be reasonable, and that, if it be unreasonable, the passenger, availing himself of the first opportunity to complete his journey, may so complete it under the contract, although the time stipulated therein has expired. But the rule here suggested, we are satisfied, goes no further than above stated. Thus, in 2 Wood's Railway Law, 1403, the instances suggested to support the statement that conditions of this character must be reasonable or they will have no validity, and, if impossible of performance, they are unreasonable, are, first, that if a ticket is issued from A. to B. and return, "good for this day only," and there is no train which leaves B. on the return to A. after the arrival of the train, the condition would be unreasonable, and the holder would be entitled to a return passage to A. on the first train leaving B. for A. on the next day; and, second, if a ticket is issued from A. to B. "good for this day only," and by some accident to the train the trip is not completed until the next day, the ticket is good for the balance of the passage. Elliott says that the limitation must be reasonable, and in the note thereto that if the company runs no train on the day to which it is limited, or if it is a round-trip ticket, and there is not time to make the round trip within the period of limitation, or if it is a through ticket over connecting lines, and the time is too short to reach the last line, where there is no delay within such period, "we suppose the traveler could take the first train on the next day." 4 Elliott on Railroads, § 1598, and note. Fetter says that the time limited must allow sufficient time "for a person using ordinary diligence to accomplish the trip," and, quoting from Little Rock & F. S. Ry. v. Dean, 43 Ark. 529, 51 Am. Rep. 584—a case strongly relied on by plaintiff—says: "The carrier must afford a purchaser of a limited ticket the necessary facilities for accomplishing his journey within the stipulated time, and upon his failure to do so, he is not in position to treat the contract of carriage as forfeited, and demand a repayment of fare for the same passage, at least if the ticket holder avail himself of the first opportunity *to complete his journey* after the expiration of the time limited." The italics are ours. The case cited was one where the passenger, having a through ticket over connecting lines, took the first train on defendant's road that left the place after his arrival therein, on a train of the connecting road. Gulf, etc., R. Co. v. Wright (Tex. Civ. App.) 30 S. W. 294, cited by plaintiff, was a case where the stipulation on the ticket was that it should be entirely used within three days after being stamped for the return trip; and the passenger, traveling diligently, failed to finish his journey within that time owing to delays in the movements of trains on the part of the railroad company; and it was held that he could finish his journey. The only other case cited by plaintiff at all applicable upon this point is that of Auerbach v. N. Y. C. & H. R. Co., 60 How. Prac. 382, where, in deciding for the railroad company, the court said, in effect, that where the agreement is that one must use his ticket for a continuous passage prior to a certain date, and begins his continuous journey in time to reach his destination in the usual course of travel, but is prevented by delays occurring upon the railroad from finishing his journey in the lifetime of the ticket, he may continue his journey to its end. Although this was mere obiter—the court holding that the plaintiff was not entitled to recover for the reason that he did not commence his journey in time to reach his destination in the usual course of travel within the lifetime of the ticket—it is in line with the statements heretofore mentioned as made in the text-books and the cases already cited. It may be noted that the judgment in this case was reversed by the New York Court of Appeals upon the theory that the passenger did commence his journey on defendant's road in time, and that, having so commenced it, he was entitled, under his contract, to pursue it continuously to the end, notwithstanding that the time expired while he was still on the train, pursuing such journey; the case, in this respect, being similar in principle to Lundy v. C. P. R. Co., 66 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100. See Auerbach v. Railroad Co., 89 N. Y. 281, 42 Am. Rep. 290. However, there is nothing in the Auerbach opinion in 60 How. Prac. 382, or in the other cases cited by plaintiff, or in the views of the text-book writers, or in the cases cited in the text-books, as to unreasonable limitations as to time, that supports the position to which plaintiff is forced by the circumstances of this case, viz., that because the railroad company failed, through its own fault or inability, to transport him upon his return journey, and he was thereby put to the trouble and inconvenience and expense of returning without its aid and by other means, and he did so return, he may enforce a passage under the original contract upon another journey taken by him at a subsequent time, and after the expiration of the time specified in the contract, provided he does so within, as plaintiff says, "a reasonable time."

There is a plain distinction between the case where the passenger, seeking diligently to pursue his journey to its end, is prevented from so doing within the stipulated time by reason of the fact that the time allowed was too short to admit of the accomplishment of the trip, or by some fault or inability of the railroad company, and takes advantage of the first opportunity afforded by the company to complete such journey, and such a case as is here presented. In the former case the passenger is diligently proceeding under his original contract, availing himself of all the means offered by the railroad company to complete his journey, and the limitation as to time is ineffectual against him only to such an extent as is necessary to enable him to reach his journey's end. In this case the plaintiff was not proceeding under the original contract at all, but was simply seeking, by reason of defendant's breach of such contract, to enforce a passage upon a subsequent and distinct journey, commenced long after the expiration of the time stipulated in the contract. We know of no principle of law that would warrant him in so doing.

There is nothing in the suggestion that the statement of defendant's employé at the San Francisco ticket office on July 5th, in response to plaintiff's query as to what would happen if the trains were not running on July 6th, that "it will be good when they do start," operated as a waiver by the railroad company of the stipulation as to time. It will be observed that this is not a case of a statement made by an employé of the company at the time of the sale of the ticket and the making of the contract, but, if the statement was made at all (there is no finding of the court upon the subject), it was made two days after the contract was entered into, and by another employé, who was not shown to have any authority to make such a waiver, even if the language used could be construed as a waiver at all. The only case cited by plaintiff to sustain his contention on this point is that of Nelson v. Long Island R. Co., 7 Hun, 142, where one of the three justices participating held that the statements of the ticket agent selling the ticket were admissible for the purpose of determining what the original contract was. Such cases are, of course, not in point.

It is further contended that the defendant could not, while retaining the void ticket offered by plaintiff, legally demand the delivery of any other ticket or the payment of fare, and could not legally eject plaintiff for failure to comply with such demand. As already stated in our discussion of the findings of the court on this subject, the conductor expressly repudiated this ticket as absolutely void, and notified the plaintiff that he could not honor it. It was, as a matter of fact, entirely without value.

We are not at all satisfied that the conductor had any right to retain this ticket, but we cannot see how an improper retention of a worthless ticket by the conductor could give the plaintiff any right to remain on the train without the presentation of a valid ticket or the payment of fare. He had not exhibited or surrendered a valid ticket, he had given nothing of value to the conductor, and he had refused and continued to refuse to pay his fare. The statute provides that if any passenger refuses to pay his fare, or to exhibit or surrender his ticket, when reasonably requested so to do, he may be ejected at any usual stopping place or near any dwelling house. Civ. Code, §§ 487, 2188. The conditions under which he might lawfully be ejected had thus arisen, and the improper retention of the worthless ticket could not impair the right of the railroad company to prevent him from riding without payment of fare. Upon this question the case of Rahilly v. St. Paul & Duluth R. Co., 66 Minn. 153, 68 N. W. 853, is directly in point. The court there said: "We are all agreed that, even if the conductor had no right to take up the ticket, this would not give the plaintiff any right to refuse to pay his fare until and unless the ticket was returned. Having no right to ride on the ticket, it was his duty to pay his fare or leave the train, and then pursue his remedy against the defendant for wrongfully withholding the ticket from him." Plaintiff cites the case of Vankirk v. Pennsylvania R. Co., 76 Pa. 66, 18 Am. Rep. 404, which is somewhat in line with his contention on this point. The case, however, differs from this in the fact, apparently considered material by the Pennsylvania court, that the plaintiff there offered to pay his fare, provided the ticket already delivered was returned to him. The opinion there proceeded upon the theory that the conductor had no right to demand anything in addition to the accustomed fare, and, the plaintiff having offered to pay this upon the return of the ticket improperly retained, the conductor's refusal to return it was a demand for something more than the accustomed fare. In the case at bar the plaintiff did not offer to pay his fare in the event that the ticket was returned. He simply said, in effect, that he would neither pay his fare nor get off the train until the ticket was returned, and the evidence clearly shows that he intended to ride upon the worthless ticket or be ejected from the train. The case of Bland v. Southern Pacific Co., 55 Cal. 570, 36 Am. Rep. 50, cited by plaintiff, is clearly not in point. There a passenger from San Jose for San Francisco, who had failed to purchase a ticket, gave to the conductor, when the train was about four miles out of San Jose, $2, which was the regular ticket price to San Francisco. The conductor put this in his pocket, and then demanded 20 cents additional, the extra amount due for fare to San Francisco when a passenger failed to procure his ticket at the station. The passenger refused to pay this, and the conductor then and there stopped the train, and, although the plaintiff then offered to pay the twenty cents additional, ejected him, without first returning the money already paid. It was said by the court that the conductor certainly had no authority to eject the passenger and keep the money paid and received as fare, and that the stopping of the train and the actual amotion of the plaintiff were parts of a single act by which the servants of the defendant asserted a right to do that which they were not authorized to do while retaining plaintiff's money. This was clearly right, but the distinction between this case and that is obvious.

The judgment and order denying defendant's motion for a new trial are reversed.

We concur: VAN DYKE, J.; SHAW, J.

On Rehearing.

In Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this case. I think the case of Bland v. S. P. Co., 55 Cal. 570, 36 Am. Rep. 50, is very clearly in point. The circumstances were different, but the cases cannot be distinguished in principle. The ticket which the conductor took and retained was the property of the plaintiff and had a legal value. It was evidence of a broken contract; and on the principle of the Bland Case the conductor had no right to eject the plaintiff without first returning the ticket. This is said, of course, upon the assumption that the plaintiff's account of the transaction was true. It was contradicted by the conductor; but here we must accept the evidence, which supports the findings of the trial court.

145 Cal. 713

SELFRIDGE v. PAXTON et al. (S. F. 2,995.)

(Supreme Court of California. Jan. 9, 1905.)

PARENT AND CHILD—NECESSARIES—LIABILITY OF PARENT—CUSTODY—STATUTES —APPLICATION.

1. Civ. Code, § 4, provides that the Code establishes the law respecting the subjects to which it relates; section 196 declares that the parent entitled to the custody of a child must give him support; and section 207 declares that if a parent neglects to provide necessaries for his child, "who is under his charge," a third person may supply them, and recover the reasonable value from the parent. *Held* that, where a divorce decree awarded the custody of an infant child to the mother, a third person furnishing medical services to the child with knowledge of such decree could not recover therefor from the child's father.

Department. 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Grant Selfridge against Blitz W. Paxton and another. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, Blitz W. Paxton appeals. Reversed.

See 67 Pac. 138.

James W. Oakes, for appellant. Morrison & Cope, for respondent.

McFARLAND, J. This is an action brought against the defendants to recover for medical and surgical services rendered to Roma W. Paxton, the infant daughter of the said defendants. The case was tried without a jury, and the court made findings and rendered judgment for plaintiff. From the judgment and from an order denying a motion for a new trial, the defendant Blitz W. Paxton appeals.

The facts material to the determination of the case are, in brief, these: For several years prior to the 17th day of September, 1894, defendants were married to each other, and during that time the said Roma W. Paxton was born to them, as the fruit of their marriage. On said 17th day of September, 1894, the defendants were duly divorced by a decree of court. The decree gave to the defendant Bessie the care and custody of the said Roma; providing, however, that the defendant Blitz might visit the child upon reasonable occasions. But the decree had no provision as to the maintenance of said Roma, and had no other provision whatever. After the date of the decree the defendants lived separately; Blitz residing in Sonoma county, and Bessie in San Francisco. Roma resided with her mother, and was under her custody, in San Francisco. The divorce was obtained at the suit of the wife, on the ground of desertion. Afterwards, and about March 19, 1900, Roma, still a minor, became severely ill; and, at the request of the mother, Bessie, plaintiff commenced attending her professionally, and continued to do so until some time in the following June. He performed on her some difficult surgical operation. His services were necessary, and their value was as found by the court. The first surgical operation was performed a day or two after plaintiff was first called to attend Roma, and on March 22d he wrote to the defendant Blitz, informing him of Roma's serious illness, and of the operation; and he received a reply, dated March 30th, in which said defendant acknowledged receipt of plaintiff's letter, and said that he would be obliged if plaintiff would advise him of any change in the patient's condition. Plaintiff, at the time he rendered the services, knew of the said decree of divorce, and that Roma then was, and for several years theretofore had been, living with and in the custody of the mother, under said decree.

The foregoing are, perhaps, the only facts necessary to be considered, but the following facts also appear: On the day of the divorce the defendants, Blitz and Bessie, entered into a written contract, which, in brief, is as follows: Reference is made in the contract to the pending action for a divorce, and Bessie agreed to take upon herself the maintenance of the said Roma, and also another child of the parties, and Blitz agreed to give her $5,620 in money, which he did then give her, and to pay the premiums on, and make certain disposition of, a certain policy of insurance, and to pay her, in addition, for the support of the children, $13,200, in installments of $100 each month, until the whole should be paid, provided that, if both of the children should die before the whole amount was paid, then the payments should cease, and he gave security for the payment of said money; and Bessie released all interest in all other property, whether community or separate property of Blitz.

It is apparent that the evidence does not show any contract, either express or implied, on the part of defendant Blitz to pay for the said services rendered Roma, and the court does not find any such contract. The finding merely is that the appellant was notified of the illness of Roma, and did not object to respondent's services. The case, therefore, seems to present the naked legal question whether, under the law of this state, a third person can recover of a father for necessaries furnished his infant child, when by a decree of court the care, custody, and control of the child had been taken away from him and given to the mother, who, to the knowledge of the person furnishing the services, is exercising such custody under such decree; and our opinion is that this question must be answered in the negative.

As to what the rule on this subject is under the general law, and without reference to any statutory provision, the decisions in other jurisdictions are, no doubt, somewhat at variance. In McKay v. McKay, 125 Cal. 65, 57 Pac. 677, Mr. Justice Harrison, speaking for the court, says: "The question of the father's liability for the care and support of his children after a decree of divorce, in which their custody has been awarded to the mother, has been frequently presented in actions brought therefor by strangers or by the mother, and courts have almost invariably held that an action against him to enforce such liability could not be maintained." Citing many cases. This would be determinative of the question, if it were not that, perhaps, as contended by respondent, the language above quoted was not necessary to the decision of that case, and was therefore dictum. But the rule stated in that case is the one declared by the statutory law of this state, which, of course, must govern. The law as to the liability of a parent for necessaries furnished the child comes within the declaration of section 4 of the Civil Code of this state, that "the Code establishes the law of this state respecting the subjects to which it relates." The Civil Code, commencing with section 193, under the caption of "Parent and Child," clearly "establishes the law" respecting the rights, duties, and liabilities which arise out of that relation, and the law touching the question involved in the case at bar is found in sections 196 and 207. These sections are as follows:

"Sec. 196. Obligations of Parents for the Support and Education of Their Children. The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability."

"Sec. 207. When a Parent is Liable for Necessaries Supplied to the Child. If a parent neglects to provide articles necssary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessaries, and recover the reasonable value thereof from the parent."

By these sections, the duty to support a child, and the liability to the third person for necessaries furnished it, are clearly confined to a parent "entitled to the custody" of the child, and having it "under his charge"; and no such liability attaches to a parent who has been deprived of such custody and charge. In the opinion delivered by the learned judge of the court below, for whose judgment we have the highest respect, much weight is given to the consideration of the injustice which might follow if a father could escape liability to support his children on account of a decree of divorce founded on his misconduct; and counsel for respondent also urge that consideration. But strong views have been expressed the other way—to the point that a father deprived of the custody, control, and services of his child is not justly liable to third persons who choose to furnish it supplies. In Ex parte Miller, 109 Cal. 648, 42 Pac. 428, Justice Temple, in a concurring opinion, says: "When a parent is deprived of the custody of his child, and therefore of the right to its services and earnings, by a summary proceeding, he is no longer liable for its support and education. This is true as a general proposition of law, and it is recognized by our Code. Section 196 of the Civil Code provides that a parent entitled to the custody of a child must give him support and education suitable to his circumstances, plainly implying that the parent does not owe that duty to a child when he is not 'entitled to its custody.'" And he further refers to section 207, as providing that, when a parent neglects to provide the necessaries for a child "who is under his charge," then third persons may do so, and recover the value; and he further says that in no instances except those specially provided for in the Code "has the court power to deprive the parent of his authority, and yet hold him liable for the maintenance of his child." Whatever may be thought as to how the law should be on this subject, we must take it to be as it is written in the Code. It must be presumed that the lawmakers looked at the question from all sides—considering the interests of the child as well as the proper liability of the parent—and concluded to enact the law as it stands. Of course, the court, when rendering a judgment of divorce, may provide for, and generally does provide for, the maintenance of the children of the parties; and it may afterwards so provide when it appears necessary. We cannot know why there was no such provision in the decree involved here. Probably it was because the court knew of the said contract between the parties, and thought that it afforded sufficient guaranty for the maintenance of the children.

Under the foregoing views, it is not necessary to consider the other incidental questions discussed by counsel.

The judgment and order appealed from are reversed.

We concur: LORIGAN, J.; HENSHAW, J.

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145 Cal. 751

In re BOLLINGER'S ESTATE. (S. F. 3,740.)*

(Supreme Court of California. Jan. 14, 1905.)

CONTINUANCE — DENIAL OF MOTION — DISCRETION OF COURT—ABUSE.

1. A will contest came on for trial in September, 1900, and the jury disagreed. The case was again set for trial for September 17, 1901, and was continued on contestant's motion to September 24th, then to September 25th, and then to October 1st, because one of plaintiff's attorneys was ill, and the other attorneys were otherwise engaged or insufficiently acquainted with the facts. The attorney who was ill had not, however, taken part in the first trial. On October 1st another motion for a continuance was made, although the court had stated on September 24th that contestant would have to obtain other counsel if he was not ready on the 25th. The last motion asked for a continuance for three months, as the case was of importance, and it would require an attorney from 60 to 90 days to familiarize himself with it. *Held*, that the court did not abuse its discretion in denying the last motion.

Department 2. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Contest of the will of Christian Bollinger, deceased. From an order of dismissal and from a final judgment against him, contestant appeals. Affirmed.

W. W. Foote and J. F. Conkey, for appellant. Charles W. Slack, V. A. Scheller, and Rodgers, Paterson & Slack, for respondents.

PER CURIAM. This appeal is from an order dismissing the contest of appellant and from a final judgment against him. The question to be determined is as to the ruling of the court on appellant's motion for a continuance. Appellant had filed a contest, after probate, of the will of deceased, which came regularly on for trial in September, 1900, and after a trial occupying several weeks resulted in a disagreement of the jury. Appellant was represented of record in the contest by three attorneys—W. W. Foote, J. J. Lermen, and Nicholas Bowden. The case was again regularly set for trial for September 17, 1901, and was then continued on motion of appellant's attorneys to September 24, 1901. This continuance was granted upon a statement made by one of appellant's attorneys that Mr. Foote was ill, and unable to attend the trial. At this time the court informed counsel that if they were not ready to proceed with the case on September 24th they must obtain other counsel and be ready to proceed on that day. On September 24th appellant appeared by his attorneys, Bowden and Lermen, and again moved for a continuance upon affidavits showing that Mr. Foote was in poor health and unable to attend the trial; that Lermen had expected Mr. Foote to try the case, and had made his business engagements accordingly, and had other cases set in court for many succeeding weeks; that Bowden had been employed only to assist in selecting a jury, and was not sufficiently familiar with the facts of the case to proceed with the trial. The court denied the application for a further continuance, and thereupon attorneys Bowden and Lermen withdrew from the case, and refused to proceed. The court thereupon excused the jurors who were in attendance and ready for the trial of the case, and continued it again to September 25, 1901, at which time Mr. Kerwin appeared for appellant, and asked for a further continuance for three months, stating that he appeared solely for that purpose. No reason was given as to why appellant had not employed other counsel to appear for him generally. The court, however, again continued the case to October 1, 1901, at which time Mr. Kerwin again appeared for the sole purpose of moving for a further continuance, and in support of the motion read affidavits stating that the case was one of much importance, and that it would require an attorney from 60 to 90 days to familiarize himself with the law and facts and to prepare for a trial. The court thereupon denied the motion for a further continuance, and, contestant declining to proceed, the court made an order dismissing the contest.

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*Rehearing denied February 9, 1905.

The court did not abuse its discretion in denying the continuance. The case had been pending for a long time. Mr. Foote did not appear or take part in the trial which took place in 1900. More than a year had elapsed since that trial. Appellant had been given every opportunity to employ counsel if he so desired. In important cases courts should grant reasonable and proper time to parties to employ competent counsel and prepare for trial, and, to the credit of trial judges, they are seldom appealed to in vain for a reasonable continuance. It is much better to "make haste slowly," with the view of allowing all parties a reasonable time to procure their witnesses and prepare for trial, but at the same time the ends of justice require that cases should be tried, disposed of on their merits, and unreasonable delays prevented. Estates should not be tied up by contests and kept in court for many years, regardless of the rights of the heirs or devisees. If a contest of a will is initiated in good faith, and the contestant shows due diligence, every opportunity should be given for a full investigation of the issues made by the contestant, but, if a contest must be continued for an indefinite time every time an attorney withdraws from the case, there would be no end to the matter.

The judgment and order are affirmed.

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145 Cal. 559

In re NOLAN'S ESTATE. (S. F. 3,729.)

(Supreme Court of California. Dec. 14, 1904.)

ADMINISTRATION—FAMILY ALLOWANCE—ORDER—CONCLUSIVENESS—SETTING ASIDE.

1. Where the probate court made a family allowance to the administratrix of an estate as the widow of the deceased, as permitted by Code Civ. Proc. § 1466, which was not appealed from, as permitted by Code Civ. Proc. § 963, subd. 3, it became final; and though, on a partial distribution, the court found that the administratrix was not the widow of the deceased, the family allowance could not be set aside on an order settling the account of the administratrix.

2. Where a probate judge had made a family allowance to one as the widow of the deceased, which has become final, he had no power to suspend the allowance without a petition filed or notice given.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Accounting of Mary Nolan, as administratrix of the estate of James Nolan, deceased. From an order allowing a sum as family allowance to the said administratrix as widow, the heirs appeal. Order affirmed.

Frank J. Fallon and Mullany, Grant & Cushing, for appellants. James G. Maguire and Edgar D. Peixotto, for respondents.

COOPER, C. Appeal from order settling account of Mary Nolan as administratrix of the estate of James Nolan, deceased. The item of $625, being the amount of family allowance for 25 months at $25 per month, paid by the administratrix to herself, is the subject of contest.

Mary Nolan filed a petition in the superior court praying for letters of administration upon the estate of James Nolan, deceased, in which she alleged that she was the widow of said deceased. After notice given, an order was made appointing her administratrix of the said estate. She duly qualified, letters of administration were issued to her, and she has ever since been such administratrix. In January, 1901, she filed her petition praying for a family allowance, in which she alleged that she was the widow of deceased; and the court afterwards, on the 29th day of January, 1901, made an order allowing her, as the widow of deceased, the sum of $25 per month for her support and maintenance. The amount of the item in contest accrued and was paid under this order. On petition for partial distribution of the said estate in December, 1902, after hearing all the parties. the court found that the administratrix is not, and never was, the widow of deceased, but that deceased left surviving him three brothers and the children of a deceased sister, as his only heirs, and the estate was ordered distributed to the said heirs.

It seems to be conceded that said decree was correct as to said partial distribution, and that the administratrix was not the widow of deceased. The question is as to the validity of the family allowance under a valid order of court. In our opinion, the court properly allowed the item. The court had the power, and it was its duty, to make an allowance to the widow of deceased, if he left a widow. Code Civ. Proc. § 1466. The court, upon the proofs before it at the time, did make such order, and found the administratrix to be the widow. This order was appealable. Code Civ. Proc. § 963, subd. 3. It was not appealed from, and no motion made to set it aside, and hence it became final. In re Stevens, 83 Cal. 326, 23 Pac. 379, 17 Am. St. Rep. 252; In re Welch, 106 Cal. 430, 39 Pac. 805. Having become final, it was and is conclusive as to the status of the person in whose favor it was made, for all purposes connected with the order and the payment of the money thereunder. The attack here is collateral, and all presumptions are in favor of the order. Estate of Bell, 131 Cal. 4, 63 Pac. 81, 668; In re Welch, 106 Cal. 430, 39 Pac. 805. How can we say, on this collateral attack, that the order was not correct, and that the administratrix is not the widow of deceased? The decree of partial distribution, if allowed to become final, is conclusive upon her that she is not the widow for the purposes of distribution. The decree making the family allowance, on the other hand, has become conclusive upon the heirs that the administratrix is the widow, for all purposes connected with the family allowance. The heirs did not see fit to appeal from the decree making a family allowance. The administratrix does not appear to have appealed from the decree of partial distribution. In all collateral proceedings the orders or decrees must each stand upon its own record. If there were a substantial conflict in the evidence in each case as to whether or not the administratrix is the widow of deceased, this court would sustain each order or decree upon appeal, if the only ground made were the insufficiency of the evidence in each case. This may appear to the layman to be without reason or justification, but it is only an illustration of the imperfection of human institutions. A man may be acquitted of assault and battery upon a criminal trial before a jury, and yet the injured party might obtain a large verdict against him before another jury in a civil action for the same assault and battery. A man might be sued for seduction, and a heavy verdict obtained against him, yet his wife might sue him for divorce on the ground of adultery with the party who obtained the verdict, and the verdict or judgment in the divorce proceedings be in his favor. A decree of distribution to one as the only heir of deceased, made in ignorance of the existence of other heirs, which was not appealed from, and became final, was held conclusive as to the heirs not mentioned in the decree. Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565; Quirk v. Rooney, 130 Cal. 505, 62 Pac. 825.

It is claimed that $300 of the allowance accrued after the court had made an order, November 29, 1901, suspending the family allowance, and that at least that amount should be charged to the administratrix. The order purporting to suspend the family allowance does not appear to have been made upon petition or notice. We know of no law, and none has been called to our attention, which authorized the probate judge to suspend the order for family allowance which had become final. If the judge possessed such powers over orders and decrees in probate, no order would become final, and no one would know as to when rights might be lost by the suspension of the orders on which such rights rested. Suppose the order for family allowance had been affirmed here on appeal after being fully presented; could the probate judge then have set it aside or suspended it? He could have done so if appellants' contention be correct. But here, in the absence of any motion to set aside the order on the ground of fraud or mistake, under section 473, Code Civ. Proc., and no action having been brought to set it aside, and no showing as to the insolvency of the estate, the probate judge made the order attempting to suspend an order that had become final. It is said in Woerner on the American Law of Administration (volume 1, p. 193): "A court of probate, which is without power to revoke or revise its own decrees and judgments, cannot set aside its own allowance and decree a smaller sum unless the original judgment was reversed or reformed on appeal, or adjudged void." In speaking of an order for family allowance, this court said in Re Stevens, 83 Cal. 326, 23 Pac. 379, 17 Am. St. Rep. 252: "The order is appealable (Code Civ. Proc. § 963, subd. 3), and we are of opinion it should be regarded as final. On an appeal from the order of allowance, all these facts could have been brought to the attention of the court, the ruling reviewed, and the error, if any, corrected. The time for appeal was allowed to pass, and under such circumstances the power of the court over its order is at an end. The court below cannot sit as an appellate court to review its own orders." The subject is fully discussed in Estate of Leonis, 138 Cal. 194, 71 Pac. 171, as to an order vacating a prior order of sale in a probate proceeding, which had become final. The authorities are there collected, and it is not necessary to repeat them here. It was there said: "If the court in a case like this could set aside its order, there would be no end to the matter. It might continue time and time again to make orders and set them aside."

We advise that the order be affirmed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the order is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

145 Cal. 740

ELDER v. McDOUGALD, Treasurer of City and County of San Francisco. (S. F. 3,820.)*

(Supreme Court of California. Jan. 13, 1905.)

MUNICIPAL CORPORATIONS — POLICE COURTS — PRELIMINARY EXAMINATIONS — STENOGRAPHIC REPORTERS — APPOINTMENT AND COMPENSATION.

1. Under Const. art. 11, § 8½, authorizing municipal charters to provide for the constitution and jurisdiction of police courts, and for the appointment and compensation of the attachés of the judges, the framers of the charter of the city and county of San Francisco were authorized to provide for the appointment and compensation of stenographic reporters, though in conducting preliminary examinations the judges acquire jurisdiction under the general law, and that provision of the charter limiting the appointments to two, and prescribing that they shall attend on the court and take notes of all preliminary examinations, and shall be paid specified annual salaries, superseded Pen. Code, § 869, as far as it empowers a police judge in San Francisco to appoint a reporter for a preliminary examination of a felony charge, and to fix his compensation; section 8

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*Rehearing denied February 9, 1905.

of the Constitution declaring that authorized charter provisions shall supersede all laws inconsistent therewith.

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Mandamus by R. H. Elder against John E. McDougald. A demurrer to the answer was sustained, and a peremptory writ was ordered to issue, and defendant appeals. Reversed.

Percy V. Long, City Atty., and John P. Coghlan, Asst. City Atty., for appellant. George D. Collins, for respondent.

LORIGAN, J. A mandamus proceeding was brought to compel defendant, as treasurer of the city and county of San Francisco, to pay a claim of plaintiff for services rendered as stenographic reporter in reporting the testimony and proceedings before a judge of the police court of the city and county of San Francisco at the preliminary examination held therein of one R. A. Fitzgerald, charged with murder. The superior court sustained a demurrer to the answer of defendant, and ordered a peremptory writ to issue, requiring payment as prayed for by plaintiff, and defendant appeals.

There is no dispute as to the fact of the appointment of plaintiff, and the rendition of the services. It relates to the validity of the appointment itself. The plaintiff was appointed by a judge of the police court, created under the charter of the city and county of San Francisco, before whom the preliminary examination was being held; and the appointment was made under section 869 of the Penal Code, which, it is claimed, conferred power upon him to do so. It is insisted by the appellant, however, that the judge had no authority to make the appointment under this section, but that the charter of the city and county of San Francisco, which provides for the appointment of two stenographers by the judges of the police court to take notes at all preliminary examinations, and fixes their compensation (of which plaintiff was not one), furnishes the only authority in the matter of employment of stenographers in taking preliminary examinations in that court, and that his appointment under the section of the Penal Code was void. Hence the question is narrowed down to an inquiry as to whether the provision of the Penal Code, or that of the charter, controls the judges of the police court of the city and county of San Francisco in appointing stenographers to report preliminary examinations in felony cases held before them.

The Constitution (section 8½ of article 11) authorizes and empowers the creation of police courts, and places such courts under charter control by providing that "it shall be competent, in all charters framed under the authority given by section 8 of article XI of this Constitution, to provide, in addition to those provisions allowable by this Constitution and by the laws of the states, as follows: (1) For the constitution, regulation, government and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed and for the compensation of said judges and of their clerks and attachés." Under this constitutional provision a charter for said city and county was regularly adopted, wherein a police court, to be known as the police court for the city and county of San Francisco, was created and established, consisting of four judges—one each for the several departments into which the court was divided. As to jurisdiction, it was provided that "the police court of the city and county of San Francisco shall have: First, exclusive jurisdiction of all prosecutions for the violation of ordinances of the board of supervisors; second, concurrent jurisdiction with the superior court of all misdemeanors and of the examination of all felonies committed in the city and county; third, said court, or any judge thereof, shall have the same powers in all criminal actions, cases, examinations and proceedings as are now or may hereafter be conferred by law upon justices of the peace." This is followed by provisions for the appointment of officers of the court, and then we reach the section particularly under consideration here, relative to the appointment of stenographers, which is as follows: "The police judges may appoint not more than two competent stenographers, who shall attend the sessions of the court, and take notes of all preliminary examinations made at the sessions, and transcribe into typewritten longhand all evidence taken by either of them where the parties charged have been held for trial, and deliver one copy of the same to the clerk and one copy to the district attorney. Each of such stenographers shall be paid for all his services, including transcription and all stationery used by him, an annual salary of twenty-four hundred dollars." This is a sufficient statement of the charter provisions under which to examine the points involved.

It is quite clear that the adopted charter, in as far as it undertakes to confer jurisdiction to hold preliminary examinations for felonies, confers it solely upon the police court of such city and county, to be exercised as a court. No jurisdiction is conferred under that instrument upon the judges of such court to hold them, nor could such jurisdiction be conferred upon them under the constitutional provision which authorizes only the creation of police courts. Nor was it necessary to confer any such jurisdiction by the charter. The charter having created the police court, by that very creation any judge thereof, ipso facto, became vested with jurisdiction to conduct such examinations under the general law of the state, as a magistrate. People v. Crespi, 115 Cal. 54, 46

Pac. 863; People v. Cohen, 118 Cal. 78, 50 Pac. 20. That law (Pen. Code, § 808) provides that among others invested with such jurisdiction shall be included "police magistrates in towns or cities," and, as incident to their jurisdiction as such magistrates, further provides that they shall have the power to appoint a reporter to take notes of the preliminary examination, and to fix his compensation, which shall be paid out of the treasury of the city, or city and county, in which such examination was conducted. Pen. Code, § 869. The record in this case shows that the preliminary examination at which the respondent assisted was not conducted by the police court of said city and county, acting as a court, but by one of the judges thereof, acting as a committing magistrate, under the provision of the general law above cited; and it is insisted that the constitutional provision above quoted did not authorize the framers of the adopted charter to control his power to appoint or fix the compensation of a stenographer when acting as such magistrate. It must, of course, be conceded that this contention of respondent is correct, unless the constitutional provision did confer such power, even when the judge of the police court, by virtue of his office as such, was acting as a magistrate, and whether it did or not is the only point in the case. It is to be borne in mind that the power conferred upon the framers of municipal charters to legislate concerning police courts, as to the "constitution, regulation, government and jurisdiction" of such courts, and with reference to the clerks and attachés thereof, proceeds directly from the people, expressed under a constitutional provision. Prior to this it was not competent to make any provision by framers of municipal charters for such courts. That power could only be exercised by the Legislature. People v. Toal, 85 Cal. 335, 24 Pac. 603. It was expressly to confer this authority to so legislate that the amendment to the Constitution (section 8½, art. 11) was adopted by the people; to authorize their creation not only for municipal purposes—the prosecution for violation of municipal ordinances—but as agencies of the state, to assist to a certain extent, at least, in the enforcement of its general criminal laws. As these courts were to be supported and sustained by the municipalities creating them, as part of the municipal government, and from the municipal funds, it was intended, under the broad provision of the Constitution conferring power to "constitute, organize, and govern" them, that the charter might provide for the appointment and compensation of all persons who might, in a general sense, and in view of the jurisdiction with which such courts might be clothed, be deemed necessary to a full and efficient exercise of such jurisdiction. And while it is contended on this appeal that it was not competent, under this constitutional grant of power, for the charter framers to invest such police courts with jurisdiction to enforce the general laws of the state to the extent of holding preliminary examinations, we do not feel called on to determine that question. It is not at all involved in the present inquiry. If the court could not be invested with such jurisdiction, it could certainly be invested with jurisdiction for other purposes, and there is no doubt that it was competent to provide in the charter for such stenographic reporters as might be deemed necessary for the general purposes of such courts. These reporters are recognized by our laws as proper, and sometimes indispensable, adjuncts to a court, to enable it to properly and efficiently discharge its duties.

But whatever the power conferred under the constitutional provision may be, relative to the right of the charter framers to provide for reporters, as necessary to the full and efficient equipment of the police court, as a court, it is contended that there is no authority conferred by the Constitution upon the charter framers to provide for such reporters to the judge of said court acting as a committing magistrate in conducting such examination under jurisdiction conferred by the general law, and not under the charter. We are, however, of an opposite opinion, and think that a fair construction of the constitutional provision not only authorized the framers of the adopted charter to legislate as to the necessary attachés of the police court itself, but also as to those whose attendance upon the judge of the court might be necessary to the exercise of any jurisdiction with which he was invested, whether that jurisdiction was derived from the charter itself, or was conferred upon him under the general laws by virtue of his existence as a police judge under the charter. The constitutional amendment was framed and adopted with a knowledge of the then existing legislation relative to police courts and their duties, and of the jurisdiction conferred upon the latter under the general law, from their existence as such police judges. And while authorizing the chartered municipalities to provide for the compensation of the attachés of the court itself, it had in view also the fact that (especially in a merged and consolidated municipal government like that of the city and county of San Francisco) a large jurisdiction might be exercised by the judges of such courts under the general law, in conducting preliminary examinations, and that in exercising that jurisdiction there would necessarily be incurred expenses to be borne by the municipal treasury; and it was intended that as to any attaché of the judge, as well as of the court, the municipal government should have the right to provide not only for the compensation of the judges, but for "their clerks and attachés." It is insisted, however, that no such authority is given in the constitutional provision for the appointment of attachés to the judge of the police court, that it only provides for fixing

their compensation, and that in any event a reporter appointed by a police judge to take notes of the preliminary examination held by him as a magistrate cannot be considered an attaché of such judge under the charter.

As to the power of appointment, we think that, from the context of the provision of the Constitution, it is apparent that such power was conferred. The right to "constitute, regulate, and govern police courts" would be sufficient warrant for the appointment of all persons necessary to its complete and efficient organization, and that the relation of the term "their clerks and attachés" to the general context of the provision authorized not only the fixing of the compensation of such attachés, but of their appointment to the judges of the court when necessary and proper.

It is to be borne in mind, however, in passing, that, as far as stenographers are concerned, there is no attempt made by the charter provision to appoint any particular person as stenographer, or to appoint at all, in the sense of the term as generally understood. It is left to the police judges to make the individual appointments—the charter provisions simply requiring that these appointments must be limited to two stenographers—and it is prescribed that these two shall attend on the court and take notes of all preliminary examinations held therein, and that their compensation shall be an annual sum for all services rendered. This provision of the charter can only be said to be an appointment of stenographers to the extent that, as the judges of the police court have power, under the general law, to appoint stenographers at will for each preliminary examination for a felony held by them, and fix their compensation for such examination, it is an attempt to place a limitation upon such power to that extent.

As to whether a stenographer can be included in the category of attachés who may be provided to the judge of the court, we do not think any general discussion of the meaning of the word "attaché" need be indulged in, because we are satisfied that, as employed in the constitutional provision, it is to be taken in the general and enlarged sense, as applying to any one recognized as a necessary adjunct to a court, tribunal, or office, and that, by virtue of the necessity existing at practically all preliminary examinations for the appointment of a stenographer, he should be treated as coming within that definition. Aside from this, however, the constitutional provision must be construed in the light of existing legislation, as to the relation of reporters to judges of police courts, when the amendment was adopted. Police courts of the city and county of San Francisco had been established by the Legislature and existed long prior to the adoption of this constitutional provision. These courts were given the same jurisdiction under the acts, and the judges thereof possessed the same power under the provisions of the Penal Code relative thereto, as to the examination of felonies committed in the city and county of San Francisco, as they are given under the charter provision now, or which they possess under the general law. Yet under these acts each judge of a department of the court was required to appoint a stenographer. St. 1889, p. 63, c. 66, § 8; St. 1893, p. 9, c. 15, § 8. It is true that it was further provided that such reporter should receive for his services the pay now allowed by law, but, whatever his compensation was, his appointment by the judge of the police court was provided for by law, and it is only the fact that his appointment was so provided, with which we are concerned. The only possible occasion when the judges of such courts, created under these acts, would be authorized to require his services, would be in taking testimony at preliminary examinations in felony cases, and yet it was deemed then proper that a regular stenographer should be appointed by the judge of each department for attendance thereon, as essential to a proper exercise of the jurisdiction of the court and of his own. That these stenographers so appointed were at least attachés to the judge, we think, cannot be successfully questioned. And for the purposes of taking the testimony in preliminary examinations, they were a necessary adjunct to the discharge by the judge of that duty.

And if anything were necessary to be considered, aside from the particular provision of section 8½ of article 11, which we have been discussing, to strengthen the conclusion which we have reached, it is found in the closing portion of the general constitutional provision of which section 8½ is a part, and which provides that, when a city and county government has been merged and consolidated into one municipal government, it shall be competent, in the charter thereof, to provide for the election or appointment and the compensation of its county officers and of their deputies. This closing provision of the constitutional section indicates the general policy of the state relative to the control which such a municipality shall have over its officers, and reflects light upon the particular provision relative to police courts, their judges, and the clerks and attachés thereof. That policy is that it shall be exclusively within the power of such chartered municipality to determine the compensation of all its officers, whether the duties to be discharged by them are imposed on such officers by the provisions of the charter, or are required to be performed by them as such municipal officers by virtue of the provisions of the general law of the state. Matter of Dodge, 135 Cal. 513, 67 Pac. 973.

We are of opinion, therefore, that, under section 8½ of article 11 of the Constitution, it was competent for the framers of the charter of the city and county of San Francisco to provide for the appointment and compensation of the attachés of the judges of the police court authorized to be created thereunder, and that stenographic reporters come within the category of attachés, and that it is of no moment that in conducting preliminary examinations the judge of said court acquires jurisdiction to do so as a magistrate under the general law. The purpose of the grant of power by the constitutional provision to the charter framers was to authorize them to provide for the appointment and compensation of all attachés to the judges of such court, no matter whether such attachés were necessary to a proper discharge of the duties of said judges under the provisions of the charter, or under the requirements of the general law. The charter provision operated upon them, as to their attachés, by virtue of their existence as judges of the police court created under the charter.

Express power being given to the framers of the charter to provide therein for the appointment and compensation of stenographic reporters as attachés to the judge of said court, in whatever capacity as such judge he might be called on to act, and this having been done by the framers thereof, the provisions of the charter in that respect superseded section 869 of the Penal Code, as far as it empowered a police magistrate of a city to appoint a reporter for a preliminary examination being held by him, and to fix his compensation, because, under section 8 of the Constitution, it is declared that the provisions of a charter authorized by that Constitution shall supersede all laws inconsistent with it.

It follows that the demurrer to the answer of defendant was improperly sustained, and the judgment is reversed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; SHAW, J.; VAN DYKE, J.; HENSHAW, J.

BEATTY, C. J. I concur. A shorthand reporter is not essential to the examination of a felony charge. The magistrate may, and often does, take down the depositions in longhand, and have them subscribed by the witnesses at the time of the examination. The statute merely gives him the privilege, in his discretion, to appoint a reporter to take down the testimony in shorthand, and, when that course is followed, gives to the longhand transcript the same legal efficacy that it gives to a deposition regularly subscribed by the witness. Pen. Code, § 869. Conceding, then, as I think must be conceded, that the duty and the jurisdiction of the police judges of San Francisco to examine felony charges is solely dependent upon the provisions of the Penal Code, it does not by any means follow that the mere discretion of municipal officers to appoint assistants in the performance of a duty devolved upon them by the laws of the state may not be subjected to reasonable limitations by the municipal charter.

San Francisco being a consolidated city and county, the whole compensation of her police magistrates and their assistants is payable out of the municipal funds. The framers of her freeholders' charter have decided that two salaried shorthand reporters will suffice for the duty of taking down the evidence at preliminary examinations, and have said, in effect, to the police judges, "You must get along with that number." It results, of course, that, if more than two examinations were going on at the same time, one or more of the judges would be deprived of the assistance of a stenographer. But that would not prevent them from performing the duty imposed upon them by the statute. It would only require somewhat more of their time, and some additional labor. This, however, would afford no ground for complaint that the policy of the state law was defeated or its operation impeded, and, as regards the judge, he, as a municipal officer holding and enjoying the emoluments of an office created by the charter, could not with any consistency complain of a charter provision defining his duties. I can see no objection, in any point of view, to the charter provision. There is no real conflict between it and the state law—its utmost effect in any contingency being to compel an examination in San Francisco to be conducted in one of two alternative methods equally legitimate and effective, and differing only in point of convenience and expense; a consideration peculiarly affecting the local taxpayers, and in that sense a municipal affair.

As to the competency of a municipal charter to regulate the compensation of municipal officers for the performance of all duties, including those devolving upon them under the general laws of the state, the Case of Assessor Dodge, 135 Cal. 512, 67 Pac. 973, is conclusive. In that case it was not only held that the compensation of the assessor, payable out of the municipal treasury, could be fixed by the city charter; it was even held that a compensation allowed him by the general law out of the state funds, for services rendered exclusively for the benefit of the state revenue, could be taken away and covered into the local treasury for the benefit of the municipal salary fund. So long as that decision stands, the right of the freeholders to fix the compensation of all municipal officers cannot be questioned. The stenographer appointed to report the proceedings at a felony examination is an officer—he must qualify by taking the oath of office—and in a consolidated city and county he is a municipal officer, and his compensation for all duties is subject, like that of the police judge, to regulation by the charter.

145 Cal. 727

PEOPLE v. CLARK. (Cr. 1,184.)

(Supreme Court of California. Jan. 11, 1905.)

LARCENY—INSTRUCTIONS—CRIMINAL LAW—TRIAL—APPEAL.

1. Where there is direct evidence that accused committed the crime charged, it is not error to refuse a charge assuming that a conviction must necessarily be based on circumstantial evidence.

2. Where the court instructed the jury that, if they could reasonably account for any fact in the case on a theory which would admit of accused's innocence, it was their duty to do so, and that, if they had any reasonable doubt of his guilt, to acquit him, it was not error to refuse a charge that the jury might reject any theory on which "the evidence might point to defendant's guilt, even though such theory may be reasonable, and much more probable than the one which admits of his innocence."

3. Where accused was jointly indicted with another for the crime charged, it was not error to refuse a charge that the jury could not find him guilty unless they were satisfied that he committed the crime alone.

4. A charge that a verdict of acquittal should be rendered on a certain phase of the evidence, regardless of whatever else might be developed in the case, is properly refused.

5. On a prosecution for larceny from the person it is not error to refuse a charge distinguishing between grand larceny and robbery.

6. Any error in the failure of the court on a prosecution for grand larceny to give the jury a form of verdict permitting them to find defendant guilty of petit larceny is favorable to the defendant, and is not cause for reversal on appeal from a conviction of grand larceny.

7. Where defendant on a prosecution for grand larceny did not request an instruction that he might be convicted of petit larceny, failure to give to the jury a form of verdict permitting them to find him guilty of petit larceny was not erroneous, especially under evidence showing that defendant was guilty of larceny from the person or grand larceny if he was guilty of anything.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Charles Clark was convicted of grand larceny, and he appeals. Affirmed.

Emmet H. Wilson, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for respondent.

GRAY, C. Defendant was convicted of grand larceny, and appeals from the judgment and from an order denying him a new trial.

1. He complains of the refusal of the court to give one of his requested instructions commencing as follows: "In order to convict the defendant on circumstantial evidence, it is necessary," etc. This instruction assumes that a conviction, if had, must necessarily be based on circumstantial evidence. At the same time appellant concedes in his brief that there was direct evidence that defendant committed the crime charged in the testimony of the complaining witness Caler. Therefore this cannot properly be called a case of circumstantial evidence, and the court rightly refused an instruction assuming that it was such a case. People v. Lonnen, 139 Cal. 634, 73 Pac. 586; People v. Burns, 121 Cal. 529, 53 Pac. 1096.

2. That part of requested instruction No. 4 which was to the effect that the jury might reject any theory or supposition on which the evidence might point to defendant's guilt, "even though such theory may be reasonable, and much more probable than the one which admits of his innocence," was properly refused and stricken out. The instruction on that subject given to the jury reads as follows: "In considering the evidence, if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, it is your duty under the law to do so; and if you have a reasonable doubt of his guilt you should acquit him." This was a proper instruction on the subject, and as full and favorable to defendant as he could reasonably ask.

3. The court refused the request of defendant to instruct as follows: "Unless there is evidence in this case to justify the conclusion beyond a reasonable doubt that the defendant, and not some one else, took and carried away the money from the person of the prosecuting witness, as alleged in the information, you cannot find the defendant guilty." This instruction was properly refused, for the reason that the information charged the defendant and one Perry jointly with the crime in question, and the evidence tended to show that the larceny was the result of their joint efforts. It would mislead the jury in such a case, and it would be improper to tell them, in effect, that they could not find the defendant guilty unless they were satisfied that he committed the crime alone. The refused instruction might be understood as above indicated, and was therefore properly refused.

4. Requested instruction No. 9 was properly refused because it stated, in effect, that a verdict of acquittal should be rendered on a certain phase of the evidence, regardless of whatever else might be developed in the case.

5. The defendant was in no way injured by the refusal of the court to give the requested instruction distinguishing between grand larceny and robbery. The defendant was charged with larceny from the person, and was not charged with robbery. He could not be acquitted of larceny if the jury were satisfied beyond a reasonable doubt that the facts showed him guilty of robbery, because "it is settled law that robbery involves grand larceny." People v. Church, 116 Cal. 303, 48 Pac. 125. "Robbery is larceny with the element of force or intimidation added." People v. Clary, 72 Cal. 61, 13 Pac. 77. The doctrine is well settled that a defendant cannot complain because the information and the instructions of the court confine his conviction to the lesser crime included within what the evidence might

otherwise warrant the jury in finding to be a greater crime. People v. Muhlner, 115 Cal. 303, 47 Pac. 128; People v. Clary, supra. It would have been a vain thing for the court to define robbery and state its various elements in a case where the information would not admit of a conviction of robbery. The court did very distinctly and plainly give to the jury the elements of grand larceny, and that was all that was necessary in a distinctly grand larceny case.

6. The defendant complains that the court failed to give the jury a form of verdict permitting them to find him guilty of petit larceny. There is no reasonable ground upon which a defendant can be heard to complain that the action of the trial court has prevented his conviction of any particular crime, either great or small. His plea of not guilty shows that he does not desire to be convicted of anything embraced in the information. It will not be presumed for a moment that the jury will do so base a thing as to convict of the higher offense because they are not permitted to convict him of the lesser; but, on the contrary, the natural presumption is that, unless they are satisfied beyond a reasonable doubt of his guilt of the higher offense, they will perform their duty, and acquit him altogether, even though they be satisfied that he is guilty of the lesser offense. "The error then, if any was committed, was favorable to defendant, and the case should not be reversed on account of it." People v. Lopez, 135 Cal. 25, 66 Pac. 965. Besides, defendant did not request an instruction that he might be convicted of petit larceny, and, further, was guilty of larceny from the person or grand larceny if he was guilty of anything. People v. Bailey, 142 Cal. 434, 76 Pac. 49; People v. Keith, 141 Cal. 690, 75 Pac. 304.

7. There is no merit in the contention that the evidence fails to support the verdict.

The judgment and order should be affirmed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

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145 Cal. 717

PEOPLE v. THOMSON. (Cr. 1,147.)

(Supreme Court of California. Jan. 10, 1905.)

HOMICIDE — SELF-DEFENSE — STATUTE — CONSTRUCTION—DYING DECLARATIONS — JURY — INSTRUCTIONS — EVIDENCE—ADMISSIBILITY—CRIMINAL LAW—APPEAL.

1. Where the appearances are such as to justify a reasonable man in believing that it is necessary to instantly kill another in order to save himself from death or great bodily injury, and he does so believe, he is not required to exercise "due care" or "circumspection" as to the manner of killing.

2. Pen. Code, § 192, providing that where a lawful act which might produce death is done without due caution and circumspection, and the death of another is caused thereby, involuntary manslaughter is committed, is not a limitation on the right of one acting on appearances to kill in self-defense.

3. One may be justified, even in a sudden quarrel, in killing another in self-defense.

4. A dying declaration stands on no higher plane than that occupied by the testimony of an ordinary witness, and where the court, on a prosecution for homicide, charged as to the right of the jury to reject the testimony of any witness whose testimony was distrusted, it was error to refuse a charge applying the same rule to the dying declarations of deceased, which had been admitted in evidence.

5. Whether declarations admitted in evidence by the court on a preliminary examination as dying declarations are such in fact is a question for the jury, and an instruction assuming that they are dying declarations is erroneous.

6. Instructions as to the object of evidence offered to show the bad reputation of deceased for peace and quiet are properly refused where they assume that defendant believed that it was necessary to kill in self-defense.

7. Where it appeared that the killing occurred in an affray concerning the hire of mules by defendant from the deceased, evidence of admissions made by deceased prior to the affray, relative to the terms of the agreement between deceased and defendant as to the mules was inadmissible; there being nothing therein to show the mental attitude of the parties toward each other at the time of the affray, or as to who was the aggressor therein.

8. Where improper matters contained in alleged dying declarations of deceased were ruled out by the court in advance of admitting the declarations, but were finally read in evidence because the defendant insisted thereon, the fact that the evidence tended to contradict such improper matters was not cause for reversal.

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Alex. J. Thomson was convicted of murder in the second degree, and he appeals. Reversed.

H. C. Lillie, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., and Daniel McFadzean, Dist. Atty., for the People.

ANGELLOTTI, J. The defendant was convicted of the crime of murder of the second degree, and adjudged to suffer imprisonment for 18 years. He appeals from such judgment, and from an order denying his motion for a new trial.

1. The killing of the deceased by the defendant was admitted, but it was claimed by the defendant that such killing was done in necessary self-defense. The trouble between the parties grew out of a difference as to the price agreed to be paid by the deceased to defendant for the hire of two mules. On the day of the mortal affray the deceased delivered the mules at defendant's residence, and was about leaving, when an altercation commenced as to the amount of money due defendant from the deceased for the hire thereof. There was a quarrel—the evidence tending to show the use of vigorous and profane language by the parties—and the quarrel culminated in the shooting of deceased by de-

fendant. So far as appears, the deceased was not armed. Defendant's claim was that deceased, who was some 12 or 15 feet from him at the time of the shooting, used such language and made such motions as to indicate that he was about to draw and fire a pistol, and that he believed, and was reasonably justified in believing, that he was in immediate danger of death or great bodily harm at the hands of deceased, and that it was necessary for him to shoot deceased to save himself therefrom. The defendant was a cripple, having a cork leg. There was much evidence tending to show that the reputation of deceased for peace and quiet was bad, and that this was known to defendant. In fact, the prosecution made no attempt to rebut the evidence introduced by defendant upon this point. It was further shown that the deceased generally carried a pistol, and that this was known to defendant. There was also testimony to the effect that shortly before this time the deceased, in conversation with defendant, pointed to a man with whom he had previously quarreled, and said: "I horsewhipped him once. The next man I have any words with, I am going to fix him"—and that at the time of the shooting, when he made a motion indicating that he was about to draw a weapon, he said to defendant, "You are in for it," or "We are in for it."

There being no evidence to clearly show that the deceased was actually armed at the moment of the difficulty, and consequently that there was actual danger to defendant at the hands of deceased, the defendant's claim of killing in self-defense rested largely, if not entirely, upon his right to act upon appearances. The evidence was of such a nature as to entitle defendant to clear and unequivocal instructions upon this subject. Under these circumstances, the defendant requested the following instruction, viz.: "The defendant was entitled to act upon appearances, and if the language and conduct of the deceased was such as to induce in the mind of a reasonable man, under all the circumstances then existing, and viewed from the standpoint of the defendant, that death or great bodily harm was about to be inflicted by deceased upon the defendant, it does not matter if such danger was real or was only apparent; and if defendant acted in self-defense from real and honest convictions as to the character of the danger, induced by the existence of reasonable circumstances, he should be acquitted, even though he was mistaken as to the extent of the danger." This requested instruction, except for the omission of the words "a fear" or "a belief" before the words "that death or great bodily harm," which omission is immaterial, was a correct exposition of the law upon the subject of appearances. The court refused to give it as requested, and, in its place, gave practically the same instruction with this proviso, viz.: "But the killing must have been done with due caution and circumspection, and not in a sudden quarrel or heat of passion. For if the killing, under such circumstances, was done without due caution and circumspection, or was done in a sudden quarrel or heat of passion, then the defendant is guilty of manslaughter." We cannot understand the object of this addition to the requested instruction, and it certainly does not correctly state the law relative to appearances that will justify a homicide. The effect thereof was not only that the requested instruction was rendered ineffectual, but the jury were plainly and unequivocably told that the defendant was entitled to act upon appearances, and could be acquitted upon the ground of self-defense where there was in fact no actual danger, only in the event that the killing was "done with due caution and circumspection and not in a sudden quarrel or heat of passion." Whatever may be meant by saying that a man must kill another in self-defense "with due caution and circumspection," there is no such limitation upon the right of self-defense. If the appearances are such as to justify a reasonable man in believing that it is necessary to instantly kill another in order to save himself from death or great bodily injury, and he does so believe, he is not required to exercise any "due care" or "circumspection" as to the manner of killing. The words "due caution and circumspection" were undoubtedly taken from our Code definition of involuntary manslaughter, which was not, under the evidence, an element in the case. Under section 192, Pen. Code, where a lawful act which might produce death is done without due caution and circumspection, and the death of another is caused thereby, involuntary manslaughter is committed. Used in connection with, and as a limitation upon, the right of one acting upon appearances to kill in self-defense, the phrase in question introduced an element not recognized by the law upon that subject. Nor is it true that a man may not, in a sudden quarrel, be justified in killing another in self-defense. It is obvious that, where a sudden quarrel has commenced and is in progress between the parties, one of the parties may assail the other under such circumstances as to make it absolutely necessary for the other to kill in self-defense, or, being the aggressor, may so conduct himself as to justify the other, as a reasonable man, in believing that it is necessary to so do in order to save himself from death or great bodily injury. In either event, the mere fact that the parties are engaged in a sudden quarrel, which may be a mere altercation of words, cannot deprive one of the right to defend himself against the real or apparent assailant. In the case at bar the parties were admittedly engaged in such a sudden quarrel, and the effect of this instruction was that the jury were told that the rule as to the right of one to act upon appearances was not applicable to the case, or, in other words, that the defendant here was not justified in acting upon appearances. The action of the court in the matter of this instruction constituted error, which we cannot say was without substantial prejudice to defendant's cause. The effect thereof was not obviated by the general abstract instruction given by the court upon the subject of self-defense.

2. The shooting was done on the 30th day of December, 1902, and the deceased died on February 8, 1903. On February 6, 1903, he made what was claimed to be a dying declaration, and this was admitted in evidence as a dying declaration. It is not claimed that the preliminary evidence as to the circumstances under which the statement was made was not sufficient to warrant the court in admitting the same in evidence, but it is claimed that the trial court erred in giving a certain instruction in regard thereto, and in refusing to give others. This dying declaration was most important to the prosecution. All the eyewitnesses of the affray were members of the family of defendant, and their testimony tended to corroborate his statement. It was upon the dying declaration and the location of the fatal wound that the prosecution was compelled to principally rely. The court (at the request of the prosecution, according to the record) instructed the jury that, if they believed that "any witness" whose testimony had been admitted was false in one part of his testimony, then such witness should be distrusted in the other parts of his testimony, and that, under such circumstances, they might reject and disregard his entire testimony. It further instructed as follows: "The dying declaration of the deceased, T. B. Slaughter, has been received by the court as testimony, and is to be considered by you as testimony in this case. Dying declarations are received by courts as evidence from necessity. There is no authority in law for administering an oath to the person making such declaration. The sense of impending death dispenses with the necessity for an oath." This was the only instruction given regarding the dying declaration. The court refused to instruct the jury that, if they believed that the deceased was willfully false in one part of his declaration, then he should be distrusted in other parts, and that under such circumstances they would be entitled to disregard and cast aside the entire declaration.

We are of the opinion that the instructions given are susceptible of the construction that a dying declaration stands upon a higher plane than that occupied by the testimony of the ordinary witness, and that the testimony of a mere witness may be distrusted and disregarded where a dying declaration may not be so rejected. A person who has made a dying declaration, which is admitted on a trial, is not a "witness" on the trial, either within the definition of our Code (Code Civ. Proc. § 1878), or within the common acceptation of the word "witness"; and the jury might well have understood that the instruction as to their right to reject and disregard the testimony of "any witness" referred solely to those whose testimony had been received under oath on the trial. Particularly was this so when the separate and distinct instruction was given as to the dying declaration. It is, of course, settled law, that the credibility or degree of weight which shall be given to a dying declaration is solely a question for the jury; that they may apply the same tests and principles in determining its truth that they apply in the consideration of the evidence of the witnesses; and that, if they believe from the evidence that the person making the declaration was willfully false in a material part thereof, they may reject and disregard his entire declaration. We are of the opinion that the court should have made this clear by the instructions. Having given an instruction as to the conditions upon which the jury might reject and disregard the testimony of other witnesses, it should, when requested by defendant, have done at least as much as to the dying declaration, and given the twenty-fifth requested instruction. We are of the opinion, too, that the one instruction given upon the subject of the dying declaration to some extent invaded the province of the jury. It was practically declared thereby that the declaration admitted was a dying declaration; i. e., that it was made by deceased under a sense of impending death, and that the jury must accept it as having been so made. It is, of course, for the court to determine, upon preliminary proof addressed to it, as to whether a declaration made by a deceased was so made under a sense of impending death as to be competent evidence; this duty of the court being placed, according to Mr. Greeleaf, "on the same ground with the preliminary proof of documents and of the competency of witnesses" (Greenleaf on Evidence, § 161); but the determination by the court that it was so made cannot, in the slightest degree, impair the power of the jury to determine as to its credibility. As Greenleaf says in the section already cited: "But after the evidence is admitted, its credibility is entirely within the province of the jury, who, of course, are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give the testimony only such credit as, upon the whole, they may think it deserves." Whether the declaration was in fact made under a sense of impending death is a question that most materially affects the question as to its credibility, and the determination of the court thereon is not conclusive upon the jury. They have the right, in considering whether they shall accept the declaration as a correct statement, to determine for themselves whether the declarant was in extremis, and fully convinced of that fact, when making the declaration, and are at liberty to disregard it if not satisfied that it was made under a sense of impending death. This appears to be settled by the great weight of authority. This court, speaking through the Chief Justice, said in People v. Amaya, 134 Cal. 531, 66 Pac. 794, that an instruction to the effect that, although it was the province of the court to determine in the first instance the admissibility of the dying declaration, the jury were not bound by the fact of its admission to conclude that it was made in view of impending death, etc., but that it was for them to determine whether it was so made, and whether it had been correctly reported, was correct. In State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322, it was held that an instruction to the effect that such a declaration was made under a sense of impending death excluded from the jury, in passing on the credibility of the declaration, the question as to whether it was so made, and was erroneous; it being declared that, in passing on the credibility of the statement, they were entitled to consider whether, as a matter of fact, deceased had lost all hope of recovery at the time he made the same. See, also, State v. Phillips, 118 Iowa, 660, 92 N. W. 876, and cases there cited; McClain on Criminal Law, §§ 430, 431; Starkey v. People, 17 Ill. 17; North v. People, 139 Ill. 81, 102, 28 N. E. 966; State v. Banister, 35 S. C. 290, 296, 14 S. E. 678; Walker v. State, 37 Tex. 366, 386; Com. v. Brewer, 164 Mass. 577, 42 N. E. 92; State v. Swift, 57 Conn. 496, 18 Atl. 664; 10 Am. & Eng. Ency. of Law (2d Ed.) pp. 385 and 386.

Inasmuch as the declaration of the deceased is competent evidence only when made under the sense of impending death and because it was so made, it would seem to logically follow that the jury should give it no consideration whatever unless they are satisfied that it was made by the deceased under such sense of impending death. It is a rule of evidence that such a declaration can be considered only in that event, and while the court must, of necessity, preliminarily determine the question of fact essential to the admission of the declaration in evidence, the rule of evidence still remains for the guidance of the jury; and, as the jury must exercise their power of judging of the effect of evidence in subordination to the rules of evidence, it would seem to be proper to inform the jury of such rule, and of their duties in regard thereto. The doctrine in such matters is stated in Com. v. Brewer, supra, as follows: "When the admissibility of evidence depends upon a collateral fact, the regular course is for the judge to pass upon the fact in the first instance, and then, if he admits the evidence, to instruct the jury to exclude it if they should be of different opinion on the preliminary matter." See, also, Jones v. State, 71 Ind. 66. The case is analogous to that where it is sought to introduce a confession of a defendant in evidence, and the court is called upon to preliminarily pass upon the question of fact as to whether the confession was freely and voluntarily made. State v. Banister, supra. In such a case it is for the jury to ultimately determine whether it was so made, and therefore entitled to consideration. People v. Oliveria, 127 Cal. 376, 381, 59 Pac. 772.

Upon a retrial, proper instructions along the lines discussed will doubtless be given. Many of the instructions requested upon this branch of the case were objectionable—some of them being purely argumentative—and were properly refused.

3. Except upon the question as to the right of the defendant to act upon appearances, which has already been noticed, the instructions upon the law of self-defense fairly covered the case, and included substantially all such portion of defendant's requested instructions upon the subject as he was entitled to. Defendant's requested instructions as to the object of the evidence offered to show the bad reputation of the deceased for peace and quiet were objectionable, in assuming that defendant believed that it was necessary to kill in self-defense. Doubtless, if proper instructions upon this subject are asked, they will be given.

4. In all other respects defendant's requested instructions, so far as proper, were fairly covered by the charge of the court.

5. We are of the opinion that the court did not err in excluding the evidence offered to show certain admissions made by deceased prior to the affray concerning the terms of the agreement between himself and defendant as to the mules. There was nothing therein tending in the slightest degree to show the mental attitude of the parties toward each other at the time of the affray—nothing at all material to the question as to who was the aggressor therein. People v. Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403, is clearly inapplicable.

The argument that the evidence tended to contradict certain matters improperly contained in the alleged dying declaration of deceased is overcome by the fact that the court ruled such matters out in admitting the declaration, and that the same were finally read in evidence only because the defendant insisted thereon.

We are unable to perceive that the district attorney was guilty of any misconduct in argument that could have prejudicially affected defendant's cause.

This disposes of all the points discussed in the briefs.

For the reasons given, the judgment and order are reversed, and the cause remanded for further proceedings.

We concur: SHAW, J.; McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.; LORIGAN, J.

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145 Cal. 652

MILLER & LUX et al. v. ENTERPRISE CANAL & LAND CO. et al. (MOWRY, Intervener). (S. F. 2,856, 3,439.)*

(Supreme Court of California. Jan. 3, 1905.)

WATER COURSE—DIVERTING OF WATERS — INJUNCTION—FINDINGS—JUDGMENT—CONCLUSIVENESS—APPEAL—NEW TRIAL.

1. Where an appeal is taken on a judgment roll alone, the question of the sufficiency of the evidence to support the findings cannot be raised.

2. Where an appeal is taken on a judgment roll alone, only error appearing on the face thereof is available to effect a reversal.

3. In an action to enjoin the diverting of the waters of a river, a finding that at certain stages of the river or at certain times some of the water flowing into the river would naturally flow into a certain slough, and back up the slough, but that there was no outlet for the waters flowing into the slough from the river, except the same channel through which the water flowed from the river into the slough, and that, when the slough was filled up and the level changed, then the water which flowed from the river into the slough flowed back into and down the river, was not contradictory of a finding that the slough was no part of the river.

4. Nor was a finding that the water diverted was needed by plaintiffs affected by a further finding that at certain times in each year the river for a short time regularly overflowed its banks onto plaintiffs' lands, thus wetting and benefiting them.

5. A finding that during certain times there was an increase of the flow of the water in the river over ordinary stages, but that there was no evidence before the court whereby it could be determined at what stages of the waters of the river at such times, if at all, water could be diverted therefrom without injury or damage to plaintiffs and other riparian proprietors, is not cause for reversal on an appeal from a judgment for plaintiffs based on the judgment roll only.

6. In such case the fact that the judgment reserved to defendants the right to bring an action to have it determined at what stages of the water, if any, water might be diverted without injury to plaintiffs, in view of a finding that there was no evidence from which that fact could be determined, is not cause for reversal on appeal from a judgment for plaintiffs, based on the judgment roll only.

7. Where a motion for new trial was made on all the statutory grounds, including insufficiency of the evidence, but the order granting a new trial thereon was simply that the defendants' motion therefor was granted, conflicting evidence on a material finding of fact requires an affirmance of the order.

In Bank. Appeal from Superior Court, Fresno County; J. R. Webb, Judge.

Action by Miller & Lux (a corporation) and others against the Enterprise Canal & Land Company and Jefferson G. James (J. C. Mowry, intervener). From a judgment for plaintiff corporation and intervener, defendants appeal, and from an order granting a new trial, said plaintiff and the intervener appeal. Affirmed on both appeals.

Houghton & Houghton (Frank H. Short, of counsel), for Miller & Lux. Octave G. De Py and Isaac Frohman, for intervener. W. C. Graves, Caldwell & Borland, Archibald Borland, and Caldwell & Caldwell, for Enterprise Land & Canal Co. and Jefferson G. James.

McFARLAND, J. These two appeals were argued and submitted together, and will both be considered and determined in this one opinion. They arise out of an action in the superior court entitled Miller & Lux and the San Joaquin & Kings River Canal & Irrigation Company, plaintiffs, versus the above-named defendants. The action was to enjoin the defendants from diverting water from the San Joaquin river. Judgment was rendered in favor of Miller & Lux, enjoining the defendants as prayed for; but the court refused to give judgment for the other plaintiff, who claimed as an appropriator of the water of said river, on the ground that the river was a navigable stream, and that the maintenance of said claimant's ditch and dam, by which it diverted the water, was a nuisance, and rendered judgment in favor of defendants against said plaintiff canal and irrigation company. From this part of the judgment the said last-named plaintiff appealed, and it was here reversed, and judgment ordered for said plaintiff. See Lux v. Enterprise Company, 142 Cal. 208, 75 Pac. 770, where some of the general facts of the whole case were stated. And that appeal is here referred to merely for the purpose of keeping in view the fact that the rights of said plaintiff the land and irrigation company are not involved in the two appeals now before the court. It is not a party to either of such appeals.

No. 2,856.

This is an appeal by defendants from a judgment in favor of plaintiff Miller & Lux and the intervener, Mowry. Plaintiff and the intervener occupy similar positions, and the affirmance or reversal of the judgment as to plaintiff would necessarily carry a similar affirmance or reversal as to the intervener. Therefore express reference need be made to the case only as between plaintiff and defendants. This appeal—No. 2,856—is upon the judgment roll alone. There is no bill of exceptions or statement, and consequently there is here no question of sufficiency of evidence to support the findings, and no exceptions to rulings made during the taking of evidence at the trial. The judgment could be reversed only upon some fatal error appearing on the face of the judgment roll, and we see none. The briefs are quite voluminous; but they go mainly to questions which arise, if at all, in the other appeal—No. 3,439—which is from an order granting a new trial, and will be noticed hereafter. The case was tried without a jury, and the court made very full findings. Among other things it found that plaintiff Miller & Lux was, and for 25 years before the commencement of the suit had been, the owner of large bodies of land lying on the San Joaquin river, and riparian thereto, and that such river is a natural water course, and that from time immemorial the waters of said river have naturally flowed over plaintiff's said lands; thereby irrigating the lands and making them fit for cultivation and pasturage, and supplying water for stock and agricultural purposes, and for all purposes for which the owner of land bordering on a running stream has the right to use the water thereof. It is further found that defendants, long after plaintiff's rights had accrued, and at a point on said river above plaintiff's lands, constructed a dam and ditch by which they obstructed the flow of the water in the river, and diverted such water away from said river, and prevented it from flowing down and onto plaintiff's lands as it was accustomed to flow; that such water so diverted is actually needed for the use and cultivation of plaintiff's lands; and that its diversion by defendants has caused and will cause plaintiff great and irreparable damage. It was claimed by defendants that a certain slough, called sometimes "Kings River Slough," and sometimes "Fresno Slough," which connects with the San Joaquin river at a point on plaintiff's lands, is a part of said river; and as defendant James owns lands bordering on said slough, though not on the main river, it was contended by defendants that James was a riparian proprietor on the main San Joaquin river, and had certain alleged rights as such riparian proprietor. The court, however, found that such slough was not a part of the San Joaquin river, but is a channel made by another river, called "Kings River," and is "a part of or extension of said Kings river through which the waters of said river flow on their way to the ocean." Of course, as there is no evidence in the record, the finding is conclusive on the point, so far as this appeal from the judgment is concerned, unless there is some other contradictory finding on the subject. Defendants contend that this finding is inconsistent with that part of finding 52 which is as follows: "That at certain stages of the river, or at certain times, some of the water flowing in the San Joaquin river will naturally flow into said Fresno slough, and back up said slough for a distance of some twelve miles; but there is no outlet for the waters flowing into said slough from said San Joaquin river, except through the same channel which the water flows from the said San Joaquin river into said slough, and, when Fresno slough becomes filled up and the level changes, then this water which has flowed from San Joaquin river into said Fresno slough flows back into and down the said San Joaquin river." But it is quite clear, we think, that this finding is not contradictory of the former finding that the slough is not a part of the river. It is also contended that defendants, under any view, were entitled to divert some of the water of the river because it was not needed by plaintiffs on their lands below, but this contention is answered by the finding above referred to, that it was so needed. And this finding is not affected by the further finding that at certain times in each year the river for a short time regularly overflows its banks onto plaintiffs' lands, thus wetting and benefiting the same.

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*Rehearing denied February 2, 1905.

Nor is a reversal of the judgment called for on account of the finding, in finding No. 57, that during certain times there is an increase of the flow of water in the river over ordinary stages, "but there is no evidence before the court whereby it can be determined at what stages of the waters of said river at such times, if at all, water can be diverted therefrom without injury or damage to the plaintiff Miller & Lux, and others owning lands riparian to said river and having vested rights therein as to the flow of the waters thereof," nor on account of that part of the judgment which reserves to defendants the right to bring an action to have it determined at what stages of the water, if any, water may be diverted without injury to plaintiff. If this finding and this part of the judgment are of any consequence at all, they are not prejudicial to defendants, and certainly give to them no cause of complaint.

We do not deem it necessary to further discuss this appeal from the judgment. It is sufficient to say that, in our opinion, the judgment, upon its face, is free from error, and the findings amply support it. Therefore on this appeal the judgment must be affirmed.

No. 3,439.

This appeal is by plaintiff Miller & Lux and the intervener, Mowry, from an order of the superior court granting a motion made by defendants for a new trial. The judge before whom the case was tried, and upon whose decision the judgment was rendered, went out of office before the motion for a new trial was heard, and the motion was granted by his successor.

The motion was made on all the statutory grounds, and there are a good many specifications of the particulars in which it is claimed the evidence is insufficient to justify the decision. The language of the order granting a new trial is simply "that the motion of the defendants for a new trial of said action be, and the same is hereby, granted." There is no intimation in the record enabling us to see upon which of the various grounds of the motion the order granting it was based. This is perhaps unfortunate in a case of this kind, for it may be that the reason for granting the motion was not insufficient evidence, in which event the case might perhaps be more readily disposed of on its real legal merits. However, as the record stands, respondents are entitled to invoke the established rule that the order must be affirmed if it can be justified on any one of the grounds on which the motion was made, and that, as insufficiency of the evidence was one of the grounds, the order must be affirmed if there was fairly conflicting evidence as to any material finding of fact.

If the motion for a new trial had been denied, and defendants were appealing from the order denying it, we could readily say that the evidence was sufficient to justify the decision. But we would not be justified in holding that there was no conflict of evidence as to any material fact found. For instance, it is found "that the said Fresno slough is no part of the San Joaquin river, but is a channel made from the overflow from Kings river during flood time, and is a part of or extension of said Kings river through which the waters of said river flow on their way to the ocean." This clearly involves a finding of fact, and, considering all the evidence touching the nature and character of Fresno slough, and the sources and condition of the water flowing or being therein, and particularly the testimony of such witnesses of respondents as Anthony, Parker, Chidester, Garner, White, and others, we cannot say that there was no conflict of evidence on the point, or that the judge of the trial court, in view of such conflict, abused his discretion in granting a new trial. It is contended by appellant that this finding was immaterial, because, even conceding that the slough is part of the river, and defendant James therefore an owner of lands riparian to the river by virtue of his ownership of lands bordering on the slough, still he would have no right, for the purpose of irrigating said lands, to go upon the river at a point many miles above the mouth of the slough, and above plaintiff's lands, and from that point divert water by means of a dam and ditch, and carry it entirely around and away from plaintiff's lands lying above the slough, and thus preventing any of the water so diverted from flowing or seeping back onto plaintiff's said lands. But if we concede this proposition to be true, it would have been available only if the court had merely enjoined defendants from diverting water through the said ditch which takes water from a point entirely above plaintiff's lands. But the court found that the defendants "were not entitled to take or divert any of the waters flowing in the San Joaquin river," and in the judgment it is decreed that defendants be enjoined "from diverting any water out of or from the San Joaquin river, or obstructing the flow of water therein, at any point above the lands, or any part of the lands, of the plaintiff Miller & Lux, or of the intervener, J. C. Mowry," and further that they are not "entitled to take or divert any of the waters flowing in the San Joaquin river." This finding and decree hold and adjudicate that defendants have no riparian rights at any point of the river, and are based on the finding that Fresno slough is not a part of the river, and for this reason the finding that the slough is not a part of the river is necessarily a material finding. For this reason, the order granting a new trial must be affirmed. If, as a fact, the court did not grant the new trial on this ground, but did grant it on some grounds which would not be held tenable by this court, the necessity of affirming the order, on the record as it stands, is unfortunate. We apprehend, however, that the parties can avoid a good deal of the expense and labor of a new trial by accepting much of the evidence given at the former trial without requiring it to be repeated.

In the appeal No. 2,856, the judgment appealed from is affirmed.

In the appeal No. 3,439, the order granting a new trial, appealed from, is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

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145 Cal. 696

UNION SAV. BANK OF SAN JOSE v. LEITER. (S. F. 3,759.)*

(Supreme Court of California. Jan. 7, 1905.)

BANKS — INSOLVENCY—UNPAID STOCK—POWER OF DIRECTORS TO LEVY ASSESSMENTS—LIMITATION OF ACTIONS—PAYMENTS—REPEAL OF STATUTE—EFFECT ON LITIGATION.

1. A corporation having no power to adopt a by-law inconsistent with the laws of the state (Civ. Code, § 301), and corporate directors having express authority to levy and collect an assessment for such percentage of the full amount unpaid on capital stock as may be necessary to satisfy the claims of creditors (Civ. Code, § 331, and section 332, subd. 1), a corporate by-law providing that "no further calls for payments on capital stock shall be made except by a two-thirds vote of all the stock issued and outstanding" does not prevent an assessment by the directors in liquidation.

2. The statute of limitation does not commence to run against an action to enforce the liability of corporate stockholders on unpaid stock, under Civ. Code, § 332, subd. 1, until levy of an assessment.

3. The levy of an assessment on unpaid corporate stock, and notice thereof to the stockholder, which was afterward rescinded, did not commence the running of limitation against the liability of the stockholder, so as to prevent the enforcement of a subsequent assessment.

4. The payment of a judgment obtained on the personal liability of a stockholder by a corporate creditor under Civ. Code, § 322, cannot be considered as payment on unpaid corporate stock.

5. St. 1903, p. 73, c. 65, repealing the bank commission act of 1878, as amended in 1887 and 1895, without a saving clause as to pending litigation, did not affect an action to enforce an assessment on bank corporate stock pursuant to a prior final judgment under the act decreeing

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*Rehearing denied January 6, 1905.

the corporation insolvent, and directing the enforcement of stockholders' liability, under Civ. Code, § 331, and section 332, subd. 1, in liquidation.

In Bank. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by the Union Savings Bank of San Jose, a corporation, against Jeremiah Leiter. From a judgment for plaintiff, defendant appeals. Affirmed.

S. G. Tompkins and S. F. Leib, for appellant. E. M. Rea and Francis J. Heney, for respondent.

ANGELLOTTI, J. This is, in form, an action by a banking corporation to recover from a stockholder the amount of an assessment levied for an amount unpaid upon the capital stock, for the purpose of satisfying the claims of creditors of such corporation. Plaintiff had judgment, and defendant appeals therefrom upon the judgment roll.

The findings fully present the facts essential to the determination of the questions presented by defendant's brief. The plaintiff corporation, ever since March 13, 1899, has been engaged solely in closing its affairs and liquidating its indebtedness under a judgment given on that day by the superior court of Santa Clara county in an action brought by the Attorney General, in pursuance of notification from the bank commissioners, who had determined that the plaintiff was insolvent. The proceedings and judgment were had under the provisions of the act creating a board of bank commissioners and prescribing their duties, approved March 30, 1878 (St. 1877–78, p. 740, c. 481), as amended in 1887 (St. 1887, p. 90, c. 80), and 1895 (St. 1895, p. 172, c. 167). The nature and effect of this amended act have been so fully discussed in comparatively recent opinions of this court as to render further statement in that regard unnecessary. See Argues v. Union Savings Bank, 133 Cal. 139, 65 Pac. 307; Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383; Union Savings Bank v. Dunlap, 135 Cal. 628, 67 Pac. 1084. Ever since the judgment of the superior court was given, the directors of plaintiff corporation, appointed in the manner provided by the act, have been in the possession and control of the corporation and its assets for the purpose of closing its affairs and liquidating its indebtedness in accordance with the provisions of said act. The capital stock of such corporation was $1,000,000, divided into 10,000 shares of the par value of $100 each. On this only $30 per share had been paid at the time of the adjudication in insolvency. On May 22, 1899, the directors in liquidation levied an assessment of $10 per share, which was collected so far as it could be, this defendant, among others, paying the assessment on his shares. On June 7, 1901, solely for the purpose of satisfying the claims of the creditors of the corporation, and it being necessary to so do in order to satisfy such claims, the directors in liquidation, acting strictly in accord with the provisions of the Civil Code relative to assessments (section 331 et seq.), levied the assessment in suit of $50 per share, and, the same not having been paid, elected to proceed by suit to recover the amount of the same. Civ. Code, § 349. Defendant is the owner of 52 shares, upon which only $40 per share has been paid, leaving $60 unpaid on the capital stock.

It is, of course, unnecessary to cite authorities in support of the proposition that unpaid subscriptions upon the capital stock constitute assets of the corporation available to its creditors. In a case arising under the provisions of this banking act, Mr. Justice Temple, speaking for the court, after stating this universally recognized proposition, said, "I have no doubt but that in some form the liquidators may, in case of necessity, resort to this fund." Bank of Ntl. City v. Johnston, supra. The question as to whether they could do so by the assessment proceedings provided by the Civil Code was not involved in that case, and was not decided therein. That question was, however, presented and decided in the later case of Union Savings Bank v. Dunlap, 135 Cal. 628, 67 Pac. 1084, which was an action brought against a stockholder upon the same assessment that is here involved. It was there held that the provisions of the Civil Code relative to assessments furnished a mode for the collection of unpaid subscriptions, which might be followed. This was but following the general views announced in prior decisions as to the status and powers of the directors in liquidation, viz., that they are trustees invested with all the powers theretofore possessed by the corporation, so far as the same are appropriate in effecting "an equitable and economical distribution of the assets of the insolvent bank among its creditors," and that they can exercise such powers in the name of the corporation. They are therefore expressly authorized by the provisions of the Civil Code to levy an assessment for such a percentage of the amount unpaid upon the capital stock as will raise an amount sufficient to satisfy the claims of the creditors of the corporation (sections 331, 332, Civ. Code) and, so electing to do (section 349, Civ. Code), enforce the collection thereof by suit in the name of the corporation. This much is apparently established by the Dunlap Case, and is not seriously disputed by learned counsel for defendant. The record in this case, however, presents several questions that were not presented in that case.

1. Section 1 of the by-laws of the plaintiff corporation was as follows, viz.: "The name of this corporation is and shall be, 'Union Savings Bank of San Jose.' The capital stock is and shall be $1,000,000, divided into 10,000 shares of $100 each, 30 per cent. of which shall be paid up. No further call for payments upon the capital stock shall be made except by a two-thirds vote of all stock

issued and outstanding." There has never been any call for the unpaid capital by a "two-third vote" of the stockholders. It is urged that this by-law is a complete bar to a recovery in this action, the contention being that this action can be maintained only upon the theory of an unpaid subscription which defendant has expressly or impliedly agreed to pay, and that the by-law shows an express agreement to the effect that in no event shall more than $30 per share be required to be paid by a stockholder, except upon a contingency which has not happened. It is unnecessary to here discuss the question as to the effect of an agreement of the nature here claimed to have existed between a corporation and its stockholders upon the rights of creditors of the corporation, further than to state that it is universally recognized that, when properly attacked, it can generally have no force as against such creditors and certainly never against creditors without notice. See Vermont, etc., Co. v. Declez, etc., Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143. The by-law in question, which, so far as material, simply provided that no further call should be made except by a two-thirds vote of all stock issued and outstanding, must be construed in connection with the provisions of the statute. A corporation has no power to adopt a by-law that is not consistent with the Constitution and laws of this state. Civ. Code, § 301; People's Bank v. Superior Court, 104 Cal. 649, 38 Pac. 452, 29 L. R. A. 844, 43 Am. St. Rep. 147. So far, therefore, as a by-law may be inconsistent with statutory provisions, it must yield. Our statutes make full and complete provision for the protection of creditors of a corporation in this behalf by expressly authorizing the directors thereof to levy and collect an assessment for such percentage of the full amount unpaid upon the capital stock as may be necessary to satisfy the claims of the creditors. Civ. Code, § 331, and subdivision 1 of section 332. This statutory provision, enacted for the protection of creditors, enters into and becomes a part of every contract between the corporation and its stockholders, whether evidenced by by-law or not; and the corporation cannot, without the consent of the creditor, yield up this power by a contract with stockholders. This power of the corporation, as we have already seen, vests in the directors in liquidation, and may be exercised by them in the name of the corporation in the manner prescribed for its exercise by the corporation. Considered in connection with these statutory provisions, the by-law relied upon as constituting a contract cannot be held to have reference to any assessment that might be thereafter levied in accordance with the provisions of the Civil Code relating to the levy and collection of assessments, but simply meant that no such call for unpaid capital as might ordinarily, in the absence of a contrary stipulation in the contract of subscription, as to the time or manner of payment, be made by the directors by a simple resolution to that effect, would be made, except by a two-thirds vote of the stockholders. An example of this character of case is to be found in California S. H. Co. v. Callender, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99, where by the contract of subscription the stockholders had expressly agreed to pay the unpaid portion upon demand. Where, however, there is no such express agreement, the promise to pay the unpaid capital upon such a call is implied from the taking of the stock, in the absence of an agreement to the contrary. Here there was such a contrary agreement, and consequently such a call could be made only by a two-thirds vote of the stockholders. But by virtue of the provisions of the Civil Code relative to assessments, which entered into and became a part of the subscriber's contract with the corporation, the corporation had the power, acting through the board of directors, after one-fourth of its capital stock had been subscribed, to levy and collect assessments for the various purposes specified in the Code, including the power to levy and collect an assessment for the full amount unpaid upon the capital stock, if such amount was necessary to satisfy the claims of creditors of the corporation, or for such percentage thereof as was necessary for that purpose; and this power, so far as amounts unpaid upon the capital stock and necessary to satisfy the claims of creditors are concerned, was vested in the directors in liquidation.

2. Certain provisions of the Code of Civil Procedure prescribing limitations as to the time within which actions may be commenced, were pleaded in bar of this action, viz., subdivisions 1 and 4 of section 338, subdivision 1 of section 339, and section 359. The trial court expressly found in terms that the action was not barred by any of these provisions, but at the same time specifically found the facts from which these general findings were deduced, and it is conceded that the question as to whether these specific findings show a case not barred by the statutory provisions invoked is properly before this court for review. This action was commenced on April 2, 1902. The assessment in suit was levied on June 7, 1901, and the election to proceed by action to recover the amount thereof was made on July 12, 1901. Whether the liability of a stockholder to pay an assessment on stock on account of unpaid capital be a liability created by statute, within the meaning of subdivision 1, § 338, Code Civ. Proc., or a liability created by law, within the meaning of section 359, Code Civ. Proc., and the limitation thereof three years, or is a liability arising from contract, within the meaning of subdivision 1 of section 339, Code Civ. Proc., and the limitation therefore two years, it will be seen that this action was brought within the statutory time after the levy of

the assessment here involved. But the decree of the superior court determining plaintiff corporation to be insolvent, restraining it from further carrying on business, and requiring the bank commissioners to surrender the property of the corporation to the directors thereof for the purpose of liquidation, was made on March 13, 1899, more than three years prior to the commencement of this action. It is urged that the liability of the stockholder in this case rested upon his implied contract to pay calls made for unpaid subscriptions, and was purely a liability arising upon a contract, not in writing, and that the statute requiring actions on such contracts to be brought within two years after the cause of action accrues is applicable. It is further urged that, while such a cause of action would ordinarily accrue only upon a call made by the directors of the corporation for the unpaid capital, when the corporation was decreed to be insolvent and put into process of liquidation by the superior court, the liability of the stockholders to pay so much of the unpaid capital as was necessary to satisfy the claims of creditors at once became fixed, and the cause of action therefor accrued, and became barred upon the expiration of two years. Upon the general question as to whether, in the event of the insolvency of a corporation and its ceasing to be a going concern, a cause of action for unpaid capital payable upon call accrues immediately upon insolvency, without any call therefor having been made, there is, it must be conceded, some conflict in the opinions of the federal and state courts that have had occasion to discuss the proposition. There has, however, been no expression of opinion by this court thereon, except in the case of Glenn v. Saxton, 68 Cal. 358, 9 Pac. 420, which was an action upon what was called an assessment for unpaid capital for the purpose of paying debts, levied upon stock of an insolvent corporation by a Virginia court. The law of Virginia, the state wherein the corporation was organized, provided that a portion of the capital should be paid at the time of subscription, "and the residue thereof as required by the president and directors," and that, if the same was not paid as required, it might be recovered by action. It was held by this court, quoting from and adopting and assenting to the views of the Court of Appeals of Maryland in Glenn, Trustee, v. Williams, 60 Md. 93, 122, that the terms of the statute became a part of the contract of subscription; that the subscriber undertook to pay the residue as required by the president and directors; that the call made by the court was the same, in effect, as if it had been made by such president and directors, and that, when made, the contract of the defendant to pay became absolute, and the cause of action accrued. In the portion of the opinion of the Maryland court quoted in Glenn v. Saxton, and as to which this court said, "In this we entirely agree," is the following, viz.: "After the payment of the two dollars per share, there was nothing due from the subscriber to stock until an authorized call was made for the residue. The contract contemplated the exercise of judgment and discretion on the part of the president and directors as to the times and amounts of future payments on the stock, and there was nothing due from the stockholders until such amounts were determined on and regularly called for. Until a regular call made, there was no unconditional liability on the part of the stockholder to pay. Until then he could not know when to pay, or how much he would be required to pay. The subscription, therefore, was conditional as to the times and amounts of payment; and consequently there was no fixed obligation of the stockholder to pay, and no right of action against him, until an assessment and call made either by the president and directors or by the order of a court of competent jurisdiction. It is for the amount of the assessment made that the right of action accrues, and not for the whole balance of the unpaid subscription, unless the whole amount be called for; and it is only from the time of the assessment and call made that the statute [of limitations] runs in favor of the defendant." There is nothing opposed to these views in any California case that has been brought to our attention. Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741, specially relied upon by defendant, was a case decided upon the peculiar language of the contract of subscription, whereby the defendants had agreed to pay "in such installments and at such times as said defendant might under and according to the laws of the said state of California be lawfully called upon and required by said corporation to pay the same," and it was pointed out in the opinion in that case, the question being as to whether the action had been prematurely brought, that this provision did not say anything about the manner in which the corporation should call upon the subscribers. Whether the distinction made by the court in that case was well founded or not is immaterial here, for clearly it was not intended therein to hold that a cause of action for money due only on proper call could accrue before such call was made. The rule stated in Glenn v. Saxton, supra, is concededly the rule of the United States Supreme Court and the appellate courts of several of the states. As to banking corporations in process of liquidation under the provisions of the banking act of 1887, as amended in 1895, and the provisions of our Code, we have no doubt that it is the true rule, at least so far as assessments levied under the provisions of the Civil Code, for such amount of the unpaid capital as may be necessary to satisfy the claims of creditors, are concerned. The reasoning of the Maryland court approved by this court in Glenn v. Saxton is peculiarly applicable to such a case. As was pointed out in Union Savings Bank v. Dunlap, supra, such a corporation, after a decree adjudging it insolvent, while restrained from continuing the banking business, continues to be a corporation until its affairs are closed, and is a going concern for all purposes of liquidation. Subject to certain rights in the court as to the removal and appointment of directors, the management of the affairs of the corporation in liquidation is in the hands of the directors of such corporation, under the direction of the bank commission. These directors are invested with all the powers of the corporation, so far as the same are essential to liquidation, including the power to assess the stock, so far as is necessary to satisfy the claims of creditors, to the full amount unpaid upon the par value thereof, and collect the amount from the stockholder. The obligation of the stockholder as to this unpaid capital is not to pay the whole amount thereof in any event, but only to pay such portion thereof as such directors, in the management of the affairs of the corporation, may find necessary to satisfy the claims of creditors, and call for in such mode as may be required by the law. Such an obligation involves, as was said in the Maryland case, the exercise of judgment and discretion on the part of the directors as to the times and amounts of payments on account of unpaid capital, and there can be no amount actually due until the amounts are determined on and regularly called for. The directors, in the exercise of the powers confided to them, are acting not only in the interest of the creditors, but also in the interests of the stockholders, and the act provided a summary process by which the court might remove any director found by it to have been guilty of fraud or negligence, and not a proper person "to be intrusted with the closing of the affairs and business of such corporation in the interest of the depositors, creditors, and stockholders thereof." This provision apparently afforded full remedy to any stockholder who might be aggrieved by any unnecessary delay on the part of the directors in determining upon and calling for such amount of the unpaid capital as might be necessary. The act further provided that the affairs of such a corporation must be closed within four years, unless further time was allowed by the bank commissioners. We are unable to see how it can be held, under our statutory provisions, that the power of the directors to levy the assessments mentioned in subdivision 1 of section 332, Civ. Code, can be impaired by lapse of time, so long as the corporation is a going concern for purposes of liquidation, or how any provision of our statute of limitations can commence to run as to the amount of any such assessment, until the levy thereof.

Much reliance is placed by learned counsel for defendant upon expressions of this court in the opinion in Harrigan v. Home Life Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99, in support of their contention that it was within the power of the directors in liquidation to make the demand for the unpaid capital at any time; that it should have been made immediately upon the adjudication of insolvency; and that the statute commenced to run from the time the call might have been made, whether it was made or not. The case cited was an action upon a life insurance policy, where the covenant of the insurer was to pay "after due notice and satisfactory proof of death," etc., which covenant, this court said, practically called for a demand only; and the well-settled rule that, where a right or claim has fully accrued except for some demand or presentation of claim to be made by the party as a condition precedent to legal relief, which such party can at any time make, if he so chooses, the cause of action has accrued for the purpose of the statute of limitations, was applied. See, also, Barnes v. Glide, 117 Cal. 8, 48 Pac. 804, 59 Am. St. Rep. 153; San Luis Obispo Co. v. Gage, 139 Cal. 408, 73 Pac. 174. We are unable to see the application of this rule to an assessment levied under the provisions of the Civil Code. As we view the law of this state upon the subject, the Legislature has seen fit to invest the directors in liquidation with the power to inaugurate assessment proceedings to the extent of such amount unpaid upon the capital as they may find necessary for the payment of creditors at any time during the process of liquidation. The matter is one entirely within their discretion, and until the levy of the assessment there is no liability of any kind on the part of the stockholder in regard thereto, other than the liability, inseparably connected in this state with the holding of stock in corporations, of being assessed thereon. The levy of the assessment is essential to the creation of the liability, which is here sought to be enforced. Of course, this court did not, by merely citing in the opinion in Harrigan v. Home, etc., Co., supra, the case of Gt. Western Tel. Co. v. Purdy, 83 Iowa, 430, 50 N. W. 45, in support of the rule applied, adopt the views of the Iowa court as to the application of that rule to the facts of that case.

It perhaps should be stated that the trial court found that it was impossible for the board of directors prior to the 1st day of March, 1901, to determine with any degree of certainty the value of the assets of the bank, or readily or correctly value the same, but that they might readily have ascertained at the outset that there was a deficiency of at least $200,000.

Some reliance is placed by defendant upon the fact that on October 27, 1899, the directors in liquidation did, by resolution, order and levy an assessment of $60 per share, and give notice thereof by mail to this defendant. No further proceeding appears to have been taken thereon. On January 26, 1901, this resolution was by another resolution of the directors declared rescinded, vacated, and set aside, and the right to collect the same waived. Nothing was ever paid thereon by any stockholder. It is urged that the statute of limitations commenced to run in favor of defendant at the date of this levy, if it had not commenced before. As to that assessment, it may be conceded that this contention is well founded. But the assessment not being paid, the amount theretofore unpaid upon the capital stock still remained unpaid, and the power of the directors in liquidation to levy assessments under subdivision 1 of section 332, Civ. Code, was not exhausted. If the board of directors had the power to levy another assessment, as it clearly did under our views as to the law, the statute of limitations as to such new assessment did not commence to run prior to such levy.

On January 26, 1901, the directors again adopted a resolution levying an assessment of $60 per share, which resolution was rescinded on June 7, 1901. There was never any attempt to enforce this assessment. This resolution is entirely immaterial to the controversy as to the statute of limitations, for this action was commenced within two years thereafter; but what has been said as to the resolution of October 27, 1899, is also applicable to this. Defendant's claim as to the statute of limitations is based upon the theory that the liability of the stockholder finds no support in the statute, but comes entirely, if at all, from his implied promise to pay upon call. When it is once established that there also existed an implied promise on his part, imported into his contract by reason of the provisions of our statute, to pay such assessments as might from time to time be levied by the directors, in the manner provided by law, to meet the claims of the creditors of the corporation up to the full amount of the unpaid capital, if necessary, the force of his argument is much impaired.

There is much force in the argument that the directors should be required to move promptly in the closing up of the affairs of the bank, both on account of the interests of the creditors and those of the stockholders, but, as we have attempted to show, the remedy for any party desirous of such speedy adjustment is in his own hands. We are satisfied that the trial court was correct in the conclusions reached upon the defense of the statute of limitations.

3. We do not understand it to be contended that payments made by defendant to creditors of the plaintiff upon judgments obtained against him by such creditors upon defendant's liability to them under section 322 of the Civil Code can be considered as payments made upon the capital stock. The law would not sustain such a contention.

4. On March 2, 1903, which was nearly a year after this action was commenced, but prior to judgment, the bank commission act of 1878, as amended in 1887 and 1895, was repealed by an act of the Legislature, which act contained no saving clause as to any pending litigation. St. 1903, p. 73, c. 65. It is urged that the effect of this repeal was to destroy the cause of action sued on, and abate this action. We are satisfied that the repeal of this act could not affect the judgment theretofore given in pursuance of its provisions decreeing the plaintiff corporation insolvent, and requiring it to proceed, under the management of its directors, to close up its affairs and liquidate its indebtedness. The judgment had become final, and had fixed the rights of all parties interested. Thenceforth the directors of the corporation were trustees, charged by the judgment with the performance of such duties as were essential to a closing of the affairs of the corporation in the interests of the creditors and stockholders, and invested, by the judgment, with all the powers of the corporation necessary therefor. It is true that the bank commission act gave the bank commissioners certain supervisory authority over them, but their status as trustees having all the powers conferred by law upon directors of corporations so far as such powers were necessary to liquidation was fixed by the judgment. As such trustees they levied the assessment in suit, and are proceeding to collect the same by action, not acting under any authority conferred by the bank commission act, but as directors of the corporation, under authority conferred by certain provisions of the Civil Code relative to corporations, which provisions have not been amended or repealed since the levy. If the right to levy this assessment had been given by the act that has been repealed, or if the effect of the repeal of such act had been to remove the directors from the office of trustee, a case would be presented which might call for the application of the authorities cited by counsel for defendant. It may be suggested that, if it be conceded that the repealing act has the sweeping effect of annulling all that has been done under the act repealed relative to plaintiff, the judgment of the superior court decreeing it insolvent would fall with the rest, and we would have the plaintiff corporation a going concern for all purposes, with all the powers of a going concern, including the power to levy and collect this assessment to satisfy the claims of its creditors, notwithstanding the by-law relied on. We are then forced to the conclusion that, if the repeal did not affect the judgment of the superior court, the power of the directors to collect the assessment levied under the provisions of the Civil Code was not impaired by such repeal; and if, on the other hand, such repeal did operate to vacate said judgment and all proceedings had under the act, the corporation continued a going concern, with the power to levy and collect the assessment in suit. As already stated, however, we are satisfied that such repeal

did not affect the judgment of the superior court. This disposes of all the points made by defendant on this appeal.

The judgment is affirmed.

We concur: VAN DYKE, J.; SHAW, J.

BEATTY, C. J. I concur in the judgment and generally in the opinion of the court. As to the effect of the call or assessment of October 27, 1899, if a cause of action had accrued to the corporation by reason of the call alone, I think the statute of limitations would have commenced running at the date of delinquency fixed by the resolution; and, if it had once commenced running, I do not think the subsequent rescission of the call would have extended the time for commencing the action. But it requires something more than a mere call to establish a right of action under the statute. The call must be followed by a resolution to proceed by action regularly adopted after the assessments have become delinquent. Until the adoption of such a resolution no stockholder can be sued. This was the point, and the only point, decided in Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383, as will more clearly appear from the department decision reported in 60 Pac. 776, where the facts are more clearly stated. Until the resolution to proceed by action is adopted, the whole matter remains, as it was before, in the discretion of the trustees, and they may either rescind the first call and afterwards adopt another, or complete their right of action under the first call by resolving to enforce it by that method. It may be added that, if the statute had been set in motion at the date of the first call in October, 1899, the action was not barred by subdivision 1 of section 338 of the Code of Civil Procedure, and it is by no means clear that this is not an action upon a statutory liability within the meaning of that section. Besides what is said in the opinion of the court in regard to the effect of the repeal of the bank commissioner's act, I am of the opinion that it was beyond the power of the Legislature, by the repeal of that act, to destroy the only remedy available to the creditors of the corporation for the enforcement of their contract rights.

I concur: HENSHAW, J.

145 Cal. 694

McGARRIGLE v. ROMAN CATHOLIC ORPHAN ASYLUM OF SAN FRANCISCO. (S. F. 2,889.)*

(Supreme Court of California. Jan. 7, 1904.)

DEEDS — LIFE ESTATE—REMAINDER—RECITAL—CONSTRUCTION—WORDS INOPERATIVE TO CONVEY INTEREST.

1. Where a deed conveying a life estate in lands recited that it was the "purpose" of the grantor that after the death of the grantee the land "shall become and be the property of R.," the recital was insufficient to convey any interest to R., and a reversion was left in the grantor after the life estate.

Department 2. Appeal from Superior Court, Sonoma County; Albert G. Burnett, Judge.

Action by Thomas McGarrigle against the Roman Catholic Orphan Asylum of San Francisco. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

J. M. Thompson and C. H. Pond, for appellant. D. C. Murphy and John L. Seawell (Frank J. Sullivan, of counsel), for respondent.

HENSHAW, J. This action was to quiet title to 42 acres of land in the county of Sonoma. Cordelia Jones during her lifetime conveyed an estate in the land in question to the plaintiff, who was her nephew. Subsequently Cordelia Jones died, and in the probate of her estate this land was distributed to Catherine McGarrigle, the mother of this plaintiff, subject to a life estate in plaintiff. Thereafter Catherine McGarrigle conveyed her fee to plaintiff, who instituted this action. Defendant and appellant claims by the deed above referred to from Cordelia Jones to the plaintiff, and the construction of that instrument is determinative of this case. It was in language as follows:

"This indenture, made this 10th day of February, in the year of our Lord one thousand eight hundred and ninety-nine, between Cordelia Jones of Sonoma county, state of California, the party of the first part, and Thomas McGarrigle of the same place, the party of the second part.

"Witnesseth, that the said party of the first part, for and in consideration of the sum of love and affection and one dollar money of the United States of America, to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, conveyed and confirmed, and by these presents does grant, bargain and sell, convey and confirm unto the said party of the second part, during his lifetime, all that certain lot, piece or parcel of land situate, lying and being in the township of Santa Rosa, county of Sonoma, state of California, and bounded and particularly described as follows, to wit: [Here follows description.]

"*It is the purpose of the party of the first part by this deed, that after the death of the said party of the second part, the said described lands shall become and be the property of the Roman Catholic Girls' Orphan Asylum of San Francisco*, state of California."

It is upon the italicized portion of this conveyance that appellant relies, but we are of opinion that the trial court correctly construed this clause as containing no operative words of grant, and as failing to convey any present interest in the property. It will be noted that the appellant is nowhere mentioned as a grantee in the deed, and that the language of the clause itself is but an expression of the grantor's purpose in the future disposition of the property. It left in her a reversion after the life estate to Thomas McGarrigle, which required some future conveyance, or some testamentary disposition, to effectuate its transfer to the orphan asylum. But not only was there a failure of operative words to convey to the asylum, but no present interest can be said to pass under the language which was employed. It is fundamental that, while possession or enjoyment of an estate may be deferred, a deed, to be operative, must pass a present interest. This was not done by the instrument in question. The express purpose was —giving to it its fullest effect—that the land should become the property of the orphan asylum after the death of McGarrigle, but should not become its property before. Such attempted dispositions have been uniformly held to be inoperative in deeds. Bigley v. Souvey, 45 Mich. 370, 8 N. W. 98; Leaver v. Gauss, 62 Iowa, 314, 17 N. W. 522; Reed v. Hazelton, 37 Kan. 321, 15 Pac. 177; Sperber v. Balster, 66 Ga. 317; Pinkham v. Pinkham, 55 Neb. 729, 76 N. W. 411; Cunningham v. Davis, 62 Miss. 366; Donald v. Nesbitt (Ga.) 15 S. E. 367.

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*Rehearing denied January 6, 1905.

The judgment and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

145 Cal. 736

PEOPLE v. WARD. (Cr. 1,133.)

(Supreme Court of California. Jan. 12, 1905.)

FALSE PRETENSES — CORPUS DELICTI—CHARACTER OF EVIDENCE REQUIRED—CRIMINAL LAW —INSTRUCTIONS TO ACQUIT—APPEAL—MATTERS PRESENTED FOR REVIEW.

1. The refusal of a motion at the close of the people's evidence to instruct the jury to acquit is the subject of an exception under Pen. Code § 1170, subd. 3, authorizing an exception to the decision of any question of law not a matter of discretion, or to a charge to the jury, and may be reviewed on appeal from the judgment under section 1259, providing that on an appeal from a judgment the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment, and on such appeal the question of the sufficiency of the evidence to sustain the verdict is presented for review.

2. The elements necessary to establish the corpus delicti of the crime of obtaining money under false pretenses, as defined by Pen. Code, § 532, are false statements adapted to the fraudulent purpose, and money parted with upon the faith of such statements.

3. The corpus delicti necessary to establish the crime of obtaining money under false pretenses must be proved by evidence independent of the extrajudicial confessions or admissions of defendant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1226.]

4. Although Pen. Code, § 1118, only authorizes the court to advise the jury to acquit, and provides that they shall not be bound by his advice, yet, where there is no competent evidence of the corpus delicti, so that it becomes the duty of the court to advise an acquittal, the fact that counsel, moving orally at the close of the people's case, uses the word "instruct," instead of "advise," does not justify a denial of the motion.

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

M. T. Ward was convicted of obtaining money by false pretenses, and appeals. Reversed.

Emmet H. Wilson, for appellant. U. S. Webb, Atty. Gen., and **J. C.** Daly, Dep. Atty. Gen., for the People.

BEATTY, C. J. The defendant was convicted on a charge of obtaining money by false pretenses (Pen. Code, § 532), and appeals from the judgment, as well as from the order denying his motion for a new trial. In support of his appeal from the order he makes the point that the evidence in the record is not sufficient to sustain the conviction. This is practically conceded by the Attorney General, but he objects to any consideration of the point because the record does not disclose the grounds of the motion, and therefore we cannot know that it was based either wholly or in part upon the alleged insufficiency of the evidence.

The motion which was filed by the defendant is not included in the bill of exceptions, but it seems that the clerk, in entering the order denying a new trial, inserted in his minutes, and in immediate connection with the order, a full copy of the motion, and it is certified to us in that form; that is to say, as a part of the minutes of the proceedings upon the motion. The contention seems to be that, since it is not the duty of the clerk to record anything but the order, his statement of the grounds of the motion must be disregarded, and that, under rule 29 of this court (64 Pac. xii), they can never be considered except when set out in a bill of exceptions. It is doubtful whether this rule applies. It has been held not to apply to the order appealed from, or to anything appearing on the face of the record of the order. Miller v. Lux, 100 Cal. 612, 35 Pac. 345, 639. But probably the statute does. At least, we are not prepared to say that a defendant in a criminal cause, seeking a review of an order denying him a new trial on the ground that the verdict is unsupported by the evidence, can be excused from showing by his bill of exceptions that he moved on that ground. For, unless that is one of the grounds of his motion, and shown to be so by his bill of exceptions, the attention of the court and of the district attorney is not called to the necessity of setting out the evidence by amendment where material evidence has been omitted from the bill as proposed; and this court, under such circumstances, might feel constrained to presume that there was other evidence introduced at the trial sufficient to cover any deficiencies apparent in the record. These questions, however, do not require to be decided in the present case, for, conceding that the evidence cannot be reviewed on the appeal from the order, the question of its sufficiency to sustain the verdict is presented by the appeal from the judgment.

When the prosecution rested, the defendant moved the court to instruct the jury to acquit. The motion was denied, and the defendant excepted. This ruling clearly involved the whole merits of the case, and necessarily affected the judgment. It is therefore reviewable on appeal from the judgment (Pen. Code, § 1259), and was the subject of an exception under subdivision 3 of section 1170. It was also an exception which, equally with a motion for a new trial on the ground of insufficiency of the evidence, gave notice to the judge and the district attorney that, if there was competent evidence to sustain the charge, they must see to it that the bill of exceptions, as settled, must show the fact. We are therefore justified in assuming in this case that, if the evidence in the record fails to support the verdict, then the evidence adduced at the trial was equally deficient.

The charge was obtaining money by false pretenses. The elements of this crime necessary to the establishment of the corpus delicti are false statements adapted to the fraudulent purpose, and money parted with upon the faith of such statements. As in other cases, the corpus delicti must be proved by evidence independent of the extrajudicial confessions or admissions of the defendant. People v. Simonsen, 107 Cal. 345, 40 Pac. 440. this case there was no substantial evidence of the falsity of the statements alleged to have been made by the defendant, aside from the testimony of witnesses as to his admissions. And this made it the duty of the court, upon request of the defendant, to advise the jury to acquit. It is true that in making his motion he used the word "instruct," instead of "advise," and it was held by this court in the case of People v. Daniels, 105 Cal. 266, 38 Pac. 720, not to have been an error to refuse an instruction in writing, similarly worded, because section 1118 of the Penal Code only authorizes the judge to advise the jury to acquit when he deems the evidence insufficient to warrant a conviction. The distinction between the right of the judge to advise a verdict of acquittal and the power to compel a verdict is, of course, an important one, in some aspects of the question, and was important in the case of People v. Horn, 70 Cal. 18, 11 Pac. 470, which was cited as authority in the case of People v. Daniels. But if the case is such that it is the duty of the court to advise an acquittal upon the ground that there is no evidence of the corpus delicti of a character absolutely required by the law to sustain a conviction, the fact that counsel, moving orally at the close of the people's case, uses the word "instruct," instead of "advise," does not justify a denial of the motion. To say that it does is to sacrifice substantial justice to a mere form. In People v. Jones, 31 Cal. 571—a well-considered decision frequently cited in later cases, and never disapproved—it was held that in such a case the court should instruct the jury that the corpus delicti was not proved. This case was not cited or referred to in People v. Daniels, though much more directly in point than People v. Horn, where the question under consideration was the effect of a former acquittal by a jury that had been instructed to acquit.

In People v. Lewis, 124 Cal. 553, 57 Pac. 470, 45 L. R. A. 783, Justice Temple, in a case of conflicting evidence, and where the evidence was amply sufficient to sustain the conviction, expressed the opinion that the refusal of the judge to advise an acquittal was not the subject of an exception, but that statement was not necessary to his conclusion, and was not the ground of decision. We approve the doctrine of People v. Jones, that, when there is a clear failure of proof upon a material allegation of the charge, the defendant has a right to demand an instruction to the jury that there has been such failure of proof, and the fact that he moves for an instruction to acquit does not relieve the court of the duty of doing what the court in such case may do, i. e., advise an acquittal.

The judgment is reversed, and cause remanded.

We concur: LORIGAN, J.; HENSHAW, J.

We concur in the judgment: ANGELLOTTI, J.; McFARLAND, J.; VAN DYKE, J.

SHAW, J. I dissent. I think the judgment should be affirmed, for the reason that under the decisions in People v. Daniels, 105 Cal. 266, 38 Pac. 720, and People v. Lewis, 124 Cal. 553, 57 Pac. 470, 45 L. R. A. 783, the record presents no question for review by this court.

145 Cal. 730

GUTIERREZ et al. v. WEGE. (L. A. 1,640, 1,641.)*

(Supreme Court of California. Jan. 11, 1905.)

WATER COURSES—USE OF WATER—SUFFICIENCY OF EVIDENCE—COSTS—DISCRETION OF COURT.

1. Where the evidence was undisputed that defendant had never used all of the water flowing from a spring on his premises during certain months in each year, a finding that he is entitled to the sole and exclusive use of all of such water is unwarranted.

2. Where the upper riparian owner has lawfully used all the water of a stream during certain seasons of each year for more than five

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*Rehearing denied in 1,640 February 9, 1905.

years, he cannot be restrained from continuing such use.

3. A decree that neither party recover costs is within the equitable discretion of the trial court.

Commissioners' Decision. Department 2. Appeal from Superior Court, Ventura County; Felix W. Ewing, Judge.

Action to quiet title by Soledad Gutierrez and others against Henry Wege. From a decree rendered, both parties appeal. Reversed.

G. H. Gould and W. R. Edwards, for plaintiffs. H. L. Poplin, for defendant.

GRAY, C. This action is brought to quiet title to the waters of Casitas creek, a small stream having its rise in a spring on the land of defendant, and flowing for some distance into the adjoining land of plaintiffs. The judgment in the case is as follows: "(1) That the defendant owns and is entitled to the sole and exclusive use of all the waters flowing from that certain spring situate upon the N. W. ¼ of the S. W. ¼ of section 29 described in defendant's amended answer, and to all waters flowing in said Casitas creek above the reservoir situated near the south line of said land, and in the bed of said creek; (2) that, of the waters arising and flowing in said creek below said reservoir, the plaintiffs, as riparian owners, are entitled to $^{40}/_{41}$ thereof, and the defendant. as riparian owner, is entitled to the remainder; (3) that the defendant and his agents and employés are perpetually restrained and enjoined from hereafter obstructing or polluting in any wise the said Casitas creek below said reservoir; and (4) that neither party recover his costs or disbursements in this action." There are two appeals before us from this judgment. The plaintiffs appeal from the first paragraph thereof, and defendant appeals from the second, third, and fourth paragraphs. We are of opinion that the first paragraph of the judgment, wherein it is decreed that the defendant "owns and is entitled to the sole and exclusive use of all the waters," etc., is not warranted by the evidence taken at the trial.

Something upwards of five years before the commencement of the action, defendant had constructed a reservoir on his land in the channel of the creek in question, through which ran the waters from the spring. From this reservoir he had constructed small ditches on each side of the creek, through which he conveyed water for the purpose of irrigating a few acres of his land—not more than four or five acres at the outside. Defendant had also dug out the spring, and developed more water than naturally flowed from it. He had also laid pipes from the spring to his house, and by that means conducted water thereto for domestic use. He had also been accustomed to water horses and cattle at the creek below the reservoir, and perhaps above it. The evidence, however, failed to show that he had used all the water flowing in the spring and stream above the reservoir at all times for a period of five years prior to the commencement of the action. The defendant himself testified that "there was water sometimes that I did not use at all during the months of August and September." The defendant's wife testified, in speaking of her husband's use of the water: "He only used the water two different periods of the year. When he is not using it for irrigation, it runs in the creek." The foregoing evidence is undisputed, and is inconsistent with the finding of the court to the effect that for more than six years the defendant had adversely diverted and used all the waters of the spring and creek above the reservoir. Indeed, the evidence goes no farther than to show that the defendant had been making such reasonable use of the water for domestic purposes and for irrigation as he was entitled to do by reason of his being a riparian proprietor. The riparian owner, so long as his use of the water is within his rights as such riparian owner, gets no right or interest in the water additional to his riparian interest, even though such use extend for a period beyond five years. A use of the water strictly within his legal rights, and with which no other person has a right to interfere, cannot be called an adverse use for the purpose of conferring a property right or ownership in the water, under the statute of limitations. It is clear, then, that the defendant was not the owner of the water by adverse use. It is also plain that he was not the "owner" or entitled to the "exclusive use" of the water by virtue of being a riparian proprietor. As such riparian owner, the water was parcel of the land, and he, as against other riparian owners, was entitled only to a reasonable use of the water upon the riparian lands, with no power to convey it elsewhere to the detriment of the riparian owner below him on the stream. Even if we were to admit that the defendant had acquired a right as against the lower riparian proprietor by adverse use, still that right would be measured by the use that the water had been put to, and the defendant here would still not be the absolute owner of the water, to do with it as he pleased, nor would he be entitled to the use of it to any greater extent than he had already used it. This is illustrated in the recent case of Southern California Investment Company v. Wilshire (Cal.) 77 Pac. 767. Nor can it be said that the defendant owns "all the waters" flowing above the reservoir by reason of the fact that the waters of the spring percolated in the soil, and the flow therefrom had been increased by digging out the spring.

It must be admitted, from the record, that before the defendant worked upon this spring at all the waters found their way in some measure, at least, from the spring to the channel of the creek, and flowed down the latter to plaintiffs' land. It may be that the fact that the defendant, as a riparian proprietor, had worked upon the spring and increased its flow, would entitle him to a greater portion of the water, on a fair division of the same, than would otherwise fall to his lot. But he certainly did not, by increasing the flow, become the owner of all the flow. Nor was he the owner in any sense except as a riparian proprietor of any water which naturally found its way from the spring to the creek. And this is so whether the water percolated directly into the creek through the soil, or reached the creek in one or more running streams. The spring supplying the stream was itself a part of the stream, and the defendant had the same right in the spring as, and no greater right therein than, he had in the stream below. He had no different or better right to cut off the water in the spring or above the spring than he had to cut it off or divert it from the stream. Any interference with the supply of the stream was an interference with the lower riparian owner's right to have the water continue to run in the stream to his land. The defendant was entitled only to a reasonable use of the waters of all parts of the stream, including the spring. The part of the judgment complained of gives him more than this, and is wrong.

The appeal of the defendants is also well founded, at least in part. It is not consistent with the law of riparian rights in this state to enjoin a riparian owner from "obstructing in any wise" the riparian stream. It is necessary that he should "obstruct" it in some measure, at least, in order to make any use of the water, either for irrigation or for domestic or house use. At certain stages of so small a stream as this, even the watering of a few cattle might consume the entire stream, and thus obstruct and prevent the flow thereof down to plaintiffs' land. It has been said by this court that an upper riparian owner cannot consume the entire stream to the detriment of a lower landowner on such stream. And this, as a general rule, is undoubtedly correct, but it has its limitations. When the flowing stream, if all allowed to remain in the channel, will not reach the lands of the lower proprietor, the lower proprietor cannot be justly called a riparian proprietor at all. There is no stream of water flowing or that would flow through his land if left unobstructed. Hence he cannot be injured, and cannot be heard to complain, if the proprietor above him diverts or consumes all the water that he finds running on his own land. Again, a stream running through two pieces of land might be of such a character that, if the upper riparian owner made any use of it at all, it would be rendered useless to the owner lower down on the stream. Under such circumstances, we do not think that the upper owner should be deprived of all use, that the lower owner or owners may have some use of it. We think it should be conceded that there are some circumstances under which the upper riparian proprietor may divert and consume the entire stream for a time, at least, without committing any actionable wrong against the lower proprietors. In this class of cases the decree of the court should be made to fit the stream that it applies to, and, as a general rule, when the stream is small the parties can best be served by giving them the alternate use of the entire stream. The stream in this case was less than two miner's inches on the land of plaintiff, by actual measurement, when all the water from every source was flowing into it. The evidence shows that during the irrigation seasons or periods the defendant had been accustomed to take and use all the water flowing down to his reservoir in the stream, and that he had been doing this for a period of upwards of five years. Of course, he is entitled to continue this use. It is impossible, however, to frame a decree on the evidence before us, as it does not show the extent or duration of these periods of irrigation, when they begin, and when they end. The stream in this case, together with the various springs supplying it, should have been treated as a unit, instead of being divided into the waters above and the waters below defendant's reservoir. An equitable division of the entire water between the parties is the only practical solution of the case. The evidence in the case, however, is so uncertain and incomplete that no decree of practical benefit to the parties can be based upon it.

The part of the decree that neither party recover costs was a matter within the equitable discretion of the trial court. Section 1025, Code Civ. Proc.; Abram v. Stuart, 96 Cal. 235, 31 Pac. 44. But inasmuch as the case must go back for another trial, it is unnecessary for us to determine here whether the discretion was properly exercised.

We advise that the entire judgment be reversed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the entire judgment is reversed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

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144 Cal. 256

SIMMONS v. ZIMMERMAN et al. (L. A. 1,424.)

(Supreme Court of California. July 27, 1904.)

VENDOR AND PURCHASER—CONTRACTS—ASSIGNABILITY—VALIDITY OF TITLE—DETERMINATION—ESTOPPEL.

1. Where an option contract for the sale of real estate ran to the grantee, and to his heirs and assigns, it was subject to assignment, notwithstanding it contained a provision that the grantee should be the exclusive judge as to whether the title of the property in question was free from defects, incumbrances, etc., and as to whether or not he was willing to accept the same.

2. Where the grantors under an option contract for the sale of real estate, providing that

the grantee should be the exclusive judge as to the validity of the title, furnished an abstract of title to the grantee's assignee, with notice of the assignment, in order to enable such assignee to pass on the validity of the title, the grantors were estopped to deny the assignability of the stipulation relating to the examination of the title, as well as all other portions of the contract.

In Bank. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Sidney A. Simmons against Mrs. H. P. Zimmerman and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The following is the opinion in department, referred to in the dissenting opinion:

"COOPER, C. Action to recover $500 deposit made by plaintiff's assignor on agreement for sale of land by defendants. Plaintiff recovered judgment, from which defendants appeal on the judgment roll.

"The facts are found as alleged in the amended complaint. The court overruled defendants' demurrer to the said complaint, and, as the findings are no broader than the allegations of said complaint, the ruling upon the demurrer becomes the material question on this appeal. The said complaint states, in substance: That on the 25th day of January, 1902, one Lyttle and defendants entered into a written contract for the sale by defendants to said Lyttle of the lot described in said contract for the sum of $6,500, of which sum the $500 in controversy was paid to defendants as a deposit, the time of Lyttle's option to purchase under the contract being three months from February 1, 1902; that upon Lyttle giving notice to defendants that he was willing to purchase, the defendants should furnish for his examination a certificate of title of said lands, made by some reputable abstract company. Lyttle assigned his interest in the contract to one West, and West gave notice that he was willing to purchase said lands according to the terms of the contract. Thereupon defendants had made and delivered to West the proper certificates or abstract of title. The contract provided: 'The first party shall have twenty days after the delivery of said certificate of title to him, as aforesaid, within which to examine and approve or disapprove the title to said property as shown by said certificate, and the first party shall be the exclusive judge as to whether or not the title to said lands and premises is free and clear of and from all defects, liens, incumbrances, taxes, and assessments whatsoever, and as to whether or not he is willing to accept the same. In the event said first party does not give notice that he will purchase said lands and premises as aforesaid, then the said sum of ($500) five hundred dollars, the consideration for this agreement, shall be forfeited to said second party as liquidated damages; but if the said first party shall give such notice and shall accept said certificate of title, then said sum shall be credited on account of the purchase price of said land and premises, and if the title to said land and premises shall be rejected by first party, then the said sum shall be returned to said party of the first part.' It is alleged and found that Lyttle made the assignment to West on the 10th day of April, 1902, for a valuable consideration; that West assigned to plaintiff on the 12th day of May, 1902, and that plaintiff is the owner of the said contract, and all rights thereunder, by reason of said assignment; that on the 1st day of May, 1902, the defendants furnished to West the certificate of title made by the abstract company, and thereafter, 'on the 20th day of May, 1902, this plaintiff duly notified said defendants that he rejected and disapproved of the title to said land and premises as shown by said certificate, and that he refused to accept said certificate of title or said title, and disapproved of the same,' and demanded a return of the said $500.

"There is no allegation that the title was in any manner defective, nor that there were any liens or incumbrances of any kind existing upon the premises. The plaintiff places himself and his rights squarely upon the proposition that the contract made the party of the first part (Lyttle) the exclusive judge as to whether or not the title was defective, and as to whether or not 'he was willing to accept the same.' It is 'so nominated in the bond' that Lyttle, the party of the first part, is to be such exclusive judge. The courts generally hold that parties have the right to make any contract which is not unlawful nor against public policy. They have the right to provide for an arbitrator, whose decision, in the absence of fraud, shall be final. They have the right, in making a contract for the sale of lands, to make an attorney or any one else the exclusive and final judge as to whether or not the title is defective. In such case the courts are inclined to leave the parties to abide by the contract as they have made it, and not to make a different one for them. Church v. Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207; Allen v. Pockwitz, 103 Cal. 85, 36 Pac. 1039, 42 Am. St. Rep. 99; Flanagan v. Fox (Com. Pl.) 23 N. Y. Supp. 48; Averett, Trustee, et al. v. Lipscombe, 76 Va. 404; Hudson v. Buck, 7 Chan. Div. 683, 23 Eng. Reps. (Moak's Notes) 808; cases cited in notes to Church v. Shanklin (Cal.) 17 L. R. A. 207. But in this case the $500 was to be returned only when the title had been rejected by Lyttle. He was the party specially selected to pass upon the title, and to be the exclusive judge as to whether or not he was willing to accept the same. As plaintiff has invoked the aid of the contract, he must be held to it himself. He does not allege that Lyttle ever examined the certificate of title or rejected it. The conditions upon which the $500 was to be returned have never occurred.

"Plaintiff alleges that he refused to accept and rejected the title. But he had no authority, under the contract, to pass upon the title, nor to reject it. Defendants never agreed that he should do so. They may have been perfectly willing that Lyttle should pass upon the title. They may have had special confidence in his legal ability, his honesty and moral character, and in such degree that they felt assured that he would do nothing except what was right, and that he would not reject the title unless there was a valid reason for so doing. They might have had no such confidence in any other person. Lyttle may have concluded that the title was all right, but that he had made a bad bargain, and would forfeit the $500. Plaintiff may have purchased the contract on speculation. He avers in his complaint that the right to the moneys deposited, and to demand, sue for, and receive the same, was assigned to him before commencing the action. If he means by this that he procured the assignment for the purpose of bringing the suit upon a doubtful claim, in such case the court would not aid him. Sanborn v. Doe, 92 Cal. 153, 28 Pac. 105, 27 Am. St. Rep. 101. The agreement to purchase the land of defendants could be assigned. Such assignment of the contract, with all the rights thereunder, would have carried the right to recover the $500 in case the title should in fact prove to be defective. It did not carry the right of making plaintiff the exclusive judge of the title instead of Lyttle. Defendants never agreed that Lyttle or his assignee should be the exclusive judge of the title. The assignment of the contract did not carry with it, as an incident, a contract that was never made. Defendants never consented to make plaintiff a judge of the title. The essence of the stipulation in the original contract that Lyttle should be the exclusive judge of the title was the personal confidence placed in him, and that he should personally pass upon the title. Where a contract provides for services of a personal nature, involving the peculiar fitness or ability of the party to perform the services, such contract as to such services cannot be assigned to one party without the consent of the other. The contract in such case is made by reason of the trust and confidence placed in the person selected. Personal performance is of the essence of the contract, and such contract cannot be assigned by one party, so as to bind the other to a different contract from that which he made. British Wagon Co. v. Lee & Co., 5 Queen's Bench Div. 149; Sloan v. Williams et al., 138 Ill. 46, 27 N. E. 531, 12 L. R. A. 496; Devlin v. Mayor et al., 63 N. Y. 17; Burrill on Assignments (6th Ed.) note 5, p. 105; La Rue v. Groezinger, 84 Cal. 285, 24 Pac. 43, 18 Am. St. Rep. 179. In the latter case this court said: 'Although the language may not show an intention that the contract should not be assigned, yet the nature of the case may be such that performance by another would be an essentially different thing from that contracted for.'

"We advise that the judgment be reversed, with directions to the lower court to sustain the defendants' demurrer to the amended complaint, and to allow the plaintiff a reasonable time to amend.

"We concur: CHIPMAN, C.; GRAY, C.

"For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the lower court to sustain defendants' demurrer to the amended complaint, and to allow the plaintiff a reasonable time to amend: HENSHAW, J.; LORIGAN, J.; McFARLAND, J."

Purrington & Adair, for appellants. Frank James, for respondent.

VAN DYKE, J. The appeal is from the judgment in favor of the plaintiff upon the judgment roll alone. The action is to recover $500 deposit paid by the assignor of the plaintiff on an agreement for the sale of land by the defendants. The amended complaint sets out the agreement in full. It was entered into the 25th day of January, 1902, between B. F. Lyttle, of Los Angeles, as the party of the first part, and Mrs. H. P. Zimmerman and H. P. Zimmerman, her husband, of the county of Riverside, the party of the second part. The party of the second part to the agreement, in consideration of $50 paid to said party, "does hereby grant and give to said first party, and to his heirs and assigns, for the period of (7) seven days, the sole and exclusive right of purchasing the following lands and premises, represented to be owned in fee simple by said second party, and to be free and clear of all incumbrances, liens, taxes, assessments, and defects whatsoever, and situated in said county of Riverside, and more particularly described as follows, to wit." Then follows a description of the premises. "It is further agreed that upon the payment by the first party of the further sum of four hundred and fifty dollars ($450) this agreement shall be extended (3) three months from February 1st, 1902. * * * Upon the first party giving notice to the second party that he is willing to purchase said lands and premises, the second party shall, within thirty (30) days thereafter, furnish to first party, for his examination and approval or disapproval, a certificate of title of said lands and premises, made by some reputable abstract company of said county of Riverside, to be selected by said first party, and to be paid for by said second party. The first party shall have twenty days after the delivery of said certificate of title to him, as aforesaid, within which to examine and approve or disapprove the title to said property as shown by said certificate, and the first party shall be the exclusive judge as to whether or not the title to said lands and premises is free and clear of and from all defects, liens, incumbrances, taxes, and assessments whatsoever, and as to whether or not he is willing to accept the same. In the event said first party does not give notice that he will purchase said lands and premises as aforesaid, then the said sum of ($500) five hundred dollars, the consideration for this agreement, shall be forfeited to said second party, as liquidated damages; but if the said first party shall give such notice and shall accept said certificate of title, then said sum shall be credited on account of the purchase price of said lands and premises, and if the title to said lands and premises shall be rejected by first party, then the said sum shall be returned to the said party of the first part." It is alleged in the complaint that upon the execution of the agreement said Lyttle paid to the defendants the sum of $50, as in said agreement recited, and thereafter, on the 30th day of January, 1902, paid the further sum of $450, and thereupon said agreement became and was extended for the period of three months from and after February 1, 1902. That on the 10th day of April, 1902, the said Lyttle, for a valuable consideration, granted, assigned, and transferred to one William F. West all his right, title, interest, and estate in and to the said agreement, and on the 25th day of April, 1902, the said West, who was then and there the owner of the interest and the estate of said B. F. Lyttle, as aforesaid, duly notified the said defendants that he was willing to purchase the lands and premises described in said agreement, and for them to furnish to him, for his examination and approval or disapproval, a certificate of title to said lands and premises, to be made by the Riverside Abstract Company. Thereafter, on the 6th day of May, 1902, the said defendants furnished to said William F. West the said certificate of title made by said abstract company, and that on the 12th day of May, 1902, the said William F. West, for a valuable consideration, granted, assigned, and transferred to the plaintiff all his right, title, interest, and estate in and to the said agreement, and that the plaintiff is the owner and holder of all the said interest and estate. That thereafter, on May 26, 1902, the plaintiff duly notified said defendants that he rejected and disapproved of the title to said lands and premises as shown by said certificate, and that he refused to accept said certificate of title, or said title, and disapproved the same, and thereupon on said day demanded of said defendants, and each of them, that they pay and return to him the said sum of $500 so deposited, as aforesaid, but that the said defendants then and there refused, and still refuse, to pay the said sum, or any part thereof, and that the same is due and owing from said defendants to this plaintiff, together with interest thereon from the 20th day of May, 1902.

Defendants demurred to the amended complaint upon the ground that it does not state facts sufficient to constitute a cause of action. This demurrer being overruled, they answered the same. The findings of the court are substantially as the facts are alleged in the amended complaint. It is further found that defendants, upon the completion of the certificate of title requested by West, "knowing that said West had succeeded by assignment to the interest and estate of said Lyttle in the said agreement, as aforesaid, forwarded the said certificate of title by mail to said West, addressed to him at the said city of Los Angeles, state of California," but that the said West did not receive the same until the 6th day of May, 1902, and that within 20 days after the receipt and delivery of said certificate, as aforesaid, the plaintiff rejected the title to said lands and premises, and disapproved of the same, and personally notified the defendants thereof.

The main contention on the part of the appellants is that the rejection of the title and the demand for the return of the $500 could be made by one person only, to wit, B. F. Lyttle. Counsel in his brief says: "By the specific terms of the contract, Lyttle was made the 'exclusive judge' as to whether or not the title was clear, and as to whether or not he was willing to accept the same, and this exclusive right was not, and in the nature of things could not be, assignable without the consent of the appellants." This view was adopted by the department in its opinion, and upon that ground the judgment of the court below reversed. A rehearing, however, was granted for the reason that this view of the nature of the contract in question by the department was deemed to be erroneous. The contract in question by its terms was made assignable, but without this provision it is an obligation of such a character that it may be transferred by the owner, or upon his death would pass to his representatives. Civ. Code, § 954. "A right arising out of an obligation is the property of the person to whom it is due, and it may be transferred as such." Civ. Code, § 1458. The agreement, it will be seen, runs to the first party, his heirs and assigns, but it is contended by the appellants that the portion conferring the right to pass upon the title is personal in its nature, and is limited to Mr. Lyttle himself. There is nothing in the nature of the contract to justify this assumption. Suppose Mr. Lyttle had died. It would hardly be contended that the contract, and every portion of it, with all the benefits conferred therein, would not have succeeded to and been vested in his legal representative. There is nothing in the nature of the transaction or in the terms of the contract to justify the assumption that any peculiar trust or confidence was reposed in Mr. Lyttle alone, or that his successor in interest would not be as capable of passing on the title and governed by like fairness and good faith in the matter as he would. In La Rue v. Groezinger, 84 Cal. 287, 24 Pac. 44, 18 Am. St. Rep. 179, it is said: "And while it is to be conceded that men have perfect liberty to contract with whom they choose, and to exclude the idea of performance by another, yet, in the absence of anything indicating such an intention, we do not think that the court should indulge in speculation as to possible prejudice or fancied preference. It should not be assumed that the parties were influenced by unusual or conjectural motives merely because some men might be so affected under sumilar circumstances." And again, "If the language [of the contract] does not exclude the idea of performance by another, and the nature of the thing contracted for or the circumstances of the case do not show that the skill, credit, or other personal quality or circumstance of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract, then the contract is assignable." In Rued v. Cooper, 109 Cal. 682, 34 Pac. 98, it is said: "Assignability of things in action is now the rule, nonassignability the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage." The complaint alleges that the court finds that the agreement to purchase was for a valuable consideration assigned by Lyttle. This means not assigned in part only, but as a whole, and it is an important portion of the agreement that the purchaser had the right to pass upon the title. If by the agreement, as contemplated, the purchaser had the right, for value, to assign the contract, as he clearly had in this case, it would be a strange condition of things that his assignee, after paying full value, should still be at the mercy of the assignor in reference to this portion of the contract, to wit, the title of the premises in question. But the defendants themselves evidently did not understand the contract to mean what is contended for by their counsel on the appeal. They understood that the assignment by Lyttle to West, of which they had notice, carried with it all the right, title, and interest of every nature formerly held by Lyttle, and it is said in the finding of the court that "said defendants, knowing that said West had succeeded by assignment to the interest and estate of said Lyttle in the said agreement, as aforesaid, forwarded the said certificate of title by mail to said West, addressed to him at the said city of Los Angeles." Said West, about the time of its reception, had assigned the said contract, with all the right and title pertaining thereto, to the plaintiff. The defendants are therefore estopped to deny the assignability of the particular stipulation in reference to passing upon the title, as well as the other portions of the contract in question. Hanna v. Wahlberg, 128 Cal. 407, 60 Pac. 1035.

It is quite true, as claimed by appellants, that the right conferred upon the purchaser to pass upon the title does not imply that he thereby possessed the arbitrary right to unreasonably and in bad faith reject the title, but it will not be presumed that the plaintiff in this case acted in bad faith in rejecting the title, but that he did so because it was defective and not marketable. The answer of defendants does not allege that the title was perfect, or good, or marketable, nor is it anywhere intimated that the plaintiff, in rejecting the same, was not justified in doing so, or that he acted in bad faith; and it is alleged, and the court finds, that within 20 days after the receipt and delivery of the said certificate of title, the plaintiff rejected the title to said lands and premises, and disapproved of the same, and on said day personally notified defendants thereof. This was in strict compliance with the terms of the contract, and it results that the plaintiff was thereupon, as the successor of Lyttle, entitled to recover the sum deposited.

Judgment affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

We dissent, and adhere to the opinion heretofore delivered in department: McFARLAND, J.; HENSHAW, J.

146 Cal. 25

NEUMANN et al. v. MORETTI. (S. F. 3,948, 3,960.)*

(Supreme Court of California. Jan. 20, 1905.)

LANDLORD AND TENANT — LEASES—SECURITY—CANCELLATION—PLEADING—JOINT DEMURRER—EVIDENCE—FINDINGS—JUDGMENT—APPEAL.

1. Where a demurrer was filed to an answer and counterclaim by both plaintiffs jointly, the demurrer would be overruled if the answer stated a defense or counterclaim against either of the plaintiffs.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 463.]

2. Where, in a suit for wrongful eviction from leased premises and to cancel a note and mortgage given by a third person to secure performance of the lease, defendant denied most of the allegations of the complaint, and affirmatively alleged that at the time of making the lease, note, and mortgage the lessee agreed with defendant, as a part of the agreement of lease, that he would purchase all dairy products for the leased creamery from defendant, and that the mortgagor executed the note and mortgage as security for the performance of such agreement, and that the lessee owed defendant $1,700 for property so purchased, etc., for which judgment was demanded, such answer and counterclaim were not demurrable for want of facts.

3. In an action for wrongful eviction of a tenant and to cancel a note and mortgage given to secure performance of the lease, evidence *held* insufficient to support a finding that the mortgage was also given to secure performance of a collateral agreement by the lessee to purchase creamery supplies from the lessor.

4. Where, in a suit by a lessee for damages for wrongful eviction, and by the lessee's security to cancel a note and mortgage given to secure

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*Rehearing denied February 17, 1905.

the lessee's performance, judgment was rendered in favor of defendant, and the lessee appealed from the judgment only, without a bill of exceptions, it would be presumed as against him that sufficient evidence was admitted without objection to sustain the findings.

5. In a suit for wrongful eviction the lessee set out a written lease of the creamery, performance of which was secured by a note and mortgage of another, etc., and prayed a cancellation of the note and mortgage and for damages. Defendant denied most of the allegations of the complaint, and alleged that at the time of making the lease, note, and mortgage the lessee agreed to purchase supplies from defendant, and that the mortgagor executed the mortgage as security for such agreement, on which there was then due and unpaid $1,700, besides interest, for which judgment was demanded, etc. *Held*, that as against the lessee the pleadings were sufficient to support a judgment in favor of defendant.

Commissioners' Decision. Department 2. Appeals from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Paul Neumann and another against Louis Moretti. From a judgment in favor of defendant, both Paul and Fred Neumann appeal, and from an order denying a new trial Paul Neumann alone appeals. Affirmed as to Fred Neumann and reversed as to Paul Neumann.

Hugh R. Osborn and Benj. K. Knight, for appellants. Charles B. Younger, Jr., for respondent.

COOPER, C. These appeals are from the proceedings in the same case, and may be considered together. Defendant recovered judgment, and plaintiffs made a motion for a new trial, which was denied. Both plaintiffs appeal from the judgment, but Paul Neumann alone appeals from the order denying a new trial.

The complaint alleges that on the 12th day of November, 1902, the defendant executed to plaintiff Fred Neumann a lease of certain premises known as the "Seaside Creamery," in the city of Santa Cruz, for the term of one year from the 15th day of November, 1902, for the rent of $80 per month, from April 15, 1903, to October 15, 1903, and $55 per month for the remaining months of the term; that at the time of the execution of the lease Paul Neumann made and delivered to defendant his promissory note of even date for $300, payable one year after date, with interest at the rate of 10 per cent. per annum, secured by mortgage on certain real estate in the city of Santa Cruz, which mortgage was duly recorded; that said note and mortgage were given as security for the performance of the covenants of the lease on the part of Fred Neumann, and a written defeasance executed and delivered by defendant to Paul Neumann, which contained the following clause: "Now, this witnesseth that if Fred Neumann shall faithfully perform the conditions of that certain lease this day made by me to him I will surrender this note to said Paul Neumann and will cancel said mortgage;" that in May, 1903, the defendant unlawfully, and contrary to the provisions of the lease, ejected the said lessee, Fred Neumann, from the possession of the leased premises, and ever since has held possession thereof, to the damage of Fred Neumann in the sum of $500. Judgment is prayed that the lease, note, and mortgage be delivered up and canceled, that defendant be enjoined from disposing of the note, and for $500 damages in favor of Fred Neumann for being dispossessed of the leased premises.

To the complaint the defendant interposed a demurrer upon the ground, among others, that there was a misjoinder of plaintiffs and a misjoinder of causes of action. The demurrer was overruled, but, as judgment was finally entered in favor of defendant, it is not necessary to pass upon the demurrer here. It is not apparent that Fred Neumann has any interest in the cancellation of the note and mortgage, nor that Paul Neumann has any interest in the damages which Fred Neumann alleges that he suffered by reason of being dispossessed of the premises. Defendant denies most of the allegations of the complaint, and alleges affirmatively that at the time of making the said lease, note, and mortgage Fred Neumann agreed with defendant, as a part of the agreement of lease, that he would purchase all dairy products, milk, and supplies for the use of the business of the said Seaside Creamery from defendant; that the plaintiff Paul Neumann executed the note and mortgage as security for the performance of said agreement so made by Fred Neumann to purchase from defendant; that afterwards the defendant, at the request of plaintiffs, and each of them, and upon their express promise to pay therefor, did furnish and deliver to Fred Neumann milk, dairy products, and merchandise, for his use in said Seaside Creamery of the value of $1,700, and that plaintiffs have not paid the same, nor any part thereof. Judgment is prayed against plaintiffs, and each of them, for the sum of $1,700, besides interest. Plaintiffs demurred to the answer, and now urge that it does not state facts sufficient to constitute a defense or counterclaim. As the demurrer is general, and put in jointly by both plaintiffs, it must be held that the answer is sufficient if it states a defense or counterclaim against either of the plaintiffs. O'Callaghan v. Bode, 84 Cal. 495, 24 Pac. 269; Rogers v. Schulenburg, 111 Cal. 284, 43 Pac. 899. We cannot say that the answer did not state facts sufficient to constitute a defense or counterclaim as to either plaintiff. It states that the agreement as to purchasing supplies from defendant was made at the time of making the lease, and that the note and mortgage were made and given as security therefor. The court found in favor of defendant and against Fred Neumann as to the eviction, the damages alleged to have been caused by such eviction, and against both plaintiffs on the counterclaim of defendant to the extent of $1,625 for goods, supplies, and dairy products sold and delivered to Fred Neumann. The court further found, as against appellant Paul Neumann, that the note and mortgage were given as security for the sums that might become due for supplies to be furnished Fred Neumann by defendant; that the agreement made as to supplies and goods to be furnished to Fred Neumann was a part and parcel of the agreement to lease, and that the lease and agreement in fact constituted one contract, for which the note and mortgage were given as security. Judgment was ordered and entered that plaintiffs are not entitled to any relief, and that defendant recover judgment against plaintiffs, and each of them, for $1,625 and interest and costs of suit.

Paul Neumann claims that the findings herein specified are not supported by the evidence, and we are of the opinion that his claim is correct. The lease contains no mention of any contract or agreement respecting the furnishing of goods and products to Fred Neumann. The mortgage is an ordinary mortgage to secure the promissory note therein described, and contains not a word as to it being given as security for anything else. The defeasance made and signed by defendant provided that he would surrender the note and mortgage provided Fred Neumann "faithfully performed the conditions of that certain lease, etc." Defendant offered in evidence a written agreement made between himself and Fred Neumann as to the purchase and price of milk, butter, and dairy products from him by Fred Neumann. This contract contained the clause, "Said Neumann agrees to pay to said Moretti for all dairy products delivered to him as above in United States gold coin." While the contract is quite lengthy, and contains 10 independent paragraphs, not a word is said therein as to appellant Paul Neumann being liable for the products to be furnished Fred Neumann thereunder, nor as to the mortgage being security therefor. There is not a syllable of evidence that appellant ever requested or agreed to pay for any of the goods and dairy products supplied to Fred Neumann. The books were kept by Fred Neumann. Defendant's counsel in their brief do not point out any evidence tending to support the findings. They claim that the agreement as to the purchase of goods and dairy products should be read into the lease as a part thereof, and cite many authorities which have no application. It would be difficult for them to find any authority to sustain the proposition that the independent contract as to purchasing supplies for the creamery was a part of the lease. The lease was in writing, and was one contract; the mortgage was in writing, and was a contract to secure the performance of the covenants of the lease to the extent of $300; and the contract as to purchasing goods from defendant was in writing, and it is not shown by the evidence that it had anything to do with the lease. As between Paul Neumann and defendant, Paul Neumann is entitled to a finding as to whether or not anything is due by Fred Neumann to defendant under the covenants of the lease as therein expressed, and, if anything is due, the amount thereof. If nothing is due, then appellant is entitled to have the note and mortgage canceled. Plaintiff Fred Neumann did not appeal from the order denying the motion for a new trial. His appeal is on the judgment roll alone, without a bill of exceptions. We must therefore presume, as against him, that there is evidence sufficient to sustain the findings, and that such evidence was admitted without objection. He can only question the judgment with reference to the pleadings, and whether or not it is the legal conclusion from the facts found. No claim is made that the judgment is not the legal conclusion from the findings, and this leaves only the question as to whether or not the pleadings are sufficient to support the findings and judgment. In view of the liberal construction to be placed upon the pleadings where the evidence does not appear to have been objected to, and the findings are conclusive, we think the pleadings are sufficient as to Fred Neumann.

The court found that the agreement under which the counterclaim arose was made at the same time as the lease, and was a part of the same transaction. The answer alleges "that at the time of making and executing said lease said parties thereto, in order to more specifically arrange as to the manner of conducting the business of said Seaside Creamery, said Louis Moretti and Fred Neumann made, entered into, and executed a further agreement," etc.

We advise that the judgment as to Fred Neumann be affirmed, and as to Paul Neumann that the judgment and order be reversed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment as to Fred Neumann is affirmed, and as to Paul Neumann the judgment and order are reversed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

146 Cal. 31

NEUMANN et al. v. MORETTI. (S. F. 3,763.)

(Supreme Court of California. Jan. 20, 1905.)

TEMPORARY INJUNCTION—BONDS—FAILURE TO GIVE—APPLICATION TO DISSOLVE—DEFENSES—APPEAL.

1. Under the express provisions of Code Civ. Proc. § 963, subd. 2, an appeal lies from an order refusing to dissolve an injunction.

2. Code Civ. Proc. § 528, provides that an injunction cannot be allowed after the defendant has answered except on notice or on an order to show cause, but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction; and section 530 declares that if the court or judge deem it proper that the defendant should be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time why the injunction should not be granted, and the defendant may in the meantime be restrained. *Held*, that where an ex parte order was granted before answer, restraining defendant from doing a particular act, it was an injunction as defined by section 525, and not a temporary restraining order, and was therefore subject to dissolution for plaintiff's failure to give the undertaking required by section 529.

3. On an application to dissolve a temporary injunction for failure of the person obtaining the same to give the required undertaking, it was no defense that the injunction would be ineffectual unless the undertaking was given, or that it did not appear to have been served on defendant.

Commissioners' Decision. Department 2. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Paul Neumann and another against Louis Moretti. From an order refusing to dissolve a restraining order, defendant appeals. Reversed.

Charles B. Younger, Jr., for appellant. Hugh R. Osborn and Benj. K. Knight, for respondents.

COOPER, C. This action was brought to secure the cancellation of a certain note and mortgage executed by plaintiff Paul Neumann to defendant. The facts are fully stated in the appeal from an order denying a new trial this day decided. S. F. 3,960, 79 Pac. 510. After the complaint was filed and summons issued, before answer or appearance by defendant, the court, on the ex parte application of plaintiffs, granted a restraining order commanding the defendant, his agents and servants, until the further order of the court, to absolutely refrain from assigning or transferring or disposing of the promissory note and mortgage. The defendant afterward made a motion to dissolve and set aside the said order upon the ground, among others, that the court did not require a written undertaking on the part of plaintiffs as required by the statute, and that no undertaking was given or required at the time of making said order or at any other time. On the 8th day of August, 1903, the court made an order refusing to dissolve the restraining order. This appeal is from the said last-named order.

The restraining order was an injunction. It required the defendant to refrain from a particular act. Code Civ. Proc. § 525. An appeal lies from an order refusing to dissolve an injunction. Code Civ. Proc. § 963, subd. 2; Schmidt v. Bitzer (Cal.) 71 Pac. 563. It was admitted that no undertaking was given or required by the judge. It was the duty of the court or judge to require a written undertaking to the effect that plaintiff would pay to the party enjoined such damages as such party might sustain by reason of the injunction (Code Civ. Proc. § 529), and the injunction will be dissolved in case of such failure to give the undertaking (McCracken v. Harris, 54 Cal. 81; Alaska Improvement Company v. Hirsch, 119 Cal. 250, 47 Pac. 124, 51 Pac. 340). It is claimed by respondent that the restraining order was not in fact an injunction but a temporary restraining order, in which no undertaking is required. In the case of San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 218, 35 Pac. 651, this court draws a distinction between a temporary restraining order and an injunction. If it be conceded that there is such distinction as to requiring a bond, we are clearly of the opinion that in this case the order was not a temporary order within the meaning of the statute. The statute provides: "An injunction cannot be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction." Code Civ. Proc. § 528. And again: "If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained." Code Civ. Proc. § 530. It is therefore plain that the temporary restraining order referred to in the statute is an order which applies to the time intervening between an application for an injunction and the day fixed in the order to show cause. Under section 528, after the defendant has answered, an injunction cannot be allowed except upon an order to show cause. Under section 530, if the court or judge deems it proper that the defendant should be heard, an order may be made requiring cause to be shown at a specified time and place. Under either section, pending the application, and before hearing the parties on the order to show cause, the defendant may be restrained. It would be the better practice, and certainly is the general practice, to require an undertaking during such temporary restraining order. But in all cases where a preliminary injunction is granted in the first instance, or after an order to show cause, the undertaking must be required and given. As said in Lambert v. Haskell, 80 Cal. 620, 22 Pac. 330: "It seems plain that the undertaking provided for by the Code of Civil Procedure is upon the preliminary injunction. No other injunction is provided for therein. And ordinarily no undertaking could be required on the final decree." We do not think it any answer that the injunction would be inefficient unless an undertaking was given or that it does not appear to have been served upon defendant. These reasons might be urged by defendant in case of contempt proceedings for violating the injunction, but, if the injunction was improperly issued without complying with the statute, the defendant has the right to have it dissolved. If it is ineffectual, and plaintiff does not intend to serve it upon defendant, it can do him no harm to dissolve it.

The order should be reversed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the order is reversed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(146 Cal. 12)

KIDWELL v. KETLER et al. (KETLER, Intervener). (S. F. 2,950.)*

(Supreme Court of California. Jan. 20, 1905.)

WILLS—TRUSTS—PRACTICAL CONSTRUCTION—TERMINATION—REMAINDERS—"PER STIRPES OR PER CAPITA"—PLEADING—CONCLUSIONS OF LAW—ADMISSIONS.

1. Where, in a suit to terminate a trust and for an accounting, both complainant in his complaint and respondents in their cross-complaint set up the will creating the trust in full, and alleged ownership thereunder, such allegation was a mere conclusion of law, not calling for a denial, and was therefore not binding as an admission on either party.

2. Where in a suit to terminate a trust created by will the defendants were minors and appeared by guardian, the minors were not bound by admissions of their guardian to their prejudice.

3. Testator devised certain property to a trustee to maintain and educate his niece and nephew until the nephew should attain majority, when the proceeds of the property remaining unexpended were to be equally divided between them, they thereafter to share equally therein during their natural lives, but, if either died without issue, the whole net proceeds should be paid to the survivor during his or her life, and, if either died with issue, then one-half of the net proceeds should be expended to maintain and educate such issue until both niece and nephew had died, when the investment and the proceeds should become the absolute property of the issue of the niece and nephew then surviving, and in default of issue should be distributed among their heirs at law. *Held*, that the issue of the nephew and niece, after their decease, took per stirpes, and not per capita.

4. Where all the beneficiaries of a trust acquiesced in a particular construction thereof for 35 years, which construction was impliedly sanctioned by the court in the settlement of the trustee's account, a ruling by the trial court in conformity with such construction, though not binding on appeal, would not be reversed where it appeared that there had been no abuse of the trust or misdirection of the funds, and some of the language was susceptible of different meanings.

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by J. Leonard Kidwell against William B. Ketler and others and Michael Flood, as trustee, etc., in which Mary E. P. Ketler, as administratrix, etc., intervenes. From a judgment in favor of plaintiff, defendant William B. Ketler and others appeal. Affirmed.

Stewart S. Wright (Wright & Wright and Alexander D. Keyes, of counsel), for appellants. McNair & Somers and John M. Burnett (Thos. F. Barry, of counsel), for respondent. Stewart S. Wright, for intervener.

HENSHAW, J. Jacob C. Beideman died in 1865, leaving a will bearing date January 26, 1863. By the first paragraph of his will he directed that all his real estate excepting three parcels be sold, and that out of the proceeds of the sale his debts be paid. The second paragraph of the will is as follows:

"Second. I give, bequeath and devise to Henry F. Williams, of the said City and County of San Francisco, twenty thousand dollars ($20,000) in money, proceeds of the sale above provided for, remaining after the said expenses and my just debts are paid; and also a certain water lot (so called) belonging to me, with the improvements thereon, situate, lying and being at the northeast corner of Clay and Davis streets in said city and county; also fifty vara lot number five (5) in block number seventy-three (73), Western Addition so called, and the improvements thereon, situate, lying and being on Hayes street, between Van Ness Avenue and Franklin Street, in said city and county, and also block number two hundred and seventy-nine (279), in said Western Addition, and bounded by Ellis, Webster, Eddy and Buchanan streets, in said city and county and the one-half of the rest, residue and remainder of my property mentioned in the tenth subdivision of this instrument, if any, that shall remain after the gifts, devises and bequests, theretofore provided for, shall be answered and fulfilled; in trust, however, for the following uses and purposes, and none other or different, that is to say, that the said sum of twenty thousand dollars, and the net proceeds of said lands, hereinabove given, devised and bequeathed be, by the said Henry F. Williams, and his successor and successors, who shall have the trust hereby created invested in mortgage securities, on improved real estate, situated in the said city and county, and that the net proceeds of such investments or so much of the same as shall be necessary therefor, be expended by the said Henry F. Williams or the person having charge of said trust, for the proper maintenance, and education of my niece Katie Ketler and my nephew Willie Ketler, both of Wilmington, State of Delaware, and children of my deceased sister, Sarah Ann Ketler, until the said Willie Ketler shall attain his majority, at which time any of such proceeds then remaining unexpended, to be divided between the said Katie and Willie, share and share alike; and thereafter all net proceeds from said investments to be equally divided between the said Katie and Willie, during their natural lives; but if either of them die without issue, then in that case the whole of such net proceeds shall be paid to and become the absolute property of the survivor of them during his or her natural life; and in case either of them die with issue surviving, then and in that case, one-half of the net proceeds of such investment shall be expended for the maintenance and education of such issue, until both the said Katie and Willie shall have deceased, when the said investment, property, and the net proceeds thereof, then remaining, shall become the absolute property of the issue of the said Katie and Willie then surviving; and in default of issue of either the said Katie or Willie them both surviving, then and in that case the said investment and property, and the net proceeds thereof then remaining shall be distributed among their then heirs at law, according to the statutes of descents and distribution, now existing in the State of California."

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*Rehearing denied February 18, 1905.

The property so distributed by the court in probate to the trustee under the terms of this trust has been managed by trustees ever since. Katie Ketler married Kidwell, and died in 1871. Her sole surviving child is the plaintiff herein. Willie Ketler died in 1901, leaving as surviving children the five minor defendants. By the terms of the trust it ceased and determined upon the death of Willie Ketler, and this action was brought to terminate it, for an accounting by the trustee, and for a distribution of the trust properties in accordance with the terms of the trust. The plaintiff set forth the will of Beideman in full, with the other facts hereinabove stated, and alleged that one-half of the trust property had vested in him under the terms of the trust, and one-half in the minor defendants; and this allegation was not denied by the minor defendants. The minor defendants, beside answering, filed a cross-complaint, in which they alleged that the rents of the real estate devised in trust had not been invested, but had been paid out to Willie Ketler and to the plaintiff, Kidwell, and his two brothers, who had subsequently died. This allegation was not denied. They also alleged that one of the trustees had paid to the plaintiff, Kidwell, and one of his brothers a large part of the capital fund of the trust estate. This was denied, but the trustee, Flood, admitted that he had paid $3,054 to the plaintiff and his two brothers, by order of the superior court of the city and county of San Francisco. Upon this issue the court found that the plaintiff had received $425, while his deceased brothers had received $2,629. The minor defendants also, in their cross-complaint, set forth in full the will of Jacob Beideman, and then alleged "that by the terms of the said trust created by and in the said will for the benefit of the said Katie and Willie Ketler and their issue the property and money therein devised and bequeathed, with the rents, issues, and profits thereof, were given and devised in fee, one-half to the issue of Willie Ketler and one-half to the issue of Katie Ketler, to take effect and vest at the time of the death of the survivor of the said Willie and Katie Ketler."

The court made its findings and conclusions of law, and in the latter declared that upon the death of William J. Ketler upon the 8th day of April, 1901, all of the trust property became the absolute property in fee of the beneficiaries in the following proportions: "To the plaintiff an undivided one-half interest; to the minor defendants each an undivided one-fifth interest of an undivided one-half interest." Upon the motion for a new trial these conclusions of law were complained of, and upon this appeal they form the principal matter in controversy between the parties. It is not surprising that the court should have given the construction to the trust which it did, even if it were erroneous, since both parties, by their pleadings, set up the same interest, and the court adopted a construction of the trust which, at that time, met the views of all the beneficiaries under it.

Thus at the threshold of the inquiry as to the true construction of the trust appellants are met with the objection of the respondent that they are bound, first, by their admissions of the allegations of his complaint, and, second, by the identical affirmative allegation which they have made in their cross-complaint. But, answering the respondent's objection, it is to be noted that both in the complaint and in the cross-complaint the will of Jacob Beideman is set forth in full, and the deraignment of title is shown in both cases to be from the trust clause of that will. The case presented, therefore, is one where the pleader sets forth his chain of title, and upon that chain pleads ownership. It is uniformly held that an allegation made under such circumstances is an allegation of a conclusion of law not calling for a denial, and not binding upon either party. Thus, as is said in Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938: "Where * * * the pleader sets forth specifically the links in his chain of title, a general allegation of ownership will be treated as a mere conclusion from the facts stated." The rule is succinctly laid down in the Encyclopædia of Pleading and Practice (page 725) as follows: "Where the title is specifically as well as generally alleged, the specific allegations control and qualify those that are general;" and this principle has frequently been recognized and applied in this state. Levins v. Rovegno, 71 Cal. 273, 12 Pac. 161; Savings and Loan Society v. Burnett, 106 Cal. 514, 39 Pac. 922. The allegation of ownership in the complaint is identical with that in the cross-complaint above quoted. It is alleged "that by the terms of said trust the parties took title," and it is plain that this is but a conclusion of law, deriving its whole and sole force from the trust in the will. This being so, it is not only a mere conclusion of law, but it amounts (if it be an erroneous conclusion) to a mere admission of the parties, which cannot change the law. Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127. It is, of course, well settled that a denial of a conclusion of law is immaterial and raises no issue. Nelson v. Murray, 23 Cal. 338; Turner v. White, 73 Cal. 299, 14 Pac. 794; Wormouth v. Hatch, 33 Cal. 121. And, as is said in Brown v. Newall, 2 Mylne & Craig, 558: "Now, it is a rule of pleading that, although a party is bound by the facts which he states, he is not bound by his statement of the legal consequences of those. It is for the court to judge what are those legal consequences." Moreover, the defendants in this action were one and all minors, and appeared, of necessity, by their guardian. The admissions of a guardian which mean the sacrifice and giving away of the ward's property are never held to be binding. Cochran v. McDowell, 15 Ill. 11; Chaffin v. The Heirs of Kimball, 23 Ill. 36; Cooper v. Mayhew, 40 Mich. 528; Collins v. Trotter, 81 Mo. 275, 280; Crain v. Parker, 1 Ind. 374; Lathers v. Fish, 4 Lans. (N. Y.) 213. It must be held, therefore, upon this proposition, that it is a proper subject of inquiry before this court upon this appeal.

The question thus presented for determination is whether under the trust the children of Mary and the children of Willie took per stirpes, or whether their issue took per capita. Jarman states the rule as follows: "Where a gift is to the children of several persons, whether it be to the children of A. and B. or to the children of A. and the children of B., they take per capita, not per stirpes. But this mode of construction will yield to a very faint glimpse of a different intention from the testator. Thus the mere fact that the only income until the distribution of the capital is applicable per stirpes has been held to constitute sufficient grounds for assuming that a like principle was to govern the gift of the capital." Says the Court of Appeals of New York (Ferrer v. Pyne, 81 N. Y. 284), discussing this subject: "The rule referred to [per capita distribution] has in modern times been applied with reluctance by some courts, because it had become a rule of property, and by others out of deference to its supposed authority, but in many, if not in all, cases with open protest, while by others it has been wholly rejected. * * * If, therefore, from any portion of the will an intention can be discovered that the children of the deceased daughter are to take as a class, and not as individuals, that intention must prevail, notwithstanding the rule of construction to which we have adverted." In Burgin v. Patton, 58 N. C. 426, it is said: "It is well settled, as a general rule, that if a testator gives an estate to be equally divided between A. and B. and the heirs of C., and the latter has several children, the division will be per capita, but, if there be anything in the will indicative of an intention that the devisees or legatees shall take as families, the general rule will not apply, and the property will be divided per stirpes, and not per capita." And in Henry v. Thomas, 118 Ind. 23, 20 N. E. 519, the proposition is much more strongly stated in the following language: "The rule [as stated by Jarman] has been so far abrogated by the courts of the different states that it no longer has any practical force in the construction of wills, and the weight of the authority is to the effect that the beneficiaries take per stirpes, unless the language used in the devise or bequest is such as to exclude that intention." Without further multiplying quotations from authorities, reference may be made to Minter's Appeal, 40 Pa. St. 114; Vincent v. Newhouse, 83 N. Y. 505; Bool v. Mix, 17 Wend. 119, 31 Am. Dec. 285; Adler v. Beall, 11 Gill & J. 123; Ihrie's Estate, 162 Pa. St. 372, 29 Atl. 750; Lachland's Heirs v. Downing's Ex'rs, 11 B. Mon. (Ky.) 32; Bond's Appeal from Probate, 31 Conn. 183; Holbrook v. Harrington, 16 Gray (Mass.) 102; McLean v. Williams, 116 Ga. 257, 42 S. E. 485, 59 L. R. A. 125.

Construing this trust with a view thus to arrive at the intent of the testator, it is at least apparent that in the disposition of the income to arise from the trust property he contemplated a distribution per stirpes. When the youngest of the two attained majority, any surplus proceeds of the investments was to be divided between them equally, and thereafter all the net proceeds were to be divided between them equally. In the event of one dying with issue, it was the share of the proceeds which had been paid to the parent, and that share only, which was to be given to the children; and we thus come to the final clause requiring construction—the disposition to be made in the event that actually arose, when both have died, both leaving children. It would seem to be reasonably certain that, as he contemplated a disposition of the proceeds of the trust between the two as separate families, so he contemplated the division of the corpus of the trust in like manner, per stirpes, and it follows that the court correctly construed the trust in this regard. There came into the hands of the trustees under this trust the three pieces of real property specifically devised. Such real estate as was embraced in the "one-half of the rest, residue, and remainder of my property" was actually converted by sale into money, and upon distribution this money with the three pieces of realty was turned over to the trustees. It appears that the trustees invested the money as called for by the trust, and paid to the beneficiaries the net income of this investment and the net rents of the property. This method of disposition was acquiesced in by Willie and Katie during their lifetimes, and upon the death of Katie the same method of disposition was adopted during the continued lifetime of Willie; that is to say, one-half of the "proceeds," including one-half of the rents of the real estate, was paid to Katie's issue, while Willie took the other moiety. This was continued until the death of Willie, when his issue here asserts that this division was violative of the terms of the trust, their contention being that under the trust the rents of these three pieces of real estate were not to be paid over as "proceeds," but were to be invested, and the "proceeds" of this investment only were to be divided. Therefore, as plaintiff had shared in the distribution of these rents with their father, he should be called upon to account and make over to them the proportion of that which is their due. As has been said, this division of the rents has continued for many years—indeed, for the long period of 35 years. It was acquiesced in by all of the beneficiaries to the trust, and it received the sanction of the court, which, at least tacitly, put this construction upon the trust in the settlement of the trustee's account. The true construction of the trust in this regard does not come before us, therefore, as a case of first impression. It has received contemporaneous construction and acquiescence for 35 years, and, while this would not be of controlling weight with a clear abuse of the trust shown, or a clear misappropriation or misdirection of its funds, yet in a case such as this, where the trust in some respects is inartificially drawn, where the word "proceeds"—itself a word of loose and varying significance — is employed with different meanings, we are far from saying that it was not the actual intent of the testator that the rents were to be paid over, as in fact was done. And, such being the case, we are not inclined to disturb the ruling of the trial court based upon such long acquiescence.

For which reasons the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

(146 Cal. 34)

BENJAMIN v. MUTUAL RESERVE FUND LIFE ASS'N. (S. F. 3,107.)*

(Supreme Court of California. Jan. 20, 1905.)

INSURANCE—ASSESSMENT CONTRACTS — APPORTIONMENT OF ASSESSMENTS — MODIFICATION OF CONTRACT—ILLEGAL ASSESSMENTS—NONPAYMENT—TENDER OF LEGAL ASSESSMENT—ESTOPPEL.

1. Where an assessment insurance certificate and the constitution of the association at the time the certificate was issued provided that whenever the death fund should be insufficient to meet existing claims an assessment should be made upon the "entire membership in force at the date of the last death, the same to be apportioned among the members according to the age of each member," subsequent resolutions of the association, classifying the members, and placing all the members who entered prior to a date subsequent to that at which the certificate was issued in a class by themselves, and providing that as to such members the assessments should be apportioned according to the age of the member, but as to members joining the association since that date the assessments should be apportioned as of the age of their entry into the association, were inoperative and void as against the holder of such certificate.

2. A certificate holder in an assessment insurance association, of whom an illegal assessment is demanded, need not pay such assessment, nor tender a sum equivalent to a legal assessment in order to preserve his rights under his contract, nor need he, on demand of the association, furnish it with his reasons for not paying the assessment.

3. The fact that a holder of an assessment insurance certificate paid a number of illegal assessments without protest does not estop the beneficiary, in an action on the policy, from asserting the invalidity of a later assessment, which the holder of the certificate did not pay.

Department 2. Appeal from Superior Court, City and County of San Francisco; Wm. R. Daingerfield, Judge.

Action by Rebecca D. Benjamin against the Mutual Reserve Fund Life Association. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

I. B. L. Brandt, for appellant. Edgar D. Peixotto and J. T. Houx, for respondent.

LORIGAN, J. This action was brought by the beneficiary to recover upon a life insurance policy for $5,000. The defense was that the policy was forfeited for nonpayment of assessments. The plaintiff had judgment, and the defendant appeals therefrom, and also from an order denying it a new trial.

The plaintiff transacts the business of life insurance on the co-operative or assessment plan. The husband of plaintiff, A. F. Benjamin, in October, 1883, applied for and received a certificate of membership in defendant, together with a policy of insurance upon his life for $5,000, payable to his said wife. In said certificate and policy the defendant agreed as follows: "Whenever the death fund of the association is insufficient to meet the existing claims by death an assessment shall be made upon the entire membership in force at the date of the last death, the same to be apportioned among the members according to the age of each member, for such a sum as the executive committee may deem sufficient to cover said claims, and the net amount received from such assessment (less twenty-five per cent. to be set apart for the reserve fund) shall go into the death fund." It was also agreed on the part of the insured that "this certificate shall be subject to all the provisions and stipulations contained in the constitution and bylaws of the association, with the amendments thereto." The insured also agreed to pay all dues and assessments when due; and it was also provided and agreed further that, in case of failure to so pay the said sum, the said certificate should become null and void, and all moneys paid thereunder should be forfeited to said association. At the time of the issuance of the said certificate of membership there was in existence, in full force and effect, a "constitution and by-laws" of said association, in which it was provided that: "On the first days of February, May, August, and November (or at such other periods as the board of directors may determine), an assessment shall be made upon the entire membership in force at the date of the last audited death claim prior thereto, for such a sum as the executive committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members according to the age of each member, as per the rates named in the certificate of membership, and the net amount received from such assessments (less twenty-five per cent. to be set apart for the reserve fund) shall go into the death fund. * * * A failure to pay the assessment within thirty days from the first days of February, May, August, and November (or at such other periods as may be named by the directors) shall work a forfeiture of membership in this association of all rights thereunder." It was further provided in said "constitution and by-laws" that: "The board of directors shall have authority to adopt such other rules and regulations as they may deem for the interest of the association." It was also provided: "This constitution may be revised or amended at any annual meeting, or at a special meeting of the members called for that purpose."

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*Rehearing denied February 18, 1905.

The findings show that the insured paid all dues and assessments up to the date of mortuary call No. 98, June 1, 1898. This call required payment on or before July 1, 1898, but was not paid, and in July the assured was notified that his policy had lapsed. On October 11th of the same year the insured died. It is contended that it was unnecessary to pay this mortuary call, for the reason that it was excessive, and contrary to the express terms of the policy or certificate of membership. By a series of resolutions the association had placed all members who entered prior to 1890—including said Benjamin—in a class by themselves, called the "fifteen-year class," and required them to pay according to the attained age of each individual at the date of the assessment. It established also other classes, known as ten and five year classes, and provided that the members of those classes should be assessed as of the age of their entry into the association. The effect of this was to compel the members of the 15-year class, to which plaintiff's husband belonged, to bear the expense of the insurance of that class, without the aid of those joining after 1890; the result being that Benjamin was compelled to pay $2.67 per thousand, while a member of the 10-year class of the same age as Benjamin was assessed only $2.40 per thousand. It is contended that this is in violation of the original contract that the assessments would be apportioned among all the members according to the age of each member. The lower court found the above facts to be true, and decided that the mortuary assessment, No. 98, against Benjamin, being at a greater rate on each $1,000 of insurance held by him under his policy than was assessed upon each $1,000 held by other members of said association of the same age as Benjamin, upon policies issued to them under what is termed the "10-year policy plan," was unauthorized by the contract between Benjamin and the defendant association, and was disproportionate and discriminating against him, and was invalid and void.

This conclusion of the lower court is undoubtedly correct, unless, as is insisted by appellant, the finding that the mortuary call was disproportionate and discriminating, and was unauthorized, and in violation of the contract of insurance, is not justified by the evidence. This contention of appellant is based upon the reports of the Superintendent of Insurance of the state of New York, where the defendant association is incorporated, and that of the actuary of the association, introduced in evidence, supplemented by the testimony of the latter. But, as far as the matters contained in such reports are concerned, we do not see that they in any manner disturb the sufficiency of the finding. These reports—particularly that of the actuary—are relative to the status of the class of membership holding policies in the fifteen-year class, as regards their relation to past and future assessments for death claims, which it was insisted were properly chargeable to that class on the basis of the mortality experience of the entire membership; and also with regard to the question of the sufficiency or insufficiency of the proceeds of future calls or assessments based upon rates at the then assessed age, to meet probable death losses in that class. In these reports the secretary and actuary assumed that under the law of New York and under the constitution and by-laws of the association the association had the right to place its members who had joined prior to 1890 in a class by themselves (the fifteen-year class), and to assess them on a basis different from that applied to members coming into the association in subsequent years, and who were also divided into classes (ten and five years); and, having assumed this right, the reports proceeded to assign reasons why it would be entirely equitable and proper to assess the members of such fifteen-year class at their attained ages, and to assess members of the other classes at their age of entry, independent of the contract of insurance held by persons of the fifteen-year class, such as Benjamin. The testimony of the actuary of the association is in the same general line. When, however, we eliminate from the reports and the testimony of the actuary all discussion as to methods of insurance and the legitimate system which should prevail in co-operative insurance companies, such as the defendant association, concerning the assessment of its members, and the theories indulged therein as to the right of the association to divide these members into distinct classes for the purpose of assessments, and examine the facts, it is not difficult to discover the object sought to be attained by the segregation of its members into classes, and the effect upon the fifteen-year class of the resolutions requiring members of that class to pay assessments on their attained ages, and not upon the basis of an apportionment of payment of assessments among all the members of the association according to the ages of the members, as provided at least in the insurance contract between Benjamin and the association. This fifteen-year class was made up of members of the association who held policies in the association prior to January 1, 1890. Their contract of insurance nowhere authorized the association to segregate them into a class; and this was done arbitrarily, and solely with a view of placing this class by themselves for assessment purposes. From an investigation made on behalf of the association by its actuary as to the payments by and the payments to this fifteen-year class from the beginning of the association up to 1898, it appeared that the payments to this class for death losses exceeded the payment by it of premiums in the sum of $852.876; that the remaining membership of the association (the ten and five-year classes) had an accumulated emergency fund over and above its losses paid and outstanding nine times the amount of a single call or assessment; that in the judgment of the actuary this condition of affairs created an inequality between the fifteen-year class and the ten and five year classes, and that, "in order to provide the revenue necessary for meeting the mortuary costs of this class [fifteen year], the basis of assessment upon all members of said fifteen-year class should be "at their attained age"; and the association acted accordingly in making its assessments upon that class. It appears, too, from the superintendent's reports, that the rates of assessment to attained age levied against the policy holders of this class were raised by the association "in the endeavor to make this portion of its membership self-sustaining as between premiums and death losses." And as further evidence that the object of the association in arbitrarily creating a fifteen-year class and raising the rate of assessment upon its members to attained age was to make the class self-sustaining appears from the testimony of the actuary, who stated, in giving his views upon the matter of rates as between the different classes, that: "The burden of one class cannot be put upon another class of members, because the system of this association defendant, in common with that of all other assessment associations, contemplates the payment by each class of its membership of the cost of the insurance of that class, and that any overpayments, by way of accumulations for a so-called reserve or emergency fund, made for the purpose of providing additional security for the performance of the association's contracts with its members, should be held for only a limited period, and at the expiration of that period applied to the benefit of the class by which such overpayments have been made, in the form of the reduction of future assessments, or to apply on account of future assessments. To use, therefore, any part of the contributions made by one class of the membership in payment of a portion of the cost of insurance of another class would be to deprive the class making the contributions so used of a portion of the benefits secured by their contracts, and to which they are fairly entitled. The effect of casting the burden of the fifteen-year class upon new members entering other classes would be disastrous to the members of the fifteen-year class, because such a course of action on the part of the association would so discourage the entering of new members that the entire burden of the fifteen-year class would be sustained by that class alone, and, if the amounts of their assessments could not be increased to meet the losses of increasing mortality, there would be no fund with which to pay death losses, and the result would be the winding up of the business of the association."

We think it is quite apparent, from a consideration of all these matters developed by the reports and the testimony of the actuary that the object sought to be accomplished by creating the fifteen-year class and raising the mortuary calls therein to attained ages was to meet this deficiency to which we have referred by requiring its payment from the class which it is claimed was responsible for it; and as to future assessments to make this class meet the mortuary calls thereof, and, in effect, to relieve the other classes, if not entirely, at least to a very appreciable extent, from doing either. And to a large extent this action was influenced by the fact that the members of the association of this class had, after joining the association and prior to 1890, been paying assessments as of the age of their entry, or at rates indorsed on their policies, which were lower than the current or attained age rates should have been, and so the association concluded it was only fair and equitable to advance these old members to the current or attained age rates, in order to equalize the burden to be borne by them and the members joining after 1890. But according to the terms of Benjamin's contract, and by virtue of his relation to the association as a member thereof, it was beyond the power of the association to do any of these things. His contract did not provide that he might be segregated into a class of the association for any purpose; or that there might be any deficiency created by the class into which the association saw pleased to place him, for the payment of which a different rule of assessment than his contract of insurance called for might be adopted. In fact, as to him, there could not be any deficiency of a class. Any deficiency existing was that of the association, for which he was no more responsible than all the other members of the association of his age. Nor could the association, by arbitrarily putting him in the fifteen-year class, and in creating other classes among the members of the association joining subsequently, deprive him of the benefit which should accrue to him under his contract by the constant addition to the association of new selected lives, and of having the amount necessary to be collected to pay mortuary assessments apportioned among the entire membership according to their actual ages when liability for the assessment accrued.

The essential principle upon which co-operative associations like that of the defendant is based is that there will be a constant invigoration of the association by the accession of new members; that it shall be in fact a going concern for the advantage of all, and that every member of the association will be given the benefit of the average mortality of the entire membership in force at the last death prior to an assessment, resulting from this constant addition of new members. And it was necessarily upon this theory that the earlier members of the association joined it. They anticipated the benefit which would result from a lower average mortality through the constant accession of these new members, and it was this benefit which was secured to Benjamin as one of the earliest members, by the provision in his contract, which called for an assessment "upon the entire membership in force at the date of the last death claim, the same to be apportioned among the members according to the age of each member." He was entitled to this benefit which would accrue from the constant accession of such members. This accession would naturally create a lower average mortality among the entire membership, and consequently a smaller cost would have to be sustained by each member, where the assessment to meet death claims was distributed over the entire membership, equally apportioned as to amount according to the respective ages of the members. The right to so segregate its members into a fifteen-year class, as was done here, was determined by the Supreme Courts of Minnesota and North Carolina adversely to the contention of this appellant. In these cases the suits were brought against this same appellant by member of its association who had been segregated, with Benjamin, into this fifteen-year class, to recover damages for cancellation of their policies for nonpayment of a mortuary call similar to the one under consideration here, levied under the same resolutions advancing the members of that class along to attained ages, and assessing them according to rates fixed for such age. In these decisions it was held that the change in the rate of assessment to advanced age, and which was to apply only to those members who entered prior to 1890, placed in a class by themselves solely for the purpose of such assessment, was an inequitable and arbitrary discrimination against that class, and violative of their contract of insurance. In the first of these cases—Ebert v. Mutual Reserve Fund Life Ass'n, 81 Minn. 116, 83 N. W. 508, 509—the court, discussing this proposition, said: "It is evident that the contract contemplated an unsteady and varying death fund from which to pay death claims, and that the amount of the assessments would vary according to the number of deaths, the growth of the association in membership, and earning capacity of the reserve fund. It is also clear that the law of self-preservation applied, and if at any time, in order to meet maturing claims, it should become necessary to levy a larger amount than that stipulated in the maximum rate of the table, the power so to do was inherent in the association, and the directors would have authority to pass suitable rules and regulations for that purpose. But it is equally clear that neither by the contract of insurance, in contemplation of the laws of New York, the constitution and by-laws, nor from the natural, inherent power of the association, based upon the doctrine of the general good, does there exist authority to arbitrarily discriminate in favor of one class of members and against another class. * * * An attempt is made to justify the action of the directors upon the ground that the old members were originally taken in at the age of entry, and, in order to properly adjust their burden with relation to members subsequent to January 1, 1890, the old members should be advanced to the current rates, because that would be their equitable proportion of the current cost of the insurance. The actuary's report and the resolutions mentioned constantly refer to the members who entered prior to January 1, 1890, as 'members of the 15-year class,' as though there was something special about the contracts of those members which would authorize such discrimination. * * * Treating the so-called 15-year members as a class, it was figured out that they were not paying their equitable proportion of the cost of insurance, and so they were advanced as to age. The explanation does not explain. It simply amounts to a confession that the cost of carrying the insurance of the so-called class has been estimated by cutting them off from the association as invigorated by the new members. Such a proceeding was in violation of the contract. The old members joined the association upon the theory that it was to be a living institution. As old members dropped out and were paid off, new ones came in, younger in years; thus adding strength, and keeping up the vitality of the association. The new members entered upon the same basis and with the same expectation, yet they continue to be assessed as of the age of entry on the 1889 table. There has been shown no reason for drawing an arbitrary line as of January 1, 1890. If the board of directors could advance the age of all members who joined prior to 1890, they can keep setting out classes according to some certain year of entry, and advance its members also as to age. And if the board can advance the members who joined prior to 1890 to the current rates of the 1889 table, they can for the same reason advance them to years ahead of the current age. The board of directors had no authority to levy such an assessment as call No. 96, and the act of the defendant in canceling plaintiff's policy for nonpayment of the call made upon such basis was void." In the other case—Strauss v. Mutual Reserve Fund Life Ass'n, 126 N. C. 971, 36 S. E. 353, 54 L. R. A. 605, 83 Am. St. Rep. 699—it is said: "We see but one simple point essential to the determination of the case: Can a mutual association, by whatever name it may be called, or whatever may be its purpose, enter into a contract with one of its members, and, after receiving large sums upon said contract, alter its essential terms, without the consent of the member, so as practically to destroy its value? We think not. The plaintiff became a member of the defendant association in 1883, and received a policy in the form of a certificate of membership, wherein it was expressly agreed that assessments should 'be made upon the entire membership in force at the date of the last death for such a sum as the executive committee may deem sufficient to cover said claims; the same to be apportioned among the members according to the age of each member as per table indorsed' on said certificate. * * * It seems that by successive resolutions, none of which were amendments to its constitution, the association has placed in a separate class all members who entered prior to 1890, and requires them to pay on the basis of the age attained by each at the date of each assessment, while other members continue to be assessed only as of their age of entry. That the result of such discrimination is injurious to the plaintiff clearly appears from the 16th, 18th, 21st and 22d findings of fact, as follows: '(16) * * * That since the last resolution of 1898 the plaintiff and all who joined said company prior to 1890, and who held policies similar to plaintiff's, were assessed at their full attained age, at rates applicable to such age, whereas persons who became members since 1890, and who held policies under what is styled the "ten-year class" and the "five-year class" are only assessed at their age of entry; and plaintiff is thereby assessed at a higher amount than if the entire membership were assessed at rates of their attained ages.' '(18) That call number 96, made on plaintiff in 1898, and pursuant to the resolutions of said year, is larger in amount than it would have been had all the members of the association been assessed at their full attained ages.' * * * Upon his findings of fact the court below concluded as matter of law that the assessment made in pursuance of the resolutions of 1898 was 'in violation of defendant's constitution, and excessive and invalid.' * * * Judgment was rendered accordingly. In it we see no error. All that we decide in the present case is that the defendant has violated its contract with the plaintiff in a material matter, whereby the plaintiff, having suffered substantial injury, is entitled to substantial damages. We do not decide that a mutual insurance company, or any other kind of insurance company, cannot issue policies of divers kinds and classes, if so authorized by its charter; nor do we decide that a member of a purely mutual association is not bound by all reasonable by-laws and changes lawfully made therein. We are not considering the enforcement of a contract inequitable on its face, but the violation of a lawful contract by attaching thereto, without the consent of the plaintiff, conditions which utterly destroy its value. It is evident that, if the resolution of 1898 is binding upon the plaintiff, he would, in any event, be eventually forced out of the company by the constantly increasing premiums."

It is, however, insisted by appellant that the case of Gaut v. Mutual Reserve Fund Life Ass'n (C. C.) 121 Fed. 403, is opposed to the principles enunciated in the above cases, and furnishes the true rule of law to be applied in the case at bar. But we do not perceive that the Gaut Case announces any different principles. In this latter case the dispute was over the right of plaintiff to be assessed during his membership as of his "age of entry" into the association. It was decided that he had no such right. No such question is involved here. It is not contended by this respondent that Benjamin could only be assessed at his age of entry, and not at his attained age; but the contention is that in apportioning the rates under the resolutions above referred to the uniformity in apportionment on a basis of the "entire membership" of the association, which his contract provided for, was not observed; that the apportionment was fixed solely with reference to a part of the "entire membership" —the fifteen-year class; that his contract fixed a ratio as between members of the same age and members of a different age of the "entire membership" at the date of the last death claim, and required that in any apportionment increasing assessments such apportionment should be so made that every member of the same age of the entire membership should be assessed at the same rate;

that the apportionment made by the resolution did not adhere to this basis, nor preserve this ratio, or attempt to do so, but the apportionment was confined solely to the membership joining prior to 1890—the fifteen-year class—and hence was a violation of his contract. This proposition was not involved in the Gaut Case, but it was the essential point involved in the Ebert and Strauss Cases, and there sustained, and we are satisfied that it must be sustained in the case at bar.

Very much is said in the briefs about "Experience Tables of Mortality," the necessity of requiring members "to pay the costs of their own insurance," the difference between the "mortuary calls" made upon the fifteen-year class and the "premium calls" paid by the ten-year class. As far, however, as Benjamin's contract is concerned, these matters only tend to confuse its proper consideration. Of course, an "Experience Table of Mortality" is the basis for figuring rates for life insurance, but this should have been taken into consideration when the association was making its contract of insurance with its members. The difficulties the association found itself in when it undertook to create the fifteen-year class, and assess them differently from its other members, and in violation of their contracts, arose no doubt, as stated by the Superintendent of Insurance of New York in his report heretofore adverted to, from "a lack of knowledge of the elementary principles of life insurance displayed by the earlier management" of the association. It is not so certain, however, but even these difficulties and the necessities they created might have been met by a uniform increase on the rates of the entire membership. But, whether they could or not, they afforded no excuse for violating the provision of the contract of insurance with Benjamin. Nor are we concerned with the distinguishing features between "mortuary" and "premium" calls. Benjamin's contract called for the payment of "assessments" for existing death claims. His contract furnished the ratio upon which an assessment should be based, namely, upon the "entire membership" in force when the liability of the assessment accrued, "to be apportioned among the members according to the age of each member" and to assess him at his attained age, and other members of his same age as of the age of their entry, was a violation of the contract of the association with him, and, for this reason, the assessment designated as "Mortuary Call 98" was void.

It is insisted by the appellant that the evidence shows an abandonment by Benjamin of his contract. This claims seems to be predicated upon the fact that he did not tender—assuming mortuary call 98 to have been illegal—the amount for which he was justly chargeable on that call under his contract, and in failing to make reply to a letter by the association to him requesting him to favor it with his "reasons for lapsing." But the assessment, being illegal and void, could not affect the plaintiff's rights. He was only required to pay legal assessments. He was not required to obtain the data upon which to correctly figure out what would be a proper amount to pay or tender, or to take chances of his tender being sufficient, if rejected, to preserve his rights. It was the duty of the association to make a lawful assessment, and the only obligation cast upon the plaintiff under his contract was to pay it on due notice, when it was lawfully made. Neither was he required to furnish the association with his reasons for "lapsing." There was no provision in his contract or the constitution or by-laws of the association requiring him to do so.

It is further claimed that the plaintiff is estopped from asserting the invalidity of "Mortuary Call 98," because her husband had paid similar calls, for several years prior thereto, without complaint, and which calls were subject to the same claim of invalidity as is asserted now. Assuming this to be true, it affords the association no ground for invoking an estoppel, for at least two reasons. In the first place, the appellant cannot take advantage of its own wrong, which would be the result if its claim of estoppel were sustained. All these prior calls, if levied upon the same theory and at the same ratio as that of call 98, were equally illegal with it, and it was wrong for the association to have levied them, or to have insisted upon their payment. They were demanded under an implied threat that, unless paid, his policy would be forfeited, and were paid under a moral compulsion. And, as said in Duggans v. Covenant Mutual Life Ass'n, 87 Ill. App. 416, quoting approvingly from a prior decision of that court: "It certainly cannot be said that Tuttle, in paying previous illegal assessments, acted fraudulently, or that he willfully did anything calculated to mislead others to their injury. When he paid illegal assessments he did so under a moral compulsion and a threat implied, at least, that if he did not pay his certificate would be forfeited, and the provisions made for his wife in case of his death be thereby lost. Can appellant be permitted to take advantage of its own wrong? We say it cannot." In the second place, and independent of the proposition that the association could not take advantage of its own wrong, the rule is general that the fact of prior illegal demands having been paid imposes no legal obligation to continue to pay them. The doctrine of estoppel has no application to such a case. Schultz v. Citizens' M. L. Ins. Co., 59 Minn. 315, 61 N. W. 331; Ins. Co. v. Knight, 162 Ill. 470, 44 N. E. 834. Some other claims are made by appellant in the way of estoppel, which have, in our opinion, no more force than the one just disposed of.

This disposes of all the points made on behalf of appellant for a reversal which we deem merit discussion. We do not pass upon the point as to the notice given to Benjamin by the association of the assessment in question, and which the lower court found was insufficient. Nor do we pass upon the preliminary objection raised by plaintiff against the consideration by us of the appeal from the order denying the new trial, which she urges upon the ground that there is nothing in the record to show that the motion for a new trial was based upon the insufficiency of the evidence to sustain the findings in the case.

In our opinion, the evidence was sufficient to warrant the finding that the assessment in question was contrary to the express terms of Benjamin's policy and invalid, and hence the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(145 Cal. 753)

ROONEY v. GRAY et al. (S. F. 3,092.)*

(Supreme Court of California. Jan. 14, 1905.)

PLEADING—MISJOINDER OF ACTIONS—DAMAGES AND INJUNCTION—INJURIES TO PERSON AND PROPERTY—AMENDED PLEADINGS — APPEAL—QUESTIONS REVIEWABLE—HARMLESS ERROR.

1. Where an action was tried on a second amended complaint, to which an answer was interposed, any error in the rulings sustaining the original and first amended complaints was immaterial.

2. In an action for damages for injury to dwelling houses caused by the conduct of a stone quarry, and to enjoin the further maintenance thereof, allegations of the complaint that large rocks were thrown upon plaintiff's premises; that large amounts of dirt and screenings had filled up the sewers, causing great volumes of sewer gas to arise therefrom, thereby endangering the health and lives of plaintiff, his family and tenants; that the houses were injured from flying rocks, which also endangered the lives and safety of the occupants; that clouds of dust arose and filled the air, to the injury of the health of plaintiff and his family—went to the propriety of the injunction, and did not constitute the basis of the demand for damages, so that a demurrer on the ground that causes of action for injuries to the person and for injuries to property were improperly united, or should at least have been separately stated, was properly overruled.

3. Where a complaint for damages was met by a specific denial of all its allegations, thus including a denial of all damages, and the case was tried on the issues thus raised, a judgment rendered on the merits would not be reversed because of the overruling of a demurrer addressed to the uncertainty of the allegations of the complaint in respect to the damages sustained by the particular injuries complained of.

4. Error in making a second and different order for judgment, without setting aside or modifying the first, is not available upon an appeal from the judgment on the judgment roll, but should be presented for consideration by a bill of exceptions.

5. In a suit for damages and for an injunction, the failure of the court to find upon the issue as to the right to injunction gives defendant no ground of complaint on an appeal from a judgment for damages without an injunction.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Patrick Rooney against George F. Gray and another, copartners as Gray Bros., and another. From a judgment for plaintiff, defendants Gray Bros. appeal. Affirmed.

Fisher Ames, for appellants. Barna McKinne, for respondent.

LORIGAN, J. This action was brought to enjoin the defendants the Gray Bros. from working and operating a quarry and rock-crushing plant adjoining the premises of plaintiff, in the city and county of San Francisco, and also to enjoin the defendant Craig, the owner of the premises upon which said quarry and rock-crushing plant are located, from renting them to the said Gray Bros. for such purpose. Plaintiff sought also to recover damages in the sum of $5,000 from the Gray Bros. for injuries to three dwelling houses on his premises, it being alleged that the concussions occasioned through the blasting operations in said quarry had loosened and weakened the foundations of said houses, causing them to settle; that the blasts had broken the windows and projected large rocks through the sides and roofs of said dwellings, breaking large holes therein, rendering them unfit for use or occupation; and that the said Gray Bros. had negligently placed large quantities of dirt, waste rock, and screenings from their quarry on vacant land adjoining plaintiff's premises, which during a heavy rainstorm were washed down and carried on the premises of plaintiff, and deposited to the depth of from four to six feet against the west wall of a two-story frame dwelling owned by plaintiff, which caused said dwelling to be thrown out of plumb, bulged in the center, and greatly injured. The court rendered judgment in favor of plaintiff against the Gray Bros. for $1,500, and in favor of the defendant Craig against plaintiff for costs. From this judgment the Gray Bros. appeal, and the case is presented here upon the judgment roll, accompanied by bills of exceptions as to some points of alleged error not available on the face of the roll.

1. The complaint in this case was twice amended, and it is urged that the court erred in overruling defendants' several demurrers to the original and the two amended complaints, and denying their motion to make the original complaint more certain and definite, as likewise their motions to strike out certain portions of the second amended complaint, and it is the accuracy of the rulings of the court on these several motions which is presented under the bills of exceptions. We are not concerned, however, with the rulings of the court upon the original or first amended complaint. These pleadings were superseded by the second amended com-

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*Rehearing denied February 13, 1905.

plaint, which was answered by the defendant, and upon the issues thus made the cause was tried and judgment rendered. If this second amended complaint was not vulnerable to the attack the defendants made upon it by demurrer or motion to strike out, then it is of no moment whether the court erred in its rulings on the demurrer or motion to the previous pleadings of plaintiff or not. The sufficiency of this last pleading is alone in question.

This demurrer to the second amended complaint—to treat of it briefly, and in respect to the particular points upon which it is urged it should have been sustained—was interposed upon the assumption, unwarranted by the pleadings, that the complaint was framed for the recovery of damages solely, while it is clear that under it plaintiff sought an injunction to restrain defendants from further prosecuting blasting and rock crushing in the vicinity of his premises, as well as for damages which he alleged he had already sustained in injuries to his dwellings thereby. With a view of sustaining a right to an injunction, plaintiff averred, among other things, that the quarry was operated in such a manner by the Grays as to constantly throw large rocks upon his premises, which covered the land with débris; that large amounts of dirt and screenings from said quarry, deposited by the defendants on the streets and sidewalks adjoining the premises of plaintiff, had been swept by wind and rain upon his premises, filling up the sewers, preventing the sewage from flowing therein, and causing great volumes of sewer gas to arise therefrom, endangering the health and lives of plaintiff, his family and tenants; that his houses, two of which were occupied by tenants, and one by himself, were being injured from rocks cast upon and hurled through them, and the lives and safety of their occupants endangered thereby; that the effect of the said blasts and operations of the rock crusher was to cause great clouds of dust and fine sand to arise, filling the air about and in plaintiff's houses, to the great injury of the health of the plaintiff and his family; and that said dust settled in the houses, ruining the carpets, curtains, and household furniture therein. It is clear from these allegations of the complaint that they were made with a view of obtaining an injunction against defendants, and, except as to the allegations of plaintiff's injuries to his houses from blasts, were not made the basis of the demand for damages. So that, in this view, there was no merit in defendants' demurrer on the ground that several causes of action—damages for injuries to the person and damages for injuries to the property—were improperly united, or, if not improperly united, should have been separately stated, and hence the demurrer on this ground was properly overruled. The only damages sought were for injuries to the houses—particularly the two-story dwelling, the allegations concerning which we have already called attention to.

There are other grounds of demurrer interposed, which could not possibly have any merit, unless on the assumption that the complaint was solely one for damages; and, as it appears that that assumption is entirely erroneous, it would be waste of time to attempt to discuss them.

The demurrer urged, also, various particulars in which the complaint was uncertain, most of which, like the other grounds of demurrer just disposed of, being predicated on a false theory as to the scope of the complaint, have no force. It is particularly insisted, however, in the same line, that the demurrer should have been sustained upon the ground that, as to the injuries to his property for which plaintiff did seek damages, the complaint is uncertain as to the manner, extent, or amount thereof. It must be conceded that a more perfect pleading in this respect, as in some other particulars, might have been prepared, especially after three efforts in that regard, and it is possible that it may be to some extent open to the last objection urged against it—that it does not set forth with sufficient certainty the exact amount of damages sustained by the particular injuries complained of, although, as to the manner and extent of those injuries, the complaint is clearly certain enough. Yet we do not think it so fatally defective as to the allegation of damages that the order of the court overruling it should work a reversal. The general rule requiring the amount of damages sustained by several alleged wrongful acts of a defendant to be stated with exactness is in order that the defendant may have an opportunity of determining whether he will concede a good cause of action for any or all of the amounts claimed, or that, if not so conceding, he may be able to prepare himself with evidence upon the trial to contest them. Mallory v. Thomas, 98 Cal. 647, 33 Pac. 757; Foerst v. Kelso, 131 Cal. 378, 63 Pac. 681. Now it is quite evident from the record in this case that the defendants were not injured by the refusal of the court to sustain the demurrer in this respect under the above rule, or any extension of it which now suggests itself to us, because the answer of the defendant consists of a specific denial of all the allegations of the complaint. They deny that any of the injuries asserted by plaintiff occurred either through their acts or at all. Having presented these square issues, and the cause having been tried on them, it cannot be said that the alleged uncertainty in the complaint as to the amount of damages claimed to have been sustained by plaintiff could have misled or prejudiced the appellants, as their contention was that the plaintiff had suffered no injury at all. When a case has been tried and a judgment rendered on the facts, in order to warrant a reversal upon the ground of error in overruling a demurrer interposed on the ground of uncertainty in the complaint, it must appear that some substantial right of the demurrant has been affected—some prejudicial error, as distinguished from abstract error, suffered by him—or he has no room for complaint. Alexander v. Central L. & M. Co., 104 Cal. 537, 38 Pac. 410; Foerst v. Kelso, supra.

As to the motion to strike out portions of the second amended complaint, it is enough to say that the court granted the motion as far as the defendant was entitled to it.

2. In the record appears a "minute order for judgment" made by the trial court May 10, 1901, ordering that plaintiff have judgment against defendant for the sum of $50. On December 7, 1901, findings and conclusions of law awarding plaintiff $1,500 damages were filed, and a judgment for that amount recorded and docketed. It is insisted by appellants that the court erred in making a second and different order for judgment, without setting aside or modifying the first. But this point is not available to the appellants on the record. It cannot be considered upon an appeal from the judgment on the judgment roll alone. It should have been presented for consideration to this court on a bill of exceptions. The first order for judgment may have been set aside by consent of the parties or by an order of the court, and the entry in the minutes to that effect would not appear in the judgment roll. As is said in Paige v. Roeding, 96 Cal. 391, 31 Pac. 264, relative to the setting aside of a prior judgment, and which applies with all the more force as to setting aside a prior order: "Circumstances may have arisen wherein the trial court would have been justified, under the law, in setting aside the first findings and judgment, and in filing the second findings and judgment; and, with no showing to the contrary, we must assume that such circumstances did arise. * * * As already suggested, we find no bill of exceptions in the record, and it is only upon a bill of exceptions that we would be allowed to examine into the sufficiency of the reasons which moved the court to set aside and declare void its first judgment rendered in the case. Its order may have been erroneous, or it may have been entirely void; but the matter is not a proper subject of inquiry before us, not having been presented for a review in any form authorized by the statute." Also Von Schmidt v. Von Schmidt, 104 Cal. 549, 38 Pac. 361.

3. There is nothing in the point that the court failed to find upon the issue as to the right to an injunction. As we read the findings, we think it did. But if it did not, it could not affect the judgment which was rendered. This was solely for damages, and was based upon sufficient findings to warrant it; and plaintiff was entitled to recover such damages thereunder, whether there was a finding on the issue of the right to an injunction or not. The court awarded no injunction against appellants, and they have no cause to complain.

The judgment appealed from is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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146 Cal. 1

MARIPOSA COUNTY v. KNOWLES. (S. F. 4,031.)*

(Supreme Court of California. Jan. 18, 1904.)

PRIVATE ROAD—SUFFICIENCY OF BOND—DEPOSIT OF DAMAGES.

1. The validity of the bond required by Pol. Code, § 2692, to be filed with a petition for a private road, is not affected by inaccurate recitals as to the petition if the petition is sufficiently identified.

2. Where, by the terms of a bond, the principal and each surety is bound in the sum specified, the bond is both joint and several for that sum, whether it is so stated or not.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 105, 106.]

3. Pol. Code, § 4145, providing that the county treasurer shall receive no money into the treasury unless accompanied by a certificate of the auditor, has no application to money as damages for laying out a road deposited with the treasurer pursuant to section 2689.

Commissioners' Decision. Department 2. Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Condemnation proceedings by the county of Mariposa against M. C. Knowles. From a judgment for plaintiff, defendant appeals. Affirmed.

John A. Wall, for appellant. J. A. Adair, Dist. Atty., for respondent.

SMITH, C. This is a proceeding to condemn a right of way for a private road over the land of the defendant. The plaintiff had judgment, and the appeal is by the defendant from an order denying his motion for a new trial.

From the findings it appears that all the proceedings before the board of supervisors were regular. But the finding as to the bond to accompany the petition required by sections 2692 and 2683 of the Political Code is attacked as not justified by the evidence; as is also the finding as to the deposit in the treasury of the $25 allowed as damages by the viewers, as required by the proviso in section 2689 of the same Code.

As to the bond the objections are "that the bond is joint, and no liability is fixed on the principal," and, consequently, none on the sureties; and that in the recitals of the bond the petition is inaccurately referred to as praying for a road "over the land of" defendant. But as to the latter point the description given is none the less accurate, because the road was also over the land of Helm, who was one of the petitioners; nor (provided the identity of the petition referred remains sufficiently clear) would a mistake in the recitals in the bond affect its validity; nor (assuming for the purpose of the decision that under the provisions of section 2690 of the Political Code objections to the bond can be considered) is the other objection more tenable. By the terms of the bond the principal and each of the sureties is bound in the sum of $100, and the bond is therefore both joint and several for that amount. Nor would the effect of the bond have been altered had the words erased from the penal clause, which purport to bind the parties "jointly and severally," been suffered to remain.

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*Rehearing denied February 17, 1905.

The objection to the finding as to the deposit of the $25 damages is also untenable. It is not disputed that this amount was deposited in the treasury by Helm, as a party interested in the road, under the proviso in section 2689 of the Political Code, cited, or that it was kept separate from the county moneys, which was all that was required. The provision of the section requiring the damages "to be set apart in the treasury out of the proper fund" applies only to the county moneys, and not to moneys paid by a private party under the proviso. Nor have the provisions of section 4145 of the Political Code, relating to auditor's certificate, any application to such moneys. Heppe v. Johnson, 73 Cal. 265, 14 Pac. 833.

I advise that the order appealed from be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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146 Cal. 21

BURBRIDGE v. RAUER et al. (L. A. 1,615.)

(Supreme Court of California. Jan. 20, 1905.)

JUDGMENTS—ACTIONS TO SET ASIDE—PLEADING —PRESUMPTIONS—EXISTENCE OF DEFENSE.

1. An allegation of a complaint to set aside a justice's judgment that the note on which the judgment was obtained was never signed by any member of any firm of which plaintiff was a member, "to his knowledge," leaves it to be presumed, in support of the judgment, that it was so signed without plaintiff's knowledge, so as to bind not only the firm, but plaintiff himself individually.

2. A further allegation that, at the date of the commencement of the justice's court action, nothing was due or unpaid to defendant's assignor from plaintiff, permits of the presumption in support of the judgment that at that date the amount claimed was due and unpaid to defendant, who was then assignee and owner of the claim.

3. A complaint to set aside a justice's judgment, procured without any fraud on causes of action barred by limitations at the time the suit to set aside the judgment is commenced, is fatally defective where it fails to affirmatively show that there was a good defense to the justice's court action.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by O. H. Burbridge against J. J. Rauer and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Powers & Holland, for appellants. Borden & Carhart and George J. Lovejoy, for respondent.

GRAY, C. This is an action in which the plaintiff obtained a decree relieving him from a money judgment theretofore obtained against him by the defendant Rauer in the justice's court, restraining the enforcement thereof, and declaring said judgment to have been obtained without jurisdiction, and to be void and of no effect. The defendants appeal from the decree, and from an order denying them a new trial.

The appellants contend that the complaint fails to state a cause of action, or ground for the interposition of equity, for the reason that it does not show that the plaintiff in this case has or had any defense to the action in the justice's court. We think this contention is well founded, and that the general demurrer of defendants to the complaint should have been sustained.

The complaint herein, so far as necessary to be stated, runs as follows:

"That heretofore, to wit, on August 28, 1897, the said defendant Rauer commenced an action in the justice's court of the city and county of San Francisco, state of California, entitled as follows: 'J. J. Rauer, Plaintiff, v. First Doe, Second Doe, Third Doe, and Fourth Doe, Associated Together and Doing Business under the Firm Name and Style of Burbridge & Co., Defendants.' That in and by the complaint filed in the said action he alleged that on the 31st day of January, 1896, at the city and county of San Francisco, state of California, the defendants named in said action made and delivered to one H. Wahl a promissory note; a copy of said alleged promissory note being set up in said complaint, and being in the words and figures following, to wit:

" 'San Francisco, Cal., Jan. 31, 1896. On or before one year after date, we promise to pay to the order of H. Wahl (without interest) one hundred and eighteen and $^{75}/_{100}$ dollars ($118.75), at our office, value received. Burbridge & Co.

" '$118.75 due January 31, 1897.'

"That said complaint further alleged that the defendants therein named, though requested, had failed and refused to pay the said note, or any part thereof, and that prior to the commencement of this action the said H. Wahl indorsed the said note to the plaintiff in said action, and that said plaintiff is still the owner and holder thereof. The said complaint further alleged as a separate cause of action against the defendants therein named that there is now due, owing, and unpaid from said defendants the sum $120 for moneys loaned and advanced to the defendants within two years last past, at the city and county of San Francisco, state of California, at their special instance and request, by one W. S. Ray; that the defendants therein named, though requested, have failed, neglected, and refused to pay said sum of $120, or any part thereof; that prior to the commencement of said action the said Ray sold, assigned, and transferred to the plaintiff therein named all his right, title, and interest in and to the said claim and demand against the defendants."

The complaint then alleges that the plaintiff herein was never in fact served with summons in the justice's court action, though the sheriff's return thereon showed that he was so served. The complaint continues. "* * * And plaintiff further alleges that the pretended promissory note attempted to be set forth in the said action of Rauer v. Doe et al. was never signed by him, or by any member of any firm or copartnership of which plaintiff was a member, to his knowledge; and plaintiff further alleges that at the time of the commencement of said action of Rauer v. Doe et al. there was not due, owing, or unpaid from this plaintiff, or from any firm or copartnership of which this plaintiff was a member, unto the said W. S. Ray, the sum of $120, or any other sum."

There is no direct statement in the complaint and nothing to show that the note was not executed by the copartnership of which plaintiff herein appears to have been a member. The statement that the note was never signed by any member of any firm or copartnership of which plaintiff was a member, "to his knowledge," leaves it to be presumed, in support of the justice's court judgment, that it was so signed without his knowledge, but in such a manner as to bind not only the firm, but also the plaintiff herein in his individual capacity. The further allegation that at the date of the commencement of the justice's court action nothing was due or unpaid to Ray from plaintiff leaves us also to presume that at that date the $120, of the second cause of action, was due and unpaid to Rauer, the plaintiff in that action, who was at that time the assignee and owner of the claim. The causes of action set out in the justice's court case were barred by limitation before the commencement of the present action, and there was nothing to show that the plaintiff in that case was guilty of any fraud in the procurement of the judgment. Hence it would be inequitable to set aside the judgment without an affirmative showing in the complaint that there was a good defense to the justice's court action. Gregory v. Ford, 14 Cal. 139, 73 Am. Dec. 639; Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888; Eldred v. White, 102 Cal. 600, 36 Pac. 944; Parsons v. Weis, 77 Pac. 1007. "Equity will not overturn a judgment valid on its face unless it is an unjust judgment." "It must be against conscience, and it must be made to appear that a like judgment would not follow in the same action, or upon the same cause of action." Harnish v. Bramer, supra. This defect in the complaint is material, and was not cured by the subsequent trial, findings, and judgment. The complaint lacked an essential and necessary allegation in a case of this character, and is fatally defective. It is therefore unnecessary to consider other questions presented in the briefs.

The judgment and order should be reversed.

We concur: HARRISON, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are reversed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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146 Cal. 3

KENT et al. v. WILLIAMS et al. (S. F. 3,046.)

(Supreme Court of California. Jan. 19, 1905.)

APPEAL—LAW OF THE CASE—NEW TRIAL—ORDER — CONSTRUCTION — NOTICE OF MOTION—CONTRACTS CONCERNING LAND — RECORDING OF CONTRACT — SUFFICIENCY—LIMITATIONS—SETTING UP NEW CAUSE OF ACTION—ESTOPPEL.

1. The determination of the appellate court becomes the law of the case, and is binding on the parties on another trial.

2. Where a notice of motion for a new trial by one defendant placed no limitation as to the issues upon which, or the parties between whom, such motion would be made, but stated in general terms that it was intended to move for a new trial "of the above-entitled action," and the order granting the motion was in general terms that the motion "for a new trial herein" is granted, the order, in effect, set aside the judgment as to all parties, notwithstanding a recital in the findings of fact that it was of no effect as between plaintiff and one of defendants.

3. Where the question was whether plaintiff or one of defendants should be first entitled to enforce a lien on a tract of land, and judgment was rendered in favor of plaintiff, an order granting a new trial on the motion of the defendant claiming the lien was binding on the defendant who owned the land, irrespective of whether he had notice of the motion, or made any appearance on the hearing thereof, the judgment being of such a character that the court could not, by granting a new trial, vacate it as between plaintiff and the other lienor, and leave it in force as between plaintiff and the owner.

4. Civ. Code, § 1158, declares that any instrument in writing affecting the title to real property may be recorded; section 1213 declares that every conveyance which is recorded as prescribed shall be constructive notice to subsequent purchasers, etc.; and by section 1215 the term "conveyance" embraces every instrument in writing by which the title to any real estate may be affected; and County Government Act, § 124 (Gen. Laws 1903, p. 157), requires the county recorder to record the instruments in separate books for deeds, mortgages, and "other

instruments." *Held*, that where a contract for the sale of land called for a conveyance thereof on the full payment of the purchase price, and required the vendee to deposit a deed in escrow in favor of the vendor, conveying certain other land, and required the vendee to apply the proceeds of all sales of such land to the payment of his purchase-money note, a record of such contract in the volume of "covenants" was constructive notice to subsequent incumbrancers.

5. Civ. Code, § 1171, declares that grants absolute in terms are to be recorded in one set of books and mortgages in another. *Held*, that the mere fact that an instrument purporting to be an absolute grant may be shown to be a mortgage, does not authorize it to be recorded among mortgages.

6. A contract concerning land, and describing it as an undivided one-quarter interest in 1,700 acres, covering the greater portions of sections 21, 28, and 33, in township 13 south, range 23 east, in Fresno county, Cal., was not void by reason of uncertainty in description.

7. Const. art. 6, § 5, provides that an action for the enforcement of a lien on real estate may be commenced in the county in which the real estate, or any part thereof, is situated; and by Code Civ. Proc. § 726, there can be but one action for the recovery of a debt secured by mortgage. Plaintiff, having a lien on two parcels of land, one situated in F. county and one in another county, sued in F. county to enforce the lien on the land therein, and judgment was erroneously rendered for a sale of that land, but on a motion for a new trial the judgment was set aside. *Held*, that the court did not lose jurisdiction to render a judgment directing a sale of the land in both counties to satisfy all liens thereon by reason of the erroneous judgment, which had been vacated after the ascertainment of error.

8. Where a note given for the price of land was secured by a lien on that land and on another tract belonging to the vendee, and within four years after the maturity of the note the payee sued to enforce the lien on the latter land, a subsequent addition of a prayer seeking to foreclose the lien on the other tract did not introduce a new cause of action, but merely added a prayer for additional relief, which the court would have been authorized to grant without such amendment, under Code Civ. Proc. § 580, providing that the court may grant any relief consistent with the case made by the complaint.

9. The fact that on appeal counsel for plaintiff erroneously claimed before the Supreme Court that the action was brought only for the foreclosure of plaintiff's lien on a certain piece of land, did not estop him from thereafter claiming, in accordance with the opinion of the Supreme Court on appeal, the right in the same action and on the original complaint to foreclose a lien not only on such tract, but on another.

10. An order refusing to vacate a prior order or judgment, from which an appeal may be taken, is not appealable unless there is a record which presents matters for consideration that could not be presented on the appeal from the original order or judgment.

11. Code Civ. Proc. § 661, provides that, when a motion for a new trial is made on the minutes of the court, a statement shall be subsequently prepared and settled, which shall contain "the grounds argued" before the court for a new trial, and only those grounds, with so much of the evidence or other matter as may be necessary to explain them. *Held*, that an order denying a new trial was not subject to review on appeal where the transcript contained a document purporting to be a statement under the statute, which was signed by the attorneys and filed with the clerk, but did not appear to have been settled or authenticated by the judge, and did not contain any specifications of error, or purport to show what grounds were argued before the court.

Department 2. Appeal from Superior Court, Fresno County; M. K. Harris, Judge.

Action by D. G. Kent and others against W. M. Williams and another. From a judgment in favor of plaintiffs, defendant the San Francisco Savings Union appeals. Affirmed.

H. C. Campbell, for appellant. John Reynolds, for respondents.

PER CURIAM. There have been two appeals heretofore in the present case, and the facts involved in the controversy are set forth in the opinions therein. 114 Cal. 537, 46 Pac. 462; 130 Cal. 401, 62 Pac. 620.

Upon the first trial of the cause, in 1895, the superior court rendered judgment in favor of the plaintiffs, and afterwards, upon the motion of the appellant herein, granted a new trial, which, upon an appeal therefrom by the plaintiffs, was affirmed by this court upon the ground that, as the plaintiffs held a lien for their claim upon the Oakland as well as upon the Fresno property, while the appellant herein held a lien only upon the Fresno property, the superior court should have directed a sale of the Oakland property before resorting to the Fresno property. Upon the next trial of the cause in 1897, the superior court held that the judgment of 1895 had become final as between the plaintiffs and Williams, and that it was without jurisdiction to change its terms as against Williams, and that by reason of the former decision of this court that the Fresno property could not be sold until after the sale of the Oakland property there could be no judgment for the foreclosure of the plaintiffs' lien upon either the Oakland or the Fresno property, and therefore rendered judgment that the plaintiffs take nothing by their action. Upon an appeal by the plaintiffs from that judgment it was reversed, and upon the next trial of the cause the superior court rendered judgment in favor of the plaintiffs for the amount of their claim, and directing a sale in satisfaction thereof, first, of the Oakland property, and, if the proceeds thereof are insufficient to satisfy their claim, then of the Fresno property. From this judgment the San Francisco Savings Union has taken the present appeal.

1. The main point urged by the appellant in support of its appeal is that, as Williams took no steps to set aside the judgment of 1895, and as the order granting a new trial upon that judgment was made solely upon its motion, the judgment against Williams became final, and there could be no further trial of the case as against him; that, as this court held upon the first appeal that the plaintiffs cannot foreclose their lien upon the Fresno property until the Oakland property has been sold, and its proceeds found insufficient to satisfy their claim, and as the plaintiffs omitted the Oakland property from the judgment of 1895, they have waived their lien thereon, and precluded themselves from obtaining any judgment for the sale of that property, there can be no judgment rendered in the case for any sale of the Fresno property which will affect the interest therein of the appellant. This proposition of the appellant is, however, the very point upon which the superior court rendered its judgment in 1897, in its favor, and which was reversed by this court upon the last appeal. In its opinion upon that appeal this court said (page 405, 130 Cal., page 621, 62 Pac.): "The court below held that the original complaint was not filed for the purpose of foreclosing the plaintiffs' lien upon the Oakland property, and that, as the first judgment had become final as to Williams, the court did not have the power to make a different decree and order the Oakland property sold first. In this, we think, the court erred." Acting upon this declaration applicable to the case before it, the superior court rendered the judgment now appealed from in accordance with the principles therein stated. An examination of the records in the two appeals shows that the facts upon this point upon which the rights of the respective parties depend are substantially identical. It must be held, therefore, that the superior court did not err in rendering its judgment in accordance with the principles declared upon the former appeal. See Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 Pac. 876.

2. The proposition of the appellant that the judgment of 1895, as between the plaintiffs and Williams, was not affected by the order granting a new trial, but became and is still final so far as Williams is concerned, is not sustained by the record. Although a recital and statement to that effect is made by the court in its findings of fact, it is none the less a conclusion of law, depending upon the proceedings which had been taken in the case, and is refuted by these proceedings as set forth in the record. In its notice of motion for a new trial the appellant placed no limitation as to the issues upon which, or the parties between whom, such motion would be made, but stated in general terms that it intended to move for a new trial "of the above-entitled action"; and the order of the court granting the motion was in like general terms that "the motion of the defendant San Francisco Savings Union for a new trial herein be, and the same is hereby, granted." This order is to be construed by its terms, and as it was for a new trial of the action its effect was to vacate and set aside the judgment theretofore rendered in the action, and place the parties in the position they held before any trial had been had. Whether Williams had notice of the plaintiffs' motion, or made no appearance upon the hearing thereof, or appeared thereto without any notice, is not disclosed by the record, nor is the fact material. The judgment was of such a character that the court could not, by granting a new trial, vacate it as between the plaintiffs and the appellant, and leave it in full force in all its terms as between the plaintiffs and Williams; but, if the scope of the order is to be limited, as contended by the appellant, its effect would be to require Williams to satisfy the judgment out of property other than that which he had mortgaged for its security, and thus increase his burden, and indirectly contravene the provisions of section 726, Code Civ. Proc. If Williams did not have notice of the appellant's motion, and did not appear at the hearing thereof, the court would have been without jurisdiction to grant the motion (Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81; United States v. Crooks, 116 Cal. 43, 47 Pac. 870), and it would have been denied; but in support of the validity of the order the jurisdiction of the court to make it must be assumed. If, in fact, the appellant gave no notice of its motion to Williams, and only asked for a new trial as between itself and the plaintiffs, the court was not precluded from granting a new trial of the entire action, and thus indirectly setting aside the judgment as to Williams, merely because he had not asked for it. Upon determining that it had erred in not directing the Oakland property to be first sold, and knowing that, in the absence of Williams, it had no jurisdiction to make any change in the judgment which would injuriously affect him, under the power which it was held at the last appeal the court possessed, it very properly granted a new trial of the entire action, as the only mode in which its error could be corrected.

3. The record of the contract between the plaintiffs and Williams, in the volume of "Covenants," gave constructive notice of its contents to the appellant. Section 1158, Civ. Code, declares that any instrument in writing "affecting the title" to real property may be recorded. Section 1213 declares that every conveyance of real property which is recorded as prescribed by law is constructive notice of the contents thereof to subsequent purchasers and mortgagees from the time it is filed with the recorder for record; and under section 1215 the term "conveyance" embraces every instrument in writing by which the title to any real property may be affected. The county government act (Gen. Laws 1903, p. 157) requires the county recorder to record the instruments authorized by law to be recorded "separately in large and well-bound separate books," and the subdivisions of section 120 of that act name the several classes of instruments for which such separate books are to be procured, and in which the instruments are to be separately recorded, the first of which subdivisions includes "deeds, grants, transfers, and mortgages of real estate," and the last of which is "such other writings as are required or permit-

ted by law to be recorded." The contract between the plaintiff and Williams was not only an instrument which affected the title of the plaintiffs to the Oakland property which they agreed to sell to him, but by reason of the agreement therein on the part of Williams to deposit in escrow with the First National Bank of Oakland a deed of his interest in the Fresno property therein described as collateral security for his payment of the purchase price of the Oakland property it was also an instrument affecting his title to the said Fresno property. The contract was not a deed, or grant, or transfer, or mortgage by him of the Fresno property, but was an agreement by which his interest in that property, after he should deposit his deed with the bank, should be held by the plaintiffs as security for his obligation to them. In this respect the contract may be likened to an executory agreement for the sale of a parcel of real estate, and, as in the case of recording such an instrument, its record imparted notice of its contents to subsequent purchasers and mortgagees. Such instrument is not embraced within any of the classes of instruments for which separate books are specially designated, or for which the recorder is required to keep separate indexes, as was the case in Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391, cited by the appellant, but it is one of "such other writings" for which a separate book is to be provided. The recorder was, therefore, authorized to copy it into any book whose title would reasonably indicate its character, and when so copied it was duly recorded. The volume entitled "Covenants" is a proper designation of the character of the instrument, and its record therein could not have been misleading, and must be held to have been sufficient. The appellant thereby had constructive notice of its contents, and became charged with knowledge of all facts that any inquiry prompted by such notice would have disclosed. Upon such inquiry it would have learned that Williams had deposited with the Oakland bank the deed of his interest in the Fresno property, which the contract provided should be given as security to the plaintiffs for the payment of his promissory note. Such information of the existence of this unrecorded deed was as binding upon the appellant as if the deed had been properly recorded. Civ. Code, § 1217.

The contention that the subsequent recording of the deed in the volume of "Deeds" is of no effect, and that it should have been recorded in the volume of "Mortgages," cannot be maintained. The deed is without any conditions or qualifications, but is absolute in its terms; and section 1171, Civ. Code, declares that "grants absolute in terms are to be recorded in one set of books and mortgages in another." The fact that an instrument purporting to be an absolute grant is subject to a defeasance, or may be shown to be a mortgage, does not authorize it to be recorded among mortgages. Only such instruments as are mortgages by their terms are to be so recorded.

4. The objection of the appellant that the contract and deed are void by reason of the uncertainty in the description therein of the Fresno property must be overruled. It cannot be said that it is impossible, for one familiar with that part of the country to take that description, and with the aid of the record of Williams' interest in the land, ascertain and locate upon the ground the extent of his interest in the sections named in the contract. The court, in its judgment directing a sale thereof, gave a definite description of the portion in which the appellant is interested, and also of that in which it has no interest, and it must be assumed that it received competent evidence from which to ascertain these descriptions.

5. Upon filing the complaint in this action in the superior court of Fresno county that court acquired jurisdiction to render judgment for the foreclosure of the securities given for the note, and to direct a sale of the Oakland property, as well as that of the Fresno property. Under section 726, Code Civ. Proc., there can be but one action for the recovery of a debt secured by mortgage, and, if the property which is mortgaged to secure a debt is situated in different counties, under the Constitution, art. 6, § 5, providing that an action for the enforcement of the mortgage may be commenced in the county in which the real estate, or any part thereof, is situated, the plaintiff may commence an action in either of those counties, and in the single action obtain a judgment for the foreclosure of his mortgage upon the property in both counties. See Murphy v. Superior Court, 138 Cal. 69, 70 Pac. 1070, and cases there cited. Having acquired this jurisdiction, the court could not lose it by reason of any error which it might commit in the course of the trial, or by any erroneous judgment which it might render, and which, after ascertaining the error, it caused to be vacated.

6. The statute of limitations is not available to the appellant. The action was commenced in 1893, within four years after the maturity of the note of Williams, and the amendment of the complaint in 1897 did not introduce a new cause of action, but merely added a prayer for additional relief upon the cause of action set forth in the original complaint, which the court, under section 580, Code Civ. Proc., would have been authorized to grant without such amendment. See Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786. The fact that upon the first appeal counsel for the plaintiffs erroneously claimed before this court that the action was brought only for the foreclosure of their lien upon the Fresno property, did not estop them from afterwards claiming, in accordance with the opinion of

this court, the right in the same action, and upon the original complaint, to foreclose their lien upon both properties.

7. The appeal from the order refusing to vacate the judgment does not present any facts for the consideration of the court other than those which are presented upon the appeal from the judgment itself; and the rule is well established that an order refusing to vacate a prior order or judgment from which an appeal may be taken is not appealable unless there is a record which presents matters for consideration that could not be presented upon the appeal from the original order or judgment. Goyhinech v. Goyhinech, 80 Cal. 409, 22 Pac. 175; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Alpers v. Bliss (Cal.) 79 Pac. 171.

8. The appeal from the order denying a new trial cannot be considered. The appellant, in its notice of intention to make such motion, stated that it would be made upon the minutes of the court. Section 661, Code Civ. Proc., provides that, when a motion for a new trial is made upon the minutes of the court, a statement shall be subsequently prepared and settled, which shall contain "the grounds argued" before the court for a new trial, and only those grounds, with so much of the evidence or other matter as may be necessary to explain them. The transcript herein contains a document purporting to be such statement, which is signed by the attorneys and filed with the clerk, but does not appear to have been settled or authenticated by the judge, and does not contain any specifications of error, or purport to show what grounds were argued before the court on the motion for a new trial. For these reasons the order denying a new trial is not subject to review. Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419. The appeals from the order refusing to vacate the judgment and from the order denying a new trial are dismissed.

The judgment is affirmed.

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145 Cal. 784

BERRY v. BERRY. (L. A. 1,305.)

(Supreme Court of California. Jan. 18, 1905.)

DIVORCE—NONSUPPORT—EVIDENCE—SUFFICIENCY.

1. Under the express provisions of Civ. Code, § 130, a divorce may not be granted on the uncorroborated evidence of either party.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 405.]

2. In divorce, evidence *held* insufficient to show that defendant had failed to support his wife to the best of his ability.

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Suit by Ella Estelle Berry against John Ward Berry for divorce. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Reversed.

Will D. Gould and J. E. Bates, for appellant. Henry W. Nisbet, for respondent.

VAN DYKE, J. This is an action for divorce. Plaintiff and defendant were married in Middlesex county, Mass., October 18, 1898. The plaintiff alleges in her complaint that for more than one year preceding the commencement of the action she has been and is now a resident of the county of San Bernardino, in the state of California. The complaint contains two counts. In the first it is charged that the defendant for more than a year immediately preceding the commencement of the action had willfully neglected and failed to provide plaintiff with the common necessaries of life by reason of his profligacy, idleness, and dissipation. In the second count it is charged that for more than a year immediately preceding the commencement of the action the defendant had willfully neglected and failed to provide plaintiff the common necessaries of life, he having the ability so to do, and had compelled her during said period to live upon the charity of her relatives and friends. The defendant, a resident of Massachusetts, where the parties were married, employed attorneys to defend the action, through whom a verified answer to the complaint was filed. In his answer he denied that the plaintiff had resided in the state of California for more than one year before the commencement of the action, or that at that time she was a bona fide resident of the state of California, and alleges that "the plaintiff moved from the commonwealth of Massachusetts into the state of California for the purpose of obtaining a divorce from this defendant for a cause not allowed by law in said commonwealth," and denies that he willfully or at all neglected or failed to provide for plaintiff the common necessaries of life, or that he did so by reason of profligacy, idleness, dissipation, or at all, and denies that he willfully or at all neglected or failed to provide the plaintiff with the common necessaries of life, or had compelled her to live upon the charity of her relatives or friends, or any of them; but, on the contrary, he alleges that he has at all times faithfully kept his marriage vows, and conducted himself toward the plaintiff as a faithful husband should, and alleges that the plaintiff has willfully been absent from the defendant for more than one year from the date of filing the complaint, without any cause or justification, and without the consent of the defendant. The court found that the plaintiff had been for more than one year preceding the filing of the complaint a bona fide resident of the county of San Bernardino, state of California, and that the defendant for more than one year prior to the filing of the complaint, to wit, the 29th day of June, 1901, had willfully neglected and failed to provide the plaintiff with the common necessaries of life, he, the said defendant, having during all of said time the ability so to do; and that plaintiff had been compelled to live upon the charity of her relatives and friends. The court, however, found in favor of the defendant in reference to the charge of profligacy, idleness, and dissipation. Judgment was accordingly entered granting a divorce to the plaintiff January 9, 1902. The defendant, through his attorneys, made a motion for a new trial on various grounds—among others, the insufficiency of the evidence to justify the findings, and errors of law—which motion for a new trial was thereafter submitted and denied June 9, 1902. Thereafter, on July 3, 1902, notice of appeal from the judgment and also from the order denying defendant's motion for a new trial was served and filed on the part of the defendant. Appellant, through his counsel, has filed a brief on the appeal, and at the October term of this court in Los Angeles argued and submitted the cause. The respondent has not filed any brief and failed to appear at the hearing of the cause on the argument.

From the record of the evidence contained in the statement on motion for a new trial it appears that the plaintiff was the only witness present at the trial of the cause. All the other evidence was by deposition of the parties in the East, including the father and mother of the plaintiff. The judge who tried the cause in the court below, in summing up the evidence in the case, says: "The only serious question in my mind is whether or not the wife, by the burden of proof, has shown that her husband is able, or was able during the period of the marriage, to provide her with the common necessaries of life, being firmly convinced as I am that he did not provide her with the common necessaries of life. The testimony shows that he went to Boston every day, and returned every night. We are led to infer that he worked while he was there. He testifies that he did work, and carried on his furniture business. There is no testimony which would support a finding of idleness or profligacy or dissipation on his part that I can see in the case. The only question is, was he able to provide his wife with the common necessaries of life? Our Supreme Court—and, I think, very properly, and in keeping with what I would consider to be a natural law—have said that if a man is able to work, but cannot get work, that fact in itself does not give the wife a ground of divorce. He must have property. He must have something whereby he can provide her with the common necessaries of life. * * * The only testimony I have on that point is the testimony of the wife to the effect that he was continually promising, but failed to provide; and it seems to me under all the testimony in the case—and I feel a little reluctant to arrive at that conclusion—but it seems to me under all the testimony in the case that the preponderance of the evidence is to the effect that he was able to provide her with the common necessaries of life, but that he failed and neglected to do so, and for that reason I shall order judgment in favor of the plaintiff on the second ground or cause of action." The law, however, declares in very explicit terms that no divorce can be granted upon the uncorroborated statement of either of the parties to the action. Civ. Code, § 130. And doubts should be resolved against a divorce instead of for it. "The marriage relation is the foundation of all society. It is not to be severed on slight grounds or for trivial causes. The policy of the law, therefore, is against granting divorces. Unlike other cases, in an action for divorce judgment cannot be rendered for the plaintiff on the default of the defendant, even upon a verified complaint; nor can it be granted upon the uncorroborated statement, admission, or testimony of the parties." Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016. "While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same, unless good cause for its dissolution exists, is an interested party. It has been said by eminent writers upon the subject that such an action is really a triangular proceeding, in which the husband and wife and the state are parties. * * * The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce." Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73. Upon the statement of the learned judge of the court below that the only testimony with reference to the failure to provide was that of the wife, the judgment of the court below should have been for the defendant. But in the testimony of the plaintiff herself she says, "I never knew him to withhold money from me when he had it, and I never knew him to have money around him." And there is no evidence in the transcript showing that the defendant did not do the best he could, under his circumstances, to support his wife.

At the time of the marriage the defendant was 23 and the plaintiff about 17. The defendant was just starting in as a partner in a business of repairing furniture in Boston, and was obliged to borrow from his sister in starting his business $2,500, and the evidence is all to the effect that he was an industrious, temperate man, and was never idle when he could get work. His mother and sister, it seems, did not view the marriage favorably, and the sister testifies that she met Mr. Allen, the father of the plaintiff, just before the marriage, and says, "I told him I did not think that my brother could support his daughter in the way his daughter wanted to be supported, and he said: 'I don't care if Ward has not one cent. I can afford to support them, if necessary.'" After they were married they went to housekeeping. His folks and her folks assisted in furnishing the house, and her father and mother and their adopted boy went to board with the parties from November until the next March, when the plaintiff and her mother went to Limerick, in Maine, where they remained until the latter part of the following October, 1899. Plaintiff's father, in his deposition, says: "I think my wife and I lived with Mr. Berry from November until the next March. On no occasion did I make complaint to Mr. Berry in regard to the board." In the transcript appear several letters from the plaintiff to the defendant while she remained at Limerick, of the most endearing character. Soon after their return from Limerick the plaintiff was about to be confined, and the physician who was consulted, it seems, advised taking her to a hospital of which he had charge. The deposition of the physician was introduced on behalf of the plaintiff at the trial. In this he says: "Q. I understand you recommended the removal of the plaintiff to the Frost Hospital? A. I did. Q. Did you attend her then? A. I did. Q. Did you render any bill to any one for medical services on this basis? A. I did. Q. To whom? A. The husband. Q. For attendance at the house and hospital both? A. Covering all attendance on the wife. Q. Did the husband pay this bill? A. He did. Q. Did he pay the entire bill? A. To the best of my knowledge he did. Q. Was the bill paid promptly? A. Reasonably so. Yes, sir. As doctors' bills are paid." In the deposition of Mrs. Allen, taken in Massachusetts, and read on the trial, she says: "I asked Mr. Berry if he was willing that his wife should go to the hospital, and he answered 'No,' that her place was at her home." And it appears from the defendant's deposition, as well as otherwise, that at that time the home of the parties was a suitable place for plaintiff's confinement. However, the physician thought he could attend to her better at the hospital; hence the removal there. Mrs. Allen, plaintiff's mother, further in her testimony says: "Q. How long was your daughter at the hospital? A. Two and a half weeks, I think that was the time I paid for. Q. You paid the hospital bill for the time she was there? A. Yes, sir." In this connection there was produced on behalf of the defendant, during the examination of the plaintiff herself on the stand, a letter which the defendant had written to her while she was in California, of which the following is a copy:

"Malden, Mass., June 11, 1900.

"My Dear Wife: Although I much dislike to refer to this matter you will recollect that your mother made complaint that since I had not paid the bills of Doctor Leeds, she herself was compelled to and did pay it. Yet I was surprised June 9, 1900, to learn from Dr. Leeds that she had paid him nothing whatever. Accordingly on the same date I paid his account amounting to thirty dollars as indicated by the copy of his receipt which I herewith mail to you. This I do so that you may not be misled by certain false statements and by various misrepresentations that have been made. You may rest assured of my constant and ever endearing love for you. And you ought to learn very much from this particular instance of misrepresentations here disclosed.

"Ever yours, J. Ward Berry."

Accompanying this is a copy of the bill of Dr. Leeds referred to, and which Dr. Leeds, as already shown, testified had been paid by the defendant, Berry.

The particular grievance of the plaintiff against the defendant is based upon what she supposed was his neglect to treat her properly and pay the bills while she was at the hospital during her confinement. In her cross-examination she says: "I wrote him a letter, and told him that if he could not take care of me through my confinement, and pay my bills, that I should not live with him another day. That is all I wrote him. Q. Is that the real cause of your leaving him? A. That is the real cause. Because I did not care anything about him after his abuse of me—abuses I went through and suffered all through my confinement, and before that."

In the defendant's deposition he says: "I was married to the plaintiff at Malden, Massachusetts, October 18, 1898. Our domestic relations were happy. I have never had any bad habits. I have always lived a plain and unquestionable life. I have never been profligate, idle, or dissipated, and never willfully or at all neglected or refused or failed to provide plaintiff with the common necessaries of life." Again, he says, after he earned some money as a clerk, "I put that money in the furniture business. I was in the furniture business from October 4, 1897, until the spring of 1900. The money I borrowed from my sister, Mrs. Cressey, I used in the furniture business. The furniture business was not a paying venture. It left me in debt other than to my sister. I had two or three hundred dollars in promissory notes I was obliged to take up. I was about three hundred dollars in debt six months before I gave up the furniture business in the spring of 1900."

The defendant testifies as follows in reference to his wife going to the hospital: "At the time of my wife's confinement the house was all furnished—five rooms; and my wife was provided with all that she needed in the way of food, clothing, and other comforts. The day that my wife went to the hospital the doctor sent for me to go down to his office to see him. He told me that my wife was in a critical condition, and that he did not care to take upon himself the responsibility of caring for her at the house, and that he wished I would consent to have her go to the hospital. I immediately went back and told my wife she had better go.

My wife said she did not want to leave her home, and she did not want to leave me. After she went to the hospital I packed the furniture up and had it moved over to Mrs. Annie Green's (her aunt), to be stored there. The same day that my wife went to the hospital she asked as a special favor to have the things and household goods packed up and stored at her aunt's house until she was able to go to housekeeping again. The child was born March 14, 1900, and died March 17th, the following Saturday, and was buried March 20th, and my wife stayed in the hospital one and a half weeks after the death of the baby. While she was at the hospital I called to see her every evening, after I was admitted, during the time she was there." It also appears from bills presented in his deposition that he paid the baby's funeral expenses. He further testified that all of his earnings went to the support of his family after his marriage, and there is nothing in the evidence in reference to his ability to provide for his family inconsistent with his own testimony.

In his deposition he also testifies that the plaintiff, in May, 1900, left Massachusetts, with her mother, and went to California for the purpose of getting a divorce. The plaintiff, in her testimony, denied that she ever told him she was going to California to get a divorce, but the circumstances surrounding the case seem to corroborate the defendant's statement. She testifies that she deserted him, and just before starting to California she dropped him a note as follows: "As I am going right away and auntie is soon to move, I sent your things over to your house. All except two carpets and the sideboard and two tables. Those I sold to pay my bills with, or help pay them. The other things are yours, the silver, that is the solid, is in your valise, and the other is in the half barrel which you had better take care of right away. Your clothes are in the packing box. I shall be many miles away when you receive your things and I thought I would see you had your things all right before I started." In her testimony she says: "My parents have been taking care of me since I have been in California. I have an explanation to offer as to those affectionate letters that have been introduced in evidence while I was living at Limerick. I was a very proud girl, and at that time I was very sick and needed sympathy, and I was too proud to go to my mother for it and so in that feeling I wrote to him. * * * And I did, as a matter of fact, think a great deal of Mr. Berry at that time; I did; I thought quite a little of him." Further she says: "I have not asked him for any money since I came to California. Q. Did he want you to come to California? A. I did not ask him. Q. You came right away on your own responsibility? A. I did; yes, sir. Q. And you never have asked him for any money for your support since then? A. No, sir."

The evidence on the part of the defendant, which is not contradicted in any material respect, is a complete answer to the plaintiff's complaint of want of care and attention on the part of the defendant during her sickness and confinement at the hospital, and this, in fact, according to her own statement, is her principal grievance on the charge of failure to provide, on the part of the defendant, the common necessaries of life. Aside from the want of evidence to support the finding on the merits of the action, it appears very plainly that the plaintiff was not a bona fide resident of this state, so as to entitle her to bring the action, even if a proper ground of divorce existed. According to the testimony of the plaintiff, her home at Highlands was with her parents, and in the deposition of her father, Mr. Allen, taken in Massachusetts, and used in her behalf on the trial, he says: "I returned from California a year ago last November, and my wife returned from California over six months ago. I returned for the purpose of protecting my business here in Boston. * * * I never voted there, and do not know that I am a citizen of California. I am a registered voter at Chelsea, and voted there at the last state election." It would appear from this, therefore, that the father of the plaintiff was not a citizen of California, but a temporary resident, at the most, in Highlands, in this state; and there is nothing to show that the plaintiff had a residence independent of that of her parents. There is nothing to show that the defendant ever was in California. His residence is in Boston. It is true she says she deserted him and came to California. Taking all the circumstances together, to say the least, it does not establish a clear case of a bona fide residence on the part of the plaintiff. But, inasmuch as the evidence utterly fails to support the finding upon the merits, it is not necessary to pass upon the question of residence.

The judgment and order denying a new trial are reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

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145 Cal. 777

HOLMES v. MARSHALL et al. (L. A. 1,594.)*

(Supreme Court of California. Jan. 17, 1905.)

EXECUTIONS—EXEMPTIONS—LIFE INSURANCE.

1. The exemption from execution of "all moneys, benefits," etc., "growing out of life insurance, if the annual premiums paid do not exceed $500" (Code Civ. Proc. § 690, subd. 18), extends to the beneficiary, and exempts insurance money received by a surviving wife from liability for her debts.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, § 75.]

2. Money received from life insurance being exempt from execution (Code Civ. Proc. § 690, subd. 18), the proceeds of a policy payable to

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*Rehearing denied February 16, 1905.

the estate of insured, after payment of the expense of administration, may be set apart for the benefit of the widow, under section 1465, without first paying the decedent's debts, and, when so set apart, are exempt as to her debts.

3. The deposit in the bank of life insurance money, which, under Code Civ. Proc. § 690, subd. 18, is exempt from execution, does not change its character so as to subject the amount to attachment under execution.

4. The court has the power to have a levy of an attachment on exempt property set aside.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by W. H. Holmes against N. A. Marshall and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Powers & Holland, for appellant. Morton, Houser & Jones, for respondents.

COOPER, C. This action is upon a promissory note for $1,000, dated October 5, 1899, signed by J. F. Jenkins and his wife, Annie J. Jenkins. J. F. Jenkins died intestate, and respondent, Annie J. Jenkins, is his surviving widow. After the action had been commenced, a writ of attachment was issued and levied upon $1,020.57 on deposit in the Citizens' National Bank of Los Angeles to the credit of respondent Annie J. Jenkins. The court made an order, after notice, and on motion of respondents, setting aside the levy of said writ and dissolving it as to the money so on deposit with said bank. This appeal is from the order so made.

The principal question is as to whether or not the said money was subject to the debts of respondent Annie J. Jenkins, or exempt from execution against her. At the time of his death, J. F. Jenkins was the owner and holder of three full paid-up life insurance policies upon his own life, two of which (one for $99 and one for $1,385) were payable to respondent Annie J. Jenkins, and one of which (for $982.50) was payable to the estate of deceased, his administrators or executors. The estate of said deceased was duly probated, and the $982.50 insurance collected, which constituted the entire estate, and of which there remained $539.45 after paying costs and expenses of administration. This was set apart to the surviving widow, Annie J. Jenkins, as exempt from execution, under section 1465, Code Civ. Proc. The proceeds of all said policies were deposited by respondent Annie J. Jenkins, in one account, to her credit in said Citizens' National Bank of Los Angeles. She drew against this account from time to time until the date of the levy of the attachment, when there remained the sum of $1,020.27 to her credit in said bank.

"All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars," are exempt from execution. Code Civ. Proc. subd. 18, § 690. The main contention of appellant is that the exemption extends only against the debts of the person whose life was insured, and who paid the premiums requisite to procure the insurance and keep it in force, and that such exemption does not continue after his death, in favor of the beneficiary. In construing this statute, as in the construction of all statutes, it is the duty of the court to arrive at the intent of the Legislature, if it can be done, from the language used in the statute. Statutes exempting property from execution are enacted on the ground of public policy, for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence. The general rule now is to construe such statutes liberally, so as to carry out the intention of the Legislature and the humane purpose designed by the lawmakers. Am. & Eng. Enc. Law (2d Ed.) vol. 12, pp. 75, 76, and cases cited; In re McManus, 87 Cal. 294, 25 Pac. 413, 10 L. R. A. 567, 22 Am. St. Rep. 250; Spence v. Smith, 121 Cal. 536, 53 Pac. 653, 66 Am. St. Rep. 62. Bearing this rule in mind, let us see what the Legislature has said as to this matter. It has said that where the annual premiums do not exceed $500 the insurance moneys shall be exempt from execution. Here the annual premium did not exceed $500. It has said that all moneys accruing or in any manner growing out of any life insurance shall be exempt from execution. The money here accrued and grew out of life insurance upon the life of deceased. After his death no execution could issue against him. The words "exempt from execution" were clearly intended to apply to the moneys coming from the life insurance to the hands of the beneficiary. It is exempt from execution as to all strangers or parties who have no claim to it, without any provision of statute. It was intended to exempt it from the debts of the party to whom it was payable, and who procured title to it by the death of the insured. It was not the intention that the insured might die, leaving a small insurance and a dependent family, and that the insurance money should be subject to execution for the debts of the wife, even if she is the beneficiary named in the policy. The words "exempt from execution" mean exempt from any execution. The Legislature mentioned no class of executions, and we are not at liberty to judicially insert a class. "Exempt from execution" includes the defendant Annie J. Jenkins, and applies to plaintiff. We have no decision of this court upon the question, and the decisions of other courts do not furnish much assistance, because the statute under which each decision was made is different from ours. In Kentucky and Minnesota the statutes declare, in effect, that certain insurance benefits, reliefs, etc., "shall be exempt from execution and shall not be liable to be seized, taken, or appropriated, by any legal or equitable process, to pay any debt or liability of a member." In both these states the fund or relief is held to be exempt from execution, whether against the original member, or against any beneficiary who has been paid or is entitled to be paid any benefit falling within the class described in the statute. Schillinger v. Boes et al., 85 Ky. 357, 3 S. W. 427; Brown v. Balfour, 46 Minn. 68, 48 N. W. 604, 12 L. R. A. 373; First National Bank v. How, 65 Minn. 187, 67 N. W. 994. It seems at least doubtful as to whether or not these decisions properly construe the statutes of these states. The decisions in other states—particularly in New York—hold similar language to create an exemption only as to the member or insured. In New York the language of the statute is that such funds shall be exempt "from execution, and shall not be liable to be seized, taken or appropriated by any legal or equitable process to pay any debt or liability of such deceased member." Bolt v. Keyhoe, 30 Hun, 619. The Kentucky and Minnesota cases are criticised by Freeman in his work on Executions (3d Ed.) vol. 2, § 234b. But the author says, in speaking of the language of the statutes in those states: "If these statutes stopped with the words 'exempt from execution,' there would be no doubt of the exemption in favor of the beneficiary; but the additional words in the statute indicate that the Legislature had in mind merely the debts or other liabilities of members of the association in question, and hence that, after the benefit was received by a person other than a member, it would be subject to the usual laws relating to executions." In our Code the statute stops with the words "exempt from execution." Under our statute, necessary household and kitchen furniture is exempt from execution; and, if the wife succeeds to such furniture, it is equally exempt as to her debts. The farming utensils or implements of husbandry of the judgment debtor are exempt, and, if the son should take them under the will of his father, following his father's occupation, they would still be exempt as to the son's debts. Equally true as to the insurance money in controversy herein. If it had come to J. F. Jenkins in his lifetime, it is conceded that it would have been exempt as to his debts. It came to his wife as his beneficiary, and is equally exempt as to her debts.

As to the policy payable to and collected by the estate, the estate was the beneficiary, and the money was, for the reasons before stated, exempt from execution. It was therefore assets of the deceased exempt from execution, and was properly set apart to the widow as being so exempt. Code Civ. Proc. § 1465; Estate of Samuel Miller, 121 Cal. 353, 53 Pac. 906. The administrator or executor is not the owner of any part of the estate. He, in his official character, only holds it in trust for the parties entitled to it, subject to the purposes of administration. The title to the insurance money came o respondent Annie J. Jenkins through the estate, and under the order setting it apart, and vested the title in her as effectually as if she had been named as the beneficiary of the policy. We can see no reason why the insurance money coming to her directly as beneficiary should be exempt from execution, and not that coming to her indirectly through the estate and the order setting it apart. In either case it is exempt from execution. In one case the instrument of life insurance gives her the title; in the other, the law gives it to her. The statute provides that all property exempt from execution shall be set apart for the use of the surviving husband or wife. Code Civ. Proc. § 1465. If it is exempt from execution before being set apart, it does not cease to be so the moment it is set apart. The widow takes the family allowance by order of the court. After it is paid to her, it cannot be seized on execution for her prior debts and diverted from the support of the family. The principle is fully discussed in regard to a homestead set apart for the family in Keyes v. Cyrus, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296. It was there held that the provision for setting apart exempt property, including a homestead, was for the protection and support of the family. The court said: "The authority given to the court in the first part of section 1465 to set apart for the family 'all the property exempt from execution including the homestead selected' implies that the property when set apart is exempt from execution. * * * A homestead may be set apart to the widow, even though the estate be insolvent, and the property so set apart constitute the entire estate of deceased; but, if the homestead thus set apart to her could be immediately taken in execution by one of her creditors, it would fail to be available for her use or support, and it might happen that her creditor would fare better than a creditor of the decedent whose money had perhaps been used to purchase the very property so set apart." In Barnum v. Boughton, 55 Conn. 117, 10 Atl. 514, it was held that money paid to the widow, as an allowance for her support, through the probate court, could not be taken or attached by one of her creditors. The court said: "She could neither ask nor receive it for the payment of her debts. The probate court could not grant it for that purpose. * * * If one allowance can be intercepted, so can every other, for, if the door is opened for one creditor, it cannot be closed against any, and the entire estate might thus be diverted from its legal destination. The law will not permit the instant necessities of the widow and the ultimate rights of the creditors of the estate to be postponed, in its name, to the demands of her creditors." So in this case the court will not allow the insurance money which is exempt from execution as to the creditors of the estate to be taken by the creditors of the widow. It is equally exempt as to them.

Appellant contends that by the deposit of the money in the bank the money lost its identity, and that thereafter the bank owed Annie J. Jenkins the money; that the debtor thus voluntarily parted with the money which was exempt, and acquired in lieu thereof a credit due by the bank. Such construction would seem to be unreasonable, and no authority is cited which supports it. It is true that, in one sense, by the deposit the relation of debtor and creditor was created as between the bank and Mrs. Jenkins, but she put the exempt money in the bank. She regarded it as money in the bank. She expected to, and did, draw it as she needed it. The bank did not give her the identical pieces of money that she deposited, but it gave her, as she drew upon it, money equal in value and kind. She was not required to keep the money buried or in her stocking, in order to have it remain exempt. If the appellant's theory is correct, she could not have paid a $5 grocery bill with a $20 piece, receiving $15 in change, without the risk of having the $15 attached. The law does not require such absurdity. The cases cited by appellant arose under the United States pension laws, and are not in point. The section of the Revised Statutes construed provides: "No sum of money due or to become due to any pensioner, shall be liable to attachment," etc. The courts have correctly held that the section only protected the money while due or in course of transmission to the pensioner. Money due or to become due is designed to protect the amount of the pension until it reaches the hands of the pensioner. It is then no longer money due or to become due. Our statute exempts the money, and, although deposited in the bank, it is still money and protected. It has not lost its identity because of the fact that the identical coins or bills deposited are not to be returned. Respondent probably never saw any coins or bills, but took the checks which the insurance company gave her as evidence that it had the money for her, and deposited them with the bank; having the amounts credited in her bankbook as evidence that she had the money in the bank. In Hibernia Savings & Loan Society v. City and County of San Francisco, 139 Cal. 205, 72 Pac. 920, 96 Am. St. Rep. 100, it was held that the checks or orders drawn upon the Treasurer or Assistant Treasurer of the United States, payable on demand, are not merely obligations of the United States, but solvent credits, subject to taxation. The court said: "The orders were simply a convenient mode of payment of the obligation. They were, for all practical purposes, the money itself." So in the case at bar the credit in the bank is, for all practical purposes, under the exemption laws, to be regarded as the money itself. Respondent had the right to have the levy set aside upon the exempt property. Section 556, Code Civ. Proc., provides that the writ may be discharged when the same was improperly or irregularly issued. This was not a dissolution of the writ of attachment, but an order setting aside the levy as to the exempt property. It would be strange if a court were so impotent that it could not set aside the erroneous levy of its own writ upon exempt property. Any other rule would compel the injured party to bring a suit for damages, which not only would lead to delay, but might in the end prove futile. Courts have power over their own process, and to set aside a levy of a writ of attachment or execution upon exempt property. Freeman on Executions, § 271; Enc. Pl. & Pr. vol. 8, p. 579, and cases cited; Sandburg v. Papineau, 81 Ill. 446.

It follows that the order should be affirmed.

We concur: GRAY, C.; SMITH, C.

For the reasons given in the foregoing opinion, the order is affirmed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

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145 Cal. 759

SULLIVAN et al. v. GAGE et al., State Board of Examiners. (S. F. 3,062.)

(Supreme Court of California. Jan. 16, 1905.)

CLAIMS AGAINST STATE—COSTS—FEES FOR RECEIVER'S ATTORNEYS — MANDAMUS TO STATE BOARD—EFFECT OF REJECTING CLAIM—DISMISSAL OF APPEAL—SPECIAL APPROPRIATION.

1. A judgment for counsel fees recovered by attorneys for a receiver appointed in a suit by the state to wind up the affairs of a corporation are not costs, within Code Civ. Proc. § 1038, providing that where the state is a party, and costs are awarded against it, they must be paid out of the state treasury, so as to take from the State Board of Examiners all discretion in the allowance of it as a claim against the state.

2. Where the order appointing a receiver is void for want of jurisdiction, an order awarding counsel fees for the receiver is also void.

3. An order awarding counsel fees for services of an attorney for a receiver should run in favor of the receiver, rather than to the attorney.

4. The State Board of Examiners not having authority to "entertain for a second time a demand against the state once rejected by it, unless such facts are presented as in suits between individuals would furnish sufficient ground for granting a new trial" (Pol. Code, § 670), mandamus does not lie to compel the allowance of a claim which the board has once rejected.

5. The dismissal of an appeal from an order of court is not an affirmance of the order, so as to give it any validity which it otherwise did not have.

6. St. 1895, p. 238, c. 193, making an appropriation for payment of five distinct claims of different persons, is void under the provisions of Const. art. 4, § 34, that "no bill making an appropriation for money, except the general appropriation bill shall contain more than one item of appropriation and that for one single and certain purpose, to be therein expressed."

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action for mandate by Jeremiah F. Sullivan and another against Henry T. Gage and others, constituting the State Board of Examiners. There was a judgment for plaintiffs, and defendants appeal. Reversed.

W. C. Van Fleet and W. B. Treadwell, for appellants. Sullivan & Sullivan, for respondents.

HENSHAW, J. This is an appeal from a judgment in favor of plaintiffs, awarding a temporary writ of mandate against the defendants, the State Board of Examiners, commanding the board "to forthwith approve and allow" a claim of the plaintiffs against the state of California for $5,000. The facts material to this consideration are as follows:

In 1888 an action was commenced by the people of the state of California, upon the relation of George A. Johnson, Attorney General, under section 803 of the Code of Civil Procedure, against the American Sugar Refinery Company, a corporation, to obtain a judgment excluding that corporation from its corporate franchise on the ground of misuser. In January, 1890, a judgment was rendered in this action excluding the corporation from the franchise, dissolving it as a corporation, and imposing a fine upon it; and in February, 1890, the court, upon the application of the Attorney General, and upon order directing the defendant to show cause, made its order appointing Patrick Reddy receiver in the action, to take possession of all the property of the corporation, and to hold the same pending the appeal from the judgment. Reddy qualified as receiver, took possession of some of the property of the corporation, and so continued until the 9th day of June, 1890. Upon that date a writ of prohibition was issued from this court in the case of Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, adjudging that the order of the superior court appointing Patrick Reddy receiver, and all orders made by the superior court in pursuance or aid thereof, were null and void and of no effect, and in excess of the jurisdiction of the superior court; and the superior court and its judge were prohibited and restrained from in any manner acting upon and enforcing the orders, or either of them, and the court was further commanded without delay to revoke and annul the orders, and each of them.

On January 10, 1891, Patrick Reddy filed in the superior court his account and report of his administration as receiver, in which he stated that he had been "obliged to employ counsel for the purpose of advising him in his duties in the premises, and did employ Messrs. Sullivan & Sullivan," plaintiffs herein, and that their services as such were reasonably worth $5,000. On the same day the superior court made its order appointing M. C. Blake a referee to take proofs as to the matters embodied in the report, and to report, amongst other things, "the amount proper to be allowed as compensation for the services of Messrs. Sullivan & Sullivan, attorneys at law, rendered to said Reddy while acting as such receiver." On February 3, 1891, Blake made his report, which contained the statement that Messrs. Sullivan & Sullivan had acted as attorneys and counsel of the receiver in all the matters of said receivership, and had rendered valuable and important services, and that such services were reasonably worth the sum of $5,000, and that no payments had been made on account thereof. On the day upon which the report was filed, the court made its order approving it, which order contained the following: "And it is further ordered, adjudged, and decreed that Messrs. Sullivan & Sullivan are entitled to the sum of five thousand ($5,000) dollars from the state of California." No notice was given to the state of any of these proceedings, nor was the state represented at any of these hearings. In April, 1891, the Attorney General took an appeal to this court from this last-quoted order or judgment. On December 14, 1892, and while this appeal was pending, plaintiffs presented to the State Board of Examiners their claim for "professional services rendered by said Sullivan & Sullivan as attorneys and counselors for the receiver appointed by the superior court of the city and county of San Francisco, state of California, in that certain action entitled 'The People of the State of California, upon the Relation of George A. Johnson, Attorney General, Plaintiff, v. American Sugar Refinery, Defendant,' during the first six months of the year A. D. 1890. Said sum of $5,000 (five thousand dollars) was fixed and allowed as the fee of Sullivan & Sullivan for said professional services by the superior court of the city and county of San Francisco by order of said court duly given, made, and entered in said court on the 3d day of February, 1891." On December 15, 1892, the Board of Examiners made its order rejecting the claim, as follows: "The annexed account for $5,000, presented by Sullivan & Sullivan for legal services (case of People v. American Sugar Refinery Company), forty-first fiscal year, is rejected and disallowed, under section 662, Pol. Code, because the board is of the opinion that the state is not liable, in view of the facts, evidence, and decision of the Supreme Court in the case of Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, and Havemeyer v. Superior Court, 87 Cal. 267, 25 Pac. 433, 10 L. R. A. 650." Thereupon plaintiffs appealed to the Legislature from this disallowance of their claim, and served notice upon the State Board of Examiners of their appeal. In 1895 the Legislature passed the following act (St. 1895, p. 238, c. 193):

"An act appropriating money to pay the claims of H. P. Dyer, F. F. Dyer, C. A. Granger, Gaston Goldsmith, and Sullivan & Sullivan.

"The people of the state of California, represented in Senate and Assembly, do enact as follows:

"Section 1. The sum of eight thousand six hundred and forty-five dollars is hereby appropriated out of any money in the state treasury not otherwise appropriated, to pay the claim of H. P. Dyer for four hundred and six dollars; C. A. Granger for four hundred and thirty-one dollars; F. F. Dyer for two thousand seven hundred and seventy-five dollars; Gaston Goldsmith for thirty-three dollars; and Sullivan & Sullivan for five thousand dollars; which amounts have been assessed as costs against the state of California in the case of The People of the State of California v. The American Sugar Refinery Company, number twenty-four thousand three hundred and eighty-one, in the Superior Court of the State of California, in and for the City and County of San Francisco."

Thereafter, and upon July 12, 1895, Messrs. Sullivan & Sullivan again presented to the Board of Examiners a claim reciting the facts above stated as to the report of Mr. Reddy, its reference to Mr. Blake, his report thereon, and setting forth "that thereafter said report came on regularly for hearing before said superior court, and said court, after due consideration, duly gave and made a judgment confirming said report, and directing payment to said Sullivan & Sullivan of said sum of five thousand dollars; that said judgment has never been reversed, vacated, or set aside; that on the 27th day of March, 1895, an act of the Legislature of the state of California was duly passed and approved by the Governor of said state, appropriating out of the moneys in the state treasury not otherwise appropriated the sum of five thousand dollars to pay said claim of Sullivan & Sullivan." On December 13, 1895, the State Board of Examiners again rejected the claim, in the following order: "The annexed account for $5,000, presented by Sullivan & Sullivan for legal services in the case of The People v. Am. Sugar Refinery Company, is rejected and disallowed under section 662, Pol. Code, because not a legal charge against the state." This last-mentioned claim was also presented and acted upon by the State Board of Examiners while the appeal from the order of the superior court was still pending. On February 7, 1899, this court made its order dismissing the appeal theretofore taken by the state from that order for the failure of the appellant to file any transcript on appeal. And upon March 10, 1899, the remittitur on such appeal was filed in the superior court. On March 6, 1899, the plaintiffs again presented to the board their claim, and on June 27, 1899, the board again rejected the claim, stating: "This claim is disapproved by the Board of Examiners. First. Because the demand was rejected by the State Board of Examiners for sufficient reason on December 15, 1892, and a second time rejected by said board for sufficient reason on the 13th day of December, 1895, and there appears no law whatever authorizing this board to entertain the same demand a third time. Accordingly the board disapproves this claim, and causes the same to be filed with the records of the board, with the foregoing statement showing such disapproval and the reasons therefor." Upon this rejection the plaintiffs sued in mandate, and, as has been stated, obtained a judgment of the trial court commanding the board of examiners "to forthwith approve and allow" their claims, and from this judgment the State Board of Examiners have appealed.

Appellants' first contention against the judgment may thus be summed up: That the board of examiners, in passing upon claims such as this, are vested with discretionary and judicial powers; that mandate will not lie therefor to compel them to exercise those powers in any given way, or, as here, to force the board to approve and allow a claim. Second. That mandate will not lie in this case, because the board has already acted, has exercised its discretionary and judicial powers, and has three times rendered its judgment against the validity of the claim; that plaintiffs' only redress is by direct appeal from such judgment, or by such other appropriate mode of relief as the state has provided, and, if the state has provided no mode of relief, then the action of its agents, the board of examiners, is final and conclusive. Respondents, in answer to this, admit the well-settled rule that mandate will not lie to compel a tribunal exercising discretionary and judicial functions to act in a particular way, but they insist that mandate will lie to compel specific form of action where no discretionary or judicial powers are vested with the board or with the tribunal, and where but one form or course of action is open to them upon the claim; and they insist that their own case is of the latter sort. Furthermore, they urged against the objection that the board has already acted by rejecting the claim that these orders of rejection do not constitute res adjudicata against them, for the reason that at the time of these rejections the appeal from the order allowing them counsel fees was still pending in the court, and was therefore sub judice, while, at the time of the commencement of this action by a dismissal of that appeal, the order had become final and valid by operation of the judgment of dismissal.

The duties and powers of the board of examiners in these matters are prescribed by sections 660, 661, et seq., of the Political Code. Three classes of claims are there specified. The one for which appropriations have been made (sections 660, 661, 662); the second, those for the settlement of which provision has been made by law, though no specific appropriation has been made therefor (section 663); and the last, those for the settlement of which no provision has been made by law (sections 664, 665, and 666). As to the third class, the board has no power other than "to report to the Legislature such facts and recommendations" as they deem proper. In acting upon a claim of the other two classes the board is authorized by these sections either to approve or disapprove them. Respondents, in support of their contention that the State Board of Examiners was not called upon to exercise discretionary and judicial functions in the matter of their claim, place great reliance upon the case of Lawrence v. Booth, 46 Cal. 187. That was mandate against the State Board of Examiners to compel the allowance of a claim for costs in an action commenced by the district attorney upon behalf of the state, which costs were assessed by the district court under the provisions of a special statute; the contention of the defendant board being that the award of costs by the district attorney was not conclusively binding upon it, and did not, therefore, control its action. That contention was disposed of in the following language: "At all events, the requirement of the statute, as we construe it, is positive, that the cost of publication, as taxed by the court, shall be paid by the state. This leaves to the auditing officers no discretion as to the amount for which the claim shall be allowed. It must still pass through the hands of the Board of Examiners, in the ordinary routine of business, but the amount allowed can be no other than that fixed by the judgment of the court." Here, it will be observed, was waged no controversy over the provisions of the statute, nor over the validity of the order of the court in fixing costs; the point of difference being merely, as has been stated, whether the court's allowance absolutely controlled the action of the Board of Examiners. Apart from such exceptional cases as that illustrated in Lawrence v. Booth, it is unquestionably the fact, and has been so declared by this court, that the State Board of Examiners does exercise, in the generality of cases, discretionary and judicial action, making their acceptance or rejection of a claim not only final, but free from collateral attack. And so it is distinctly laid down as to the powers of this board upon these very claims in Cahill v. Colgan, 31 Pac. 614, where it is said: "The Board of Examiners has unlimited power to investigate the merits of all claims presented for allowance, and may act upon facts within the personal knowledge of its members, as well as upon evidence from other sources. Pol. Code, §§ 658, 666. It was the duty of the Attorney General, as a member, to impart to the board his personal knowledge of all material facts in regard to the suit of People against Havemeyer, which suit had been prosecuted by him, and he must be presumed to have performed this duty. In the matter of approving and rejecting claims against the state, the Board of Examiners acts judicially, and its decisions in cases of which it has jurisdiction are not subject to collateral attack. In his work on Judgments (section 532), Mr. Black says: 'When the statutes commit to a board of county commissioners or supervisors or auditors or to a town council the duty of examining and auditing claims against the municipality, their action in auditing, adjusting, or rejecting such a claim is judicial in its nature, and their decision is binding and conclusive, unless reversed on appeal;' citing, among other cases, Osterhoudt v. Rigney, 98 N. Y. 222; Colusa County v. De Jarnett, 55 Cal. 373; Placer Co. v. Campbell (Cal.) 11 Pac. 602. In Osterhoudt v. Rigney, 98 N. Y. 223, the court said: 'The acts of a board of audit, within its jurisdiction, in the absence of fraud or collusion, are final and conclusive, and cannot be questioned on a collateral proceeding. Whether the claim is a proper town or county charge, in a case where it is doubtful and rests upon disputed evidence, and what amount shall be allowed when not fixed by statute, are questions which the statute commits to the determination of the board of audit; and however much it may err in judgment upon the facts, so long as it keeps within its jurisdiction and acts in good faith, its audit cannot be overhauled, but is final, as well as to the taxpayers as to the claimant.' See, also, Robinson v. Supervisors, 16 Cal. 209; Miller v. Sacramento County, 25 Cal. 94; Emery v. Bradford, 29 Cal. 75, 84; Scheerer v. Edgar, 76 Cal. 569, 18 Pac. 681; Bernal v. Lynch, 36 Cal. 135; Black, Judgm. § 250." In further support of the principles here enunciated, and on the proposition that mandate will not lie to compel specific action by a tribunal vested with discretionary powers, may be cited Tilden v. Supervisors, 41 Cal. 68; Berryman v. Perkins, 55 Cal. 483; Strong v. Grant, 99 Cal. 100, 33 Pac. 733; Jacobs v. Supervisors, 100 Cal. 121, 34 Pac. 630. While in Wood v. Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249, upon which respondents rely, it is said: "If the determination of the tribunal was intended to be final, it is plain that it cannot be disturbed, either on mandamus or in any other way. If it was not intended to be final, but there is other 'plain, speedy, and adequate remedy,' the writ cannot issue, for it was not designed to usurp the place of other remedies."

We are thus brought to consider whether the claim before us presents a case within the exception to the general rule as noted in Lawrence v. Booth, for, if it does not, then clearly this action will not lie. Herein respondents cite section 1038 of the Code of Civil Procedure, to the effect that when the state is a party, and costs are awarded against it, they must be paid out of the state treasury; and their argument which follows is that the award which the court made in their favor was, in effect, an award for costs in the action, and that the order fixing the amount having been made by a court of competent jurisdiction, and the appeal from that order to this court having been dismissed, the matter becomes an absolute finality, and that naught is left for the State Board of Examiners but to approve their claim. But the parallel between this case and that of Lawrence v. Booth would be much closer, were it not for the objections which are presented to all these matters. In the first place, section 1038 is dealing merely with "costs," as such. Plaintiffs' claim is not a claim for costs, within the meaning of this section and of its chapter, nor was the award made to them by way of costs. Moreover, the validity of the order itself is here called in question, whereas the validity of the order made in Lawrence v. Booth was never in controversy. It is beyond peradventure that this court decided that the appointment of the receiver in the case of People ex rel. v. American Sugar Refinery was void, as being in excess of the jurisdiction of the court. Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, and Havemeyer v. Superior Court, 87 Cal. 267, 25 Pac. 433, 10 L. R. A. 650. This, it will be observed, does not present the case of a reversal of an order appointing a receiver for mere error or irregularity in its procurement. It presents the case of an order void for want of legal authority, and where the receiver, in point of law, was not a receiver, but a trespasser. It is so stated in Costa v. Superior Court, 137 Cal. 79, 69 Pac. 840, where it was held that the superior court had no jurisdiction to appoint an administrator of the estate of a living person, and the appointment was therefore in excess of jurisdiction and void. This court said: "In this case the court finds that it has never acquired jurisdiction of the subject-matter involved in the proceedings. Its previous orders were entirely void, and in this very judgment it is so declared. The petitioner, therefore, has not been placed in possession of the property by any valid order or process of the court. After the judgment declaring the grant of administration and all subsequent proceedings void, the petitioner will be regarded as a trespasser from the beginning. He cannot be regarded as a receiver whose possession is that of the court." See, also, Staples v. May, 87 Cal. 178, 25 Pac. 346. The cases are not infrequent where the court has settled the account of a receiver erroneously appointed, and made the amount a charge against the party who has procured the appointment, but no case has been brought to our attention where a court has made such an order when its own judicial act in appointing the receiver was nugatory and void for want of jurisdiction. The receiver is not obliged to accept such appointment, and in such a case as this, as the court was without power to appoint him, it must equally be without power to make any other order depending for its validity upon the order of appointment. The utmost that is left for a receiver appointed under such circumstances is his right of action for compensation against the party procuring his appointment. Thus, in Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604, where this court denied a writ of prohibition, it is said: "It is suggested, however, that an order fixing the receiver's compensation in this proceeding might conclude the rights of the petitioners as to costs to be included in the final judgment, or in a separate action by Silver to recover the amount allowed. But they certainly cannot be concluded by the order in any collateral proceeding or new action if the court has no jurisdiction to make it." And in Grant v. Los Angeles & Pacific R. Co., 116 Cal. 71, 47 Pac. 872, it was contended by appellant that, as the order appointing the receiver was absolutely void upon its face for want of jurisdiction in the court to make it, the order fixing the compensation of the receiver, being founded thereon, was equally void; and this court, after discussion, summed the matter up in the following sentence: "That order [appointing the receiver] being void, the present order must of necessity be held, as to appellant, likewise void." So, here, it must result that the order allowing compensation, being based upon a void order appointing the receiver, is itself void. But these are not the only considerations. The order, it is to be noted, is an order directing the payment of the money to Sullivan & Sullivan, and not to the receiver. Yet it is in favor of the receiver alone that the order should have run. The employment of Sullivan & Sullivan came wholly from the receiver, and to him alone were they entitled to look for compensation. If the order in question be construed as a judgment in favor of Sullivan & Sullivan, it is a judgment in favor of one not a party to the action, nor an officer of the court. If it be construed as an order, then it is fatally defective, in that the order should have run in favor of Mr. Reddy, and should have been an allowance to him upon account of his obligation to the attorneys whom he had employed. It is thus declared in Stuart v. Boulware, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. Ed. 568, where the court says: "If it were proper for the receiver to employ counsel, the allowance of reasonable counsel fees is to the receiver, and not directly to the counsel, and such fees would constitute only one of the items in the receiver's account. The counsel had no cause of action, but the allowance was, in legal effect, to the receiver, to enable him to make compensation for professional services." Nor is this distinction unimportant. The receiver might have a cause of action against the party securing his appointment, whereas the attorney for the receiver has no such right of action, and can look for compensation only to the person who appointed him. So in this case Sullivan & Sullivan would have no right of action against the state. That right of action would be vested in Mr. Reddy alone. Their sole right would rest in their claim against the receiver. The same principle was declared in Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345, and Henry v. The Superior Court, 93 Cal. 569, 29 Pac. 230. In each of those cases an order making allowance to the attorneys directly was held to be void, and in the latter case it was annulled on certiorari.

It thus appears that the claim presented to the State Board of Examiners was a claim essentially calling for the exercise of discretion and judgment, and that this was employed with the result that the claim was three times rejected. It might well be sufficient to rest the matter here, but, in addition to what has been said, another sufficient reason may be advanced. Section 670 of the Political Code provides as follows: "The board must not entertain for the second time a demand against the state once rejected by it, or by the Legislature, unless such facts are presented to the board as in suits between individuals would furnish sufficient ground for granting a new trial." It is not disputed that the claims presented were the same. But one change had occurred since the rejection of the claim in 1895, and its new presentation and rejection in 1899, and that was that the state's appeal from the order which forms the basis of the claim had been dismissed. Upon this it is contended, as has before been stated, that the fact of dismissal not only worked an affirmance of the order appealed from, but established its validity, and that therefore the former rejection cannot be regarded as res adjudicata, and the situation was different in important legal particulars at the time of the last presentation and rejection. But the claim was last presented upon March 6th, and the judgment of dismissal did not become final by the going down of the remittitur until March 10th. So at the time of the last presentation the appeal, in contemplation of law, was still pending, and the position of the claimants was precisely the same as it was in 1895. But aside from this, the dismissal of the appeal from the order was not an affirmance of the order so as to give it any validity which otherwise it did not possess. A dismissal of an appeal is an affirmance of the judgment only in a limited sense. If the judgment is void on its face, the dismissal of the appeal from it in no wise cures such vital defect. At the most, the dismissal prevents a second appeal, and relieves the order or judgment from attack for error or irregularity which could have been taken advantage of upon appeal. Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; Ritzman v. Burnham, 114 Cal. 522, 46 Pac. 379; U. S v. Gomez, 23 How. 326, 16 L. Ed. 552, 587. Says this court in Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67: "The affirmance by the appellate court of a void judgment imparts to it no validity, and especially if such affirmance is put upon grounds not touching its validity. * * * The Supreme Court of Mississippi said that the affirmance of a void judgment on appeal, upon grounds not touching but overlooking its invalidity, did not make it valid. When a judgment is lacking in any of the foregoing particulars, it matters not whether it was rendered by the highest or lowest court in the land, it is equally worthless. No one is bound to obey it. The oath of all officers—executive, legislative, or judicial—compels them to disregard it." It follows, therefore, that the mere fact that the appeal had been dismissed did not impart any validity to this void order.

There is left for consideration the effect of the legislative act above quoted. The claim which was presented to the State Board in 1895 was based upon the act, and was rejected. In this particular the situation is not changed since the rejection of that claim, and no new rights which would "furnish sufficient ground for granting a new trial" have been shown. In that view of the case, it was the duty of the Board of Examiners to refuse to consider the claim anew, and plaintiffs were barred by the rejection of 1895. And finally, if the validity of the appropriation act itself be involved, it is, without doubt, violative of section 34, art. 4, of the Constitution, which provides that "no bill making an appropriation of money except the general appropriation bill shall contain more than one item of appropriation, and that for one single and certain purpose to be therein expressed." The language of this section is so plain that, read side by side with the act in question, it would seem to cut off the need of discussion. There is here not only more than one item, but the items themselves are not for a single purpose. Murray v. Colgan, 94 Cal. 435, 29 Pac. 871.

The judgment appealed from is therefore reversed.

We concur: McFARLAND, J.; LORIGAN, J.

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WESTERN UNION OIL CO. v. NEWLOVE et al. (L. A. 1,625.)

(Supreme Court of California. Jan. 17, 1905.)

ACTION BY LESSEE — SELF-SERVING DECLARATIONS OF LESSOR—IMPEACHING WITNESS—INCONSISTENT STATEMENT — RELATING STATEMENTS TO WITNESS—OBJECTION TO TESTIMONY.

1. In an action between a lessee and the owner of adjoining land, involving boundary, declarations of the lessor in his own favor are not admissible for the lessee.

2. Under Code Civ. Proc. § 2052, allowing a witness to be impeached by evidence of statements inconsistent with his testimony, where, in an action by a lessee against the owner of adjoining land, involving the question whether there had been a practical location of the boundary on the line where the lessor had erected a fence, the lessor having testified that the fence was put up by him on his own land for his own convenience, and not as a boundary fence, and that there was no agreement with reference to it, he may be impeached by inconsistent statements, though they were made after the date of the lease.

3. Under Code Civ. Proc. § 2052, providing that, before a witness can be impeached by statements inconsistent with his testimony, the statements must be related to him, and he must be asked whether he made such statements, it is not enough to ask him whether he had a conversation at a certain time and place with a certain person "in regard to the building of that fence to which you have referred in your direct examination," he having testified that he built it for his own convenience, and not as a boundary fence.

4. Where unobjectionable impeaching testimony of one witness is objected to "as incompetent, irrelevant, and immaterial, and also on the ground that sufficient foundation had not been laid," the statement of counsel that the same objection is interposed to the impeaching testimony of another witness, which is objectionable only in that the statements testified to by the latter witness had not been sufficiently stated to the witness to be impeached, this is not enough to call the court's attention to the distinction.

Commissioners' Decision. Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by the Western Union Oil Company against Joseph Newlove, executor, and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Bicknell, Gibson & Trask, Dunn & Crutcher, and Canfield & Starbuck, for appellant. B. F. Thomas, for respondents.

SMITH, C. This is a suit to quiet title to a strip of land containing 54.97 acres, described in the complaint. Defendants had judgment, and plaintiff appeals from the order denying its motion for a new trial.

The plaintiff, under a lease from Careaga to its assignor, of date March 14, 1900, is lessee for a term of years of a tract of land owned by Careaga since about the year 1882. The defendants are the executors, widow, and devisees of John Newlove, deceased, who became the owner of the tract adjoining the Careaga tract on the north about the year 1880. There is a fence on or near the common boundary between the two tracts, which was erected by Careaga in 1888. But it is claimed by the plaintiff that the true boundary is from 2.80 to 3.44 chains to the northward; and the land in controversy is the strip lying between this line and the fence. It is claimed by defendants in their answer that in the year 1888, there being some controversy about the boundary, there was an agreement between Newlove and Careaga fixing the line where the fence was shortly afterward erected by the latter, and that this fence has ever since been acquiesced in by the owners of both tracts as the boundary. It is also claimed that it was part of the agreement that Newlove, upon inclosing his land, should pay half the cost of the fence; and accordingly the agreed one-half value of the fence, $250, was in the year 1898 paid to and accepted by Careaga. On the issues thus raised the findings of the court are for the defendants. The court also finds "that plaintiff's alleged cause of action is barred by laches," and "that plaintiff is estopped from claiming that said fence line is not the dividing line between the said lands in which it has an estate for years and the lands of defendants."

The points urged by the appellants' counsel are: (1) That the court erred in ruling that Careaga could be examined as to statements made by him to witnesses Tunnell and Martin subsequently to the date of Careaga's lease to plaintiff's assignor, and also, in permitting Tunnell and Martin to testify to such declarations; (2) that the court also erred in excluding the declarations of Careaga in his own favor concerning the boundary of the Careaga ranch; (3) that the evidence was insufficient to justify the finding as to laches, or (4) as to estoppel; and (5) that the third finding conflicts with the findings from the fourth to the eleventh. But with regard to the last objection, we do not see that this is the case. Findings 4 to 11 are the findings as to the practical location of the land by the parties in 1888. The third finding is simply to the effect that the two tracts have a common boundary, but the location of that boundary is not found otherwise than as it may be inferred from the practical location. Nor, were it otherwise, would the conflict be material, as the necessary effect of a practical location is, in general, to establish a different line from the true line as originally existing. Nor are the findings as to estoppel and laches of any materiality. Presumably, they are merely legal conclusions from the findings as to practical location; otherwise there would be no evidence to support them. But they may be stricken out without affecting the judgment, which is fully supported by the findings as to practical location. Dierssen v. Nelson, 138 Cal. 397, 398, 71 Pac. 456; Cavanaugh v. Jackson, 91 Cal. 583, 27 Pac. 931; Burris v. Fitch, 76 Cal. 398, 18 Pac. 864; Helm v. Wilson, 76 Cal. 476, 18 Pac. 604; White v. Spreckels, 75 Cal. 616, 17 Pac. 715; Columbet v. Pacheco, 48 Cal. 397; Cooper v. Vierra, 59 Cal. 283; Sneed v. Osborn, 25 Cal. 626 et seq. The objection to Careaga's declarations in his own favor were also rightly sustained. Code Civ. Proc. §§ 1849-1853; Williams v. Harter, 121 Cal. 52, 53 Pac. 405; Taylor v. McConigle, 120 Cal. 126, 127, 52 Pac. 159; People v. Blake, 60 Cal. 510, 511, dissenting opinion of McKee, J.; Fischer v. Bergson, 49 Cal. 297.

This leaves us to consider only appellants' first point, which, however, involves several points which will require separate consideration. As to the questions to Careaga, we do not doubt they were admissible. Careaga had testified on his examination in chief that the fence was put up by him on his own land for his own convenience, and not as a boundary fence; and also that there was no agreement with reference to it. It was therefore competent to ask him whether he had not made at other times statements inconsistent with his present testimony. Code Civ. Proc. § 2052. As to the testimony of Martin, that also was admissible. Careaga had been asked specifically as to the statements to which Martin testified, and had denied making them. The evidence was therefore clearly competent under the provisions of the section of the Code cited above. It is, indeed, urged that, where a witness is questioned as to a collateral matter, his answer must be taken as conclusive, and that evidence to contradict it is not admissible; and it is claimed that the test of materiality is as stated in the case of George v. State, 16 Neb. 321, 20 N. W. 312, where it is said: "If the question put to a witness on the part of the state on his direct examination would have been objectionable as being no part of the state's case, then it is collateral, and the party asking it is bound by the answer, and will not be permitted to cause another witness to contradict it." In applying this it is argued that Careaga's declarations, having been made after the date of the lease to plaintiff's assignor, were inadmissible, and therefore could not be proven. But the decision does not support this position. It refers to the original statements of the witness on his direct examination, which were material. So that the real test is whether "the matters sought to be contradicted were immaterial." Lake Erie Co. v. Morain, 140 Ill. 122, 29 N. E. 869; Attorney General v. Hitchcock, 1 Exc. 99.

But with regard to the witness Tunnell a serious question is presented. All that was asked Careaga with reference to him was whether he had a conversation at a time and place mentioned with Tunnell "in regard to the building of that fence to which you have referred in your direct examination," and the statements to which Tunnell's testimony refers were not related to him. These statements were therefore inadmissible, and, the evidence having been objected to on the ground that sufficient foundation had not been made, their admission was error. Code Civ. Proc. § 2052. But this defect in the testimony of Tunnell is not urged by counsel, and probably escaped the attention of the court. The witness Martin had been previously examined, and his testimony had been "objected to as incompetent, irrelevant, and immaterial, and also on the ground that sufficient foundation had not been laid," and objection had been overruled and exception taken. But upon examination of Tunnell we find nothing as to the ruling of the court except the statement of plaintiff's attorney that the evidence was "subject to the same objection, ruling, and exception." This, perhaps, we may assume was assented to by the court; but it seems clear that the testimony of both witnesses was put in the same category by the plaintiff's attorney, and the court therefore could not be expected to observe the distinction. Also the statements made to Martin and Tunnell were, in effect, the same, and Careaga's denial of the former necessarily indicated that he would have denied the latter had the statement related to him. The error, therefore, we think, was immaterial.

We advise that the order appealed from be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the ordered appeal from is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

146 Cal. 77

In re HOLT'S ESTATE. (Sac. 1,321.)

(Supreme Court of California. Jan. 25, 1905.)

CONTEST OF WILLS—DEVISE TO NIECES—WHO INCLUDED—SUFFICIENCY OF EVIDENCE.

1. In the contest of a will by the stepdaughter of a brother of testatrix, evidence considered, and *held* insufficient to show that contestant was intended to be included in the provision for "my nieces."

2. Evidence of declarations made by testator after the execution of the will is inadmissible on the question as to who were intended as testator's nieces.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1040.]

Department 2. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

To the probate of the will of Cecelia Holt, deceased, Anna Louttit filed a contest, and from the decree of distribution contestant appeals. Affirmed.

James A. Louttit, for appellant. Ashley & Neumiller and Nicol & Orr, for respondent.

McFARLAND, J. This is an appeal by Anna Louttit from that part of the decree of distribution in this estate which distributes certain property of the deceased to other persons to the exclusion of the appellant. The deceased left a will in which, after certain specific legacies, she refers to the rest and residue of her property, and says: "And I give and bequeath such residue and rest of my estate to my nieces and nephews * * * share and share alike." By the decree of distribution the said residue is distributed to certain persons who are the nieces and nephews, and they are the only nieces and nephews of the testatrix, and among them the appellant was not included. Appellant is not a niece of the testatrix. She is the daughter by a former marriage of a Mrs. Hunter, who afterwards married John Fisk, a brother of the testatrix. She was about six years old when her mother married Fisk, and lived in the family with her mother and Fisk. Her name until she was married was Anna Hunter. Appellant's contention is that, upon the evidence introduced in the case, she should be held as within the class designated in the will as "my nieces and nephews." It is hardly necessary in this case to discuss the question whether the well-known meaning of "nieces and nephews"—that is, children of brothers and sisters—is not so free from either latent or patent ambiguity as to leave no room for explanatory extrinsic evidence, because the evidence introduced by appellant fails to show that she was a niece in any secondary or remote sense of the word, even if such evidence could be supposed to be admissible. The appellant introduced two witnesses on the subject—Mrs. Strohmeier, a sister of the testatrix, and her daughter, Ethel Strohmeier. The former testified to parts of a letter—the other parts having been lost or destroyed—from a sister of the testatrix to the appellant, which is of no consequence, except that it closes with the words, "with love to all from your Aunt Tina"; and, in answer to the question if appellant was taken into the family of John Fisk and treated as one of the family, the witness said: "Of course, her mother took her, and she lived right with her mother." She also said that the only nephews and nieces of the testatrix of whom she had any knowledge were those mentioned in the petition for distribution. The witness Ethel was asked what, if anything, the testatrix had said to her, after the making of the will, about the appellant. To this question respondent objected on the ground that declarations of the testatrix either before or after the making of the will were not competent evidence. The court intimated that this was the rule under the Civil Code, and counsel for appellant said that the purpose of the proposed testimony was not to vary the will, but to get declarations as to the relationship between the testatrix and the appellant, whereupon the court said: "I will permit you to go on to that extent, if it is no declaration on her part as to what she meant by the will—as to relationship I will admit that." The witness then testified by question and answer as follows: "A. Well, after the will had been made she was thinking over it, and she said that, while Anna Louttit was not her niece, she felt she would like to remember her, and that she wanted her to be considered the same as her other nieces. Q. The same as her other nieces? A. That is, she did not consider her a niece, but she wanted her to come—to be brought in the will the same as the rest of them. Q. She did not consider her a niece by blood, was that it—was not a blood relation? A. Well, she never spoke of her as a niece at all—she did not consider her a niece—but then she wanted her to be remembered in the will." Mrs. Strohmeier was recalled, and said that the appellant had addressed the testatrix as "aunt," but to this question: "Did you ever hear Mrs. Holt speak of her as a niece—anything about that?"—she answered, "No."

The above was substantially all the evidence introduced by appellant on the subject. And we think that the evidence fails to show that the court was not justified in finding that appellant is not a legatee under the will. The evidence does not show, even if it were permissible to introduce evidence to show, that the appellant was so treated and considered by the testatrix as a niece as to bring her, in any sense, within the category of "my nieces and nephews." The declaration of the testatrix to the witness Ethel, after the making of the will, that "she would like to remember" the appellant, etc., did not in any manner change the will, and was, indeed, inadmissible, and was not within the purpose for which the testimony of the witness was admitted by the court. The intention of a testator must be found in the language used in the instrument, not in his oral declarations as to what he intended. Under any view of the law, the declarations of the testatrix were admissible only as evidence of the fact that she always treated and considered appellant as her niece, and the evidence introduced entirely fails to show that fact. In the case of Grant v. Grant, 5 Law Reports (Eng.) 727, cited by appellant, the facts were very different from those in the case at bar, even if that case can be considered as rightly decided; but the case was substantially overruled in the later English case of Wells v. Wells, reported in 18 Law Reports, 504.

The order appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

146 Cal. 80

SOUTHERN CALIFORNIA RY. CO. v. WORKMAN, City Treasurer of Los Angeles et al. (L. A. 1,302.)*

(Supreme Court of California. Jan. 25, 1905.)

MUNICIPAL CORPORATIONS—STREETS—IMPROVEMENTS—RAILROAD RIGHT OF WAY—LIABILITY OF ASSESSMENT.

1. Vrooman Act, § 7 (Laws 1885, p. 147, as amended by Laws 1891, p. 196), providing for an assessment on the lots and lands fronting on the improved portion of a street, to pay for such improvement, does not authorize the assessment of a special tax for street improvement on a portion of a railroad right of way abutting the improved street, not subject to sale on execution, and necessary to enable the railroad company to operate its road under its franchise.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1031–1033.]

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Suit by the Southern California Railway Company against W. H. Workman, as city treasurer of the city of Los Angeles, Cal., and another. From a decree in favor of plaintiff, defendants appeal. Affirmed.

Cole & Cole, for appellants. C. N. Sterry and T. J. Norton, for respondent.

COOPER, C. Action to enjoin a sale of a portion of plaintiff's right of way. A temporary injunction was granted, which by the judgment was made perpetual. This appeal is from the order granting the injunction and from the judgment.

The plaintiff is a railroad corporation operating a railroad about 487 miles in length, in and through five counties in the southern part of the state. A portion of its main line, running from Los Angeles to Barstow, is located and operated in Los Angeles county, and 1,012 feet of the right of way of this line abuts on Pasadena avenue, in the city of Los Angeles. The city proceeded to make certain improvements on Pasadena avenue under the provisions of the statutes authorizing the making of such improvements and the charging of the costs to abutting property. By the proceedings of the city council the cost of the improvements was to be assessed upon abutting property upon the front-foot method provided by statute. An assessment for the purposes of said improvement was attempted to be made upon a small portion of plaintiff's right of way, consisting of an irregular strip, about 9,500 feet in length and from 60 to 100 feet in width, which attempted assessment described the property as follows: "Commencing at N. W. intersecting point of Avenue 33 and the right of way of the Southern California Railway Company, thence meandering in a northerly direction 9635 min. to Avenue 50, thence along the S. line of Avenue 50, 62 min. thence meandering in a southerly direction 9566 min. to Avenue 33, thence W. 60 along the N. line of Avenue 33 to beginning. Being the Southern California Railway right of way between Avenues 33 and 50." Plaintiff refused to pay the amount of the attempted assessment, and a bond was issued by the city, and sold to appellant Fox. The bond described the property assessed the same as in the above description in the assessment, except the words, "Being the Southern California Railway right of way between Avenues 33 and 50," were omitted, and instead thereof the words "Owner is the Southern California Railway Company, a corporation." were added. The notice of sale described the property as it is described in the bond. Plaintiff commenced this action to enjoin the sale, and, after setting forth the facts, alleged in its complaint "that, unless restrained from so doing, the said defendant W. H. Workman, as such city treasurer, at the request of the defendant Fox, will on Tuesday, the 14th day of January, 1902, proceed, under said advertisement and notice of sale, to sell or attempt to sell that portion of the right of way of the plaintiff hereinabove described, and upon which it is operating a railroad as aforesaid, in accordance with said notice, for the purpose of satisfying said bond." The complaint further alleged that the threatened sale would cause it great and irreparable injury, and "create a cloud upon the title of the plaintiff to said portion of said right of way, and to its right to use and occupy the same as and for its business of a common carrier of passengers and freight." The defendants filed a general demurrer to the complaint, which was overruled, and they declined to answer.

We are of opinion that the complaint states facts sufficient to constitute a cause of action. It states that the assessment was "upon that portion of the plaintiff's right of way herein described." The assessment concludes with the words of identification, "being the Southern California Railway right of way between Avenues 33 and 50." It was evidently the intention to assess and sell the right of way as described by metes and bounds in the assessment.

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*Rehearing denied February 24, 1905.

The statute in regard to assessments for the improvement of streets provides for an assessment upon the lots and lands fronting on the improved portion of the street. Section 7, Vrooman Act (Laws 1885, p. 147, as amended by Laws 1891, p. 196).

There is no authority for making an assessment upon a right of way, or for selling the same. A railroad is a quasi public corporation, in which the public is interested. It holds a franchise from the state, and must operate its road or forfeit its franchise. A part of its right of way cannot be sold on execution or for a street assessment. The decisions are not in harmony on the question, but we think the best-considered cases hold that such right of way cannot be sold to satisfy a street assessment. In C., M. & St. P. Ry. Co. v. City of Milwaukee, 89 Wis. 509, 62 N. W. 419, 28 L. R. A. 249, the question is ably discussed, and the court said: "Whether the track and right of way of a railroad company is subject to assessment for local improvements on the ground of special benefits, under the language of statutes, couched in general terms, providing for such assessments, is a question upon which the courts have not been agreed. The system and policy of each state enter largely into the question, and give to it a local character. By the charter of Milwaukee, the improvement of Commerce street was chargeable to and payable by the lots fronting or abutting upon such street, * * * to the amount which such improvement shall be adjudged by the board of public works to benefit such lots; and an assessment of the amount is provided for, which, when confirmed by the council, its collection may be enforced in case of nonpayment by a sale and conveyance of the lots so assessed. City Charter (Laws 1874, pp. 359, 362, c. 184, subc. 7, §§ 2, 7). So much of the lots in question as were occupied by the tracks of the railroad and supporting banks, and used for right of way purposes, had been devoted and dedicated to uses in which the public had an important interest of a probable perpetual duration; and to enforce an assessment against such right of way and track, extending about half a mile in distance, by a sale and conveyance, would necessarily dismember and break up the entirety and utility of the road as a line of travel and commercial intercourse, and interfere with and impair the paramount interests which the public have in it for these purposes. The property of the corporation in its road and appurtenances essential to its operation and use, annexed to the franchise of the company to maintain and operate its road, is an entirety, and is thus charged, in the hands of the company, with an important trust in favor of the public, though the property in all other respects is essentially private, and operated for private gain. Public policy would seem to forbid a severance and segregation of its several special or particular parts, essential to the exercise of the franchises and the use and operation of the road by forced sale upon legal process or for an assessment."

In L., N. A. & C. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435, the court said: "The other feature of the case presents a question of much greater difficulty. According to the established rule of the common law, which controls the current of modern authority, the franchises of a corporation—mere incorporeal hereditaments—were not subject to seizure and sale upon execution in the absence of express statutory provisions authorizing the sale and prescribing the method of transfer. It follows as a natural sequence that lands, easements, or things essential to the existence of the corporation and the execution of its corporate duty, and without which its franchise would be of no practical use, cannot be levied upon and sold on execution at law, so as to detach them from the franchise, and thus destroy its use."

The Court of Appeals of Missouri, in Sweaney v. K. C. R. Co., 54 Mo. App. 266, said: "The sole question is this: Does the law authorize the enforcement of a special tax bill for a street improvement against a detached right of way? * * * The tax bills in suit were issued on the theory that the land along the line of the graded street, and used by a railroad as its right of way, is chargeable with such local improvements, just as other adjacent property. This, too, is the position taken and so forcibly urged on us by plaintiff's counsel. But however cogent the argument, and however reasonable and just may be the position contended for, yet, under the repeated decisions of our Supreme Court in cases which we deem analogous, we must hold that plaintiff cannot maintain this suit, which has for its aim and purpose the carving out, sale, and conveyance of a portion only of defendant's right of way. Admitting the terms 'adjoining lands,' 'all the property on both sides,' etc., appearing in the Kansas City Charter, to be sufficiently general to embrace the railroad right of way, but even then we are met with the doctrine of our adjudicated cases that a lien will not be enforced against a mere fractional part of a railroad right of way, except it be specially authorized by the Legislature, in language not to be doubted." See City of Philadelphia v. Philadelphia, W. & B. R. Co., 33 Pa. 41; City of Allegheny v. Western Pa. R. Co., 138 Pa. 375, 21 Atl. 763; Bridgeport v. N. Y. & N. H. R. Co., 36 Conn. 255, 4 Am. Rep. 63; Detroit, G. H. & M. Ry. Co. v. City of Grand Rapids, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793, 58 Am. St. Rep. 466.

It is not necessary to decide in this case as to whether or not the fee or reversion in the land can be assessed. After a right of way has been acquired by a railroad corporation by condemnation or otherwise, and its track laid upon it, we apprehend that it would be difficult to realize by a sale of the fee remaining in the grantor. But without deciding this question, it is sufficient to say that this proceeding is for the purpose of enjoining a sale of plaintiff's right of way; that is to say, its easement. The judgment is that the bond is void as a lien upon plaintiff's right of way, and that defendant be enjoined from selling "any part or portion of plaintiff's right of way in said complaint, and hereinafter described." If the defendants do not intend to sell the plaintiff's easement, but only the subordinate estate, the judgment is not in any way injurious to them. The restraining order is merged in the judgment, and the appeal therefrom may be dismissed.

We therefore advise that the judgment be affirmed, and the appeal from the order dismissed.

We concur: HARRISON, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment is affirmed, and the appeal from the order dismissed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

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146 Cal. 73

In re HAYDEN'S ESTATE. (Sac. 1,318.)*

(Supreme Court of California. Jan. 25, 1905.)

GUARDIAN'S ACCOUNT—TIME FOR FILING—ADMISSION OF EVIDENCE—ITEMIZING BILLS PAID—CONDUCT OF COURT—SUBMISSION OF CAUSE.

1. Under Code Civ. Proc. § 1774, providing that the guardian must on the expiration of one year from the time of his appointment, and as often thereafter as he may be required, present his account to the court for settlement and allowance, it is no objection to a guardian's first account that it was filed before the expiration of a year from his appointment.

2. On the contest of the account of the guardian of an aged and infirm ward, evidence is inadmissible as to an agreement by which contestant was to support the ward during her life in consideration of the conveyance to contestant of the reversion in certain land after the death of the ward.

3. Bills paid for medical services are sufficiently itemized in a guardian's account where the amount, the person to whom paid, the nature of the services rendered, and the dates of payment are given.

4. Appellant cannot complain that the court ordered the cause submitted before all of his evidence was introduced, and without argument, because the court refused to hear certain immaterial evidence, and stated that the witness could leave the stand, "and the matter will stand submitted," where appellant offered no further evidence, and did not request to be heard in argument.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

To the account filed in the guardianship of the person and estate of Sarah C. Hayden, incompetent, F. H. Collins filed a contest, and from an order allowing the account contestant appeals. Affirmed.

A. H. Carpenter, for appellant. Nicol & Orr and E. C. Foltz, for respondent.

COOPER, C. This is an appeal from an order allowing the first account of the guardian in the above-entitled matter. The appeal is by F. H. Collins, a contestant, who claims to be an interested party.

One of the main objections relied upon was that the court had no jurisdiction, for the reason that one year had not elapsed from the date of the appointment of the guardian. There is no merit in the objection. The guardian is subject to the supervision of the court, and must render his account as guardian for examination and approval. The usual complaint is that these accounts are not rendered often enough, and not that they are too frequent. Section 1774, Code Civ. Proc., provides that the guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the court for settlement and allowance. The section, while making it the duty of the guardian to file his account upon the expiration of the year, does not prohibit him from filing and presenting it sooner. We will not presume that he will file his accounts so frequently as to incur needless expense and annoy the court. If such case should occur, the court will protect itself.

Several errors are assigned as to rulings on the admissibility of evidence, which do not require special notice. We have examined them, and find no error that would justify a reversal of the order. The questions relate principally to an agreement made by Collins, the contestant, to support the ward during the remainder of her life, in consideration of the conveyance of the reversion of certain real estate after the death of the ward. The existence of such an agreement, the fact as to whether or not Collins performed it, and the consideration for the conveyance to Collins, were matters that might have been for determination in other suits under proper issues; but in this case the ward was an old lady, paralyzed, helpless, and needing the care of a nurse at all times. She had plenty of property to support her; in fact, the income appears to have been sufficient for such purpose. In such case it was the duty of the guardian and of the court to see that she had all the necessary comforts that could be supplied to her in her last days, even if it had taken the principal for such purpose. The court should not have allowed her to be deprived of suitable food, nursing, and medical attendance in order that the estate left might be larger, or that some distant relative might be benefited. If she was not cared for by Collins, and the guardian gave her such care, his account will not be disallowed because Collins had made an agreement to care for her. In this case the amount expended for board, medicine, nursing, and medical attendance, including a considerable amount paid out in litigation in her behalf against Collins from March 10, 1903, to September 10, 1903, was only $1,028.57, being only $35.26 more than the income of the estate during the same period. It certainly does not seem, on its face, to have been extravagant, and there is no evidence to show that it was so.

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*Rehearing denied February 24, 1905.

Appellant did not attempt to prove that the charges contained in the account were not in fact paid by the guardian, but he claims that some of them were not properly itemized. The only portion of the account called to our attention in the brief is for medical attendance. The items are as follows: "Apr. 25th. Dr. Harry 20 visits at $2.50, $50.00. Sept. 4th. Dr. Arthur medical services, $70.00." The above charges are sufficiently itemized within the meaning of the statute. They show the date of payment, the amount, the person to whom paid, and the nature of the services. It is not necessary that a bill of a physician or of a lawyer should contain each item that goes to make up the charge. If the amount of the claim is disputed, or if it is denied that the services were rendered, the court on the hearing may go into the particulars.

Appellant's counsel claims that the court ordered the cause submitted before his evidence was all introduced, and refused to allow him to argue the case upon the facts. The record shows that the contestant, Collins, had been on the stand, and had been asked several questions that appeared to be immaterial, and to which objections had been sustained. Counsel asked the witness several questions about Annie Fogacci, who had been employed as a nurse for the ward. He then asked the witness: "Q. Did you and she ever quarrel? The Court: The court is not going to sit here and listen to this. These issues have been determined in the unlawful detainer suit. If you have any evidence to offer as to this account of the moneys received or disbursed, the court will hear you. Mr. Carpenter: I think we have offered it. The Court: I will permit you to ask any questions affecting this account that you have, but the court will decline to hear any further testimony without these limits." To which ruling contestant excepted. "The Court: You may leave the stand Mr. Witness, and the matter will stand submitted. Mr. Carpenter: We except to the ruling of the court ordering the case submitted before our case is in." It does not appear that the court refused to hear any relevant evidence. On the contrary, the court expressly stated that it would hear any evidence affecting the account before it. Counsel did not ask permission to argue the case, and, even if he had done so, we do not think in this case it would have been an abuse of discretion to refuse such permission.

The court further found that contestant was not an interested party, and hence had no right to contest the account. The conclusions reached make it unnecessary for us to determine the question.

The order should be affirmed.

We concur: GRAY, C.; SMITH, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

7 Cal. Unrep. 197

LAKE v. OWENS et al. (L. A. 1,512.)

(Supreme Court of California. Jan. 25, 1905.)

RESCISSION OF SALE—VALIDITY OF CONTRACT—CONFLICTING EVIDENCE.

1. The fact that the purchaser of an interest in a mine was acting in the relation of trustee of such interest for the seller, did not affect the validity of the purchase, it being a fair and open transaction for full value.

2. The findings of fact by the court on conflicting evidence will not be disturbed on review.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action for the cancellation of an instrument by E. S. Lake against Phœbe Ann Owens, executrix of J. A. Owens, deceased, and another. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

T. W. Duckworth and Henry W. Nisbet, for appellant. Chas. L. Allison and C. C. Haskell, for respondents.

CHIPMAN, C. Plaintiff brings the action to rescind a certain agreement to sell to defendant C. W. Owens an undivided sixteenth interest in the so-called "San Bernardino Iron Mines"; also to rescind the deed subsequently made thereto by plaintiff in pursuance of said agreement, and to cancel both said instruments. The cause was tried by the court sitting without a jury, and the findings and judgment were in favor of defendants that plaintiff take nothing by his action. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

Plaintiff alleged, and it was found, that he was the owner of an undivided sixteenth interest in the said mines, the testator of defendant Phœbe Owens being also at his death the owner of an undivided, but not the whole of the remaining, interest therein. Defendant Phœbe Owens, widow of deceased, duly qualified as executrix, and was by his will named as sole devisee of her husband's estate, and inventoried the said mines as property of the estate. Subsequently, to wit, December 18, 1901, defendant C. W.

Owens, son of deceased and defendant Phœbe Owens, procured from plaintiff a written contract, by which plaintiff agreed to sell his said interest in said mines to said defendant C. W. Owens for $200, and later, to wit, on February 8, 1902, plaintiff conveyed his said interest to defendant Phœbe pursuant to the directions of defendant C. W. Owens, and upon receiving full payment as provided in said contract. Plaintiff alleges in his complaint that he was induced to enter into said contract through the false and fraudulent representations of said C. W. Owens; that he (plaintiff) was an old man, infirm in bodily health and strength, and an inmate of the county hospital; that he reposed confidence in said Owens, and believed the representations made by him, and acted wholly upon said representation, among others, that plaintiffs' interest in said mines was not of greater value than $200; that soon after he had executed and delivered said deed he discovered that the defendants had, previously to the making of said contract and the delivery of said deed, joined in a contract for the sale of said mines for a sum which (had the contract been carried out) would have yielded to plaintiff $1,200 for his share therein, which fact defendants well knew and purposely concealed from plaintiff; and thereupon plaintiff gave notice to defendants rescinding said contract and deed, and offered to restore to defendants everything of value received from them by plaintiff. Without stating fully the allegations of the complaint, it may be conceded that plaintiff sets forth facts which, had the court found them to be true, would have entitled him to relief. But the court found that the said contract of sale made by defendants was but an option, and that "there had not been paid to either of the defendants any sum of money therefor, or upon said contract, and there was no means of ascertaining whether the said company (the purchaser) would purchase the mines and pay therefor or not." The court found against the plaintiff on all his allegations of fraud, misrepresentations, concealment, and claims of plaintiff having reposed confidence in defendant C. W. Owens in making said contract, and found that the transaction was fair and open, that plaintiff was acting on the advice of a friend other than defendant Owens, and that the price paid "was the fair market value" of plaintiff's interest in the mines. In view of the findings, we cannot see that the case presents any questions for serious discussion. If by the circumstances that in his lifetime deceased, Owens, held plaintiff's title in his name, and managed plaintiff's interest in the mines, and for that reason became trustee, and if this trust relation in some degree survived in the executrix, as claimed by plaintiff, still she could make the purchase of plaintiff's interest by fair and open dealing free from fraud, and for full value, as the court found was the fact. It is not entirely clear from the evidence that defendant C. W. Owens was acting for his mother when he procured the agreement to purchase the mines from plaintiff. But as the deed was made to her, and the payment also made by her, it is fair to assume that her son was acting as her agent. Plaintiff's principal contention is that this agent should have informed plaintiff of the then outstanding option, above referred to, and that the concealment of the fact is of itself sufficient to require a rescission of the contract. The evidence is conflicting as to what occurred between C. W. Owens and plaintiff and plaintiff's friend by whose advice plaintiff in fact made the contract. Defendant Owens explained on the witness stand all the facts and circumstances and why he did not mention the fact of the option. The trial court must have accepted defendants' evidence, and we think it was sufficient to support the findings negativing plaintiff's claim that he was misled by defendants' fraudulent concealment of important facts, as also is the evidence sufficient to support the other findings which themselves support the judgment.

It is advised that the judgment and order be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: VAN DYKE, J.; ANGELLOTTI, J.

I concur in the judgment: SHAW, J.

146 Cal. 68

GARCIA v. BROWN et al. (L. A. 1,289.)

(Supreme Court of California. Jan. 24, 1905.)

APPEAL—DISPOSITION OF CAUSE.

1. The clerk of the Supreme Court not having authority, in the absence of an order of court, to place a case on the calendar for oral argument until points and authorities have been filed by appellant (Sup. Ct. Rule 18, 64 Pac. x), a case placed on such calendar without such authority will be stricken from the calendar.

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Jesus Garcia against George E. Brown and others. From a judgment for defendants, plaintiff appeals. Stricken from argument calendar.

C. Linkenbach and E. J. Emmons, for appellant. J. W. P. Laird, for respondent.

ANGELLOTTI, J. Plaintiff appeals from a judgment and an order denying his motion for a new trial. The transcript on appeal was filed herein on June 26, 1902. Appellant has not filed his points and authorities, and his time to so do has long since expired. Although there were no points and authorities on file, the appeal was inadvertently placed upon the calendar for oral argument at the session of the court held at Los Angeles in April, 1904, without any order of the court to that effect, and, there then being no appearance of either party, was continued to the October, 1904, session, at which time the appellant appeared, respondent not appearing; and, upon request of appellant, the appeal was submitted, without argument, for decision. It does not appear that respondent has had any notice that the case would come on for argument.

Under these circumstances, the court will not undertake to pass upon the merits of the appeal. Under rule 18 of this court (64 Pac. x), the clerk is not authorized, in the absence of a special order to that effect, to place a case upon the calendar for oral argument until points and authorities have been filed. Until points and authorities on behalf of the appellant have been served and filed, the respondents have the right to assume that the case will not be on the calendar for argument, and are not called upon to observe whether it has been placed thereon.

Under rule 5 of this court (64 Pac. viii), appellant's points and authorities not having been filed, this appeal is subject to be dismissed on motion of the respondents, upon notice given to the appellant. It is not in condition to be decided.

The order submitting the cause for decision is vacated, and the case stricken from the oral argument calendar.

We concur: SHAW, J.; VAN DYKE, J.

146 Cal. 70

HENNE v. LANKERSHIM. (L. A. 1,314.)

(Supreme Court of California. Jan. 24, 1905.)

PARTY WALLS—CONTRACTS—CONSTRUCTION—RIGHTS OF OWNERS.

1. Where a contract for the construction of a party wall specified the width of the wall from one story to another to the under side of the fifth-story joist, and thence to the top of the fire wall, and plaintiff agreed to pay an aggregate sum in five installments, due when the wall was completed to the first, second, third, fourth, and fifth floor joists, respectively, one when the wall was up to ceiling and the last on completion of the wall, such agreement provided for a five-story party wall, and precluded one of the owners thereof from thereafter raising it against the protest of the other.

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Suit by C. Henne against J. B. Lankershim. From an order denying plaintiff's motion for an injunction pendente lite, he appeals. Reversed.

R. L. Horton, for appellant. John W. Mitchell, for respondent.

ANGELLOTTI, J. This is an appeal from an order denying plaintiff's motion for an injunction pendente lite in an action brought by him for a decree perpetually enjoining defendant from constructing a proposed addition of two stories to a party wall, and from making certain proposed opening in the proposed new portion of said wall. The parties are the owners of adjoining lots in the city of Los Angeles. Each contemplating the erection of a building on his lot, a written agreement was entered into between them in July, 1896, for the construction by defendant of a party wall on the line dividing the lots, one-half of said wall to be placed on plaintiff's lot and one-half on defendant's lot. Under the terms of the agreement, defendant was to construct a wall of certain designated dimensions, varying in thickness from a footing of 5 feet 4 inches at the base to 12 inches at the top of the fire wall, and according to certain specifications. The agreement specified the width of the wall from one story joist to another, to the under side of the fifth-story joist, and thence to the top of the fire wall. Plaintiff agreed to pay to defendant the aggregate amount of $2,700, the same being made payable at various stages of the work, five installments being due when the wall was completed to the first, second, third, fourth, and fifth floor joists, respectively, one when wall was up to ceiling, and the last upon completion of the wall. It was further provided that: "When said wall is constructed as aforesaid, the same shall be and remain as a party wall for the use and benefit of the respective parties to this contract, or their heirs, administrators, and assigns in perpetuity." The agreement further provides that, if it should ever become necessary to "repair or rebuild said wall, or any portion thereof," the expense should be borne equally by the parties. The wall was constructed, as agreed, five stories in height, and each of the parties erected upon his lot a five-story and basement building, using said wall therefor. In the year 1902 the defendant, contemplating the addition of two stories to his building, was about to add two stories to said party wall, without plaintiff's consent. He further proposed to leave an opening of about 36 feet in length extending from the bottom to the top of the addition to the wall. Thereupon plaintiff commenced this action. It was claimed by plaintiff that the party wall was not capable of safely carrying the additional weight of two more stories, and that to permit the erection thereof on said wall would cause plaintiff's building great and irreparable injury. The evidence upon this question was conflicting to such an extent that, under well-settled rules, the conclusion of the lower court thereon is not open to review. If, however, defendant had no legal right, without the consent of plaintiff, to add to the height of the party wall, his so doing would be an invasion of plaintiff's rights, constituting a continuing trespass upon his real property, which eventually would ripen into an easement. This alone, independently of any question as to other damage, would entitle plaintiff to an injunction preventing such threatened invasion.

We are satisfied that defendant was not entitled to add to the height of the wall. There is no material distinction between the facts of this case and those of Frowenfeld v. Casey, 139 Cal. 421, 73 Pac. 152. The rule that either party has the right, in the absence of agreement, to increase the height of a party wall, when it can be done without injury to the adjoining building, or impairing the strength of the wall, was fully recognized by this court in that case, but it was held that the effect of the agreements between the parties in that case was to limit the party wall to six stories. The agreements in that case did not, in terms, provide that the wall should not be carried to a greater height than six stories, but they did provide for the building of a six-story party wall. It was said by this court: "An agreement to build a party wall, with no limitation as to its height, would give the right, by implication, to build it as high as would be necessary for the purposes for which it was to be used, provided it could be done without injury or danger to the property of the other party. An agreement to build a party wall for a height defined in the agreement does not give the right by implication to build it higher." The effect of that decision is clearly that, where the agreement is for a party wall of a designated height, the designation of the height is, in the absence of other provisions, a limitation, beyond which neither party can go without the consent of the other. The agreement constitutes a conveyance of the easement to that height, and no more. It was said in that case: "The extent of defendant's easement, for the purpose of a party wall, is defined and measured by the agreement. Plaintiff owns the space on his own land above the six stories by the same title that he owns the remaining portions of his lot. He has not conveyed it to the defendant. He cannot be deprived of this property at the volition of defendant without due process of law." The agreement in the case at bar was for a wall of designated dimensions, to be at once constructed to its full height by defendant, and for which plaintiff was to pay defendant a designated amount, and which wall, when so constructed, was to be and remain the party wall. In other words, the party wall, as it was then to be constructed by defendant, was the thing concerning which the parties agreed, and for which the plaintiff was to pay his portion of the cost. That the wall then to be constructed was to be only five stories high, is, we think, apparent from the terms of the agreement. That such was the understanding of the parties is demonstrated by their contemporaneous conduct. There is no pretense that the defendant did not fully perform his contract for the construction of said wall by constructing the same to the height of five stories. Both plaintiff and defendant, apparently without question, construed the contract as calling for such a five-story wall to be then constructed, and accepted the building thereof as a full compliance by defendant with the provisions of the contract relating to the construction of the wall by him. The written agreement being for a five-story party wall, the height was limited by said agreement to five stories. This case and that of Frowenfeld v. Casey, supra, differ from the cases relied on by defendant in that in the latter cases there was no agreement which could fairly be construed as limiting the height. What has been said renders it unnecessary to consider the question as to the right of defendant to leave any opening in the proposed addition to the wall.

The order appealed from is reversed.

We concur: VAN DYKE, J.; SHAW, J.

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146 Cal. 50

BILL v. FULLER. (L. A. 1,308.)

(Supreme Court of California. Jan. 21, 1905.)

SALES — CONTRACT — CONSTRUCTION—PASSING OF TITLE—WARRANTY—MERCHANTABLENESS—BREACH — ACTIONS — EVIDENCE — WITNESSES—CROSS-EXAMINATION.

1. Defendant, after having inspected plaintiff's orange orchard, contracted in November, 1900, for all of plaintiff's oranges, with certain exceptions, at certain prices; all to be taken by defendant on or before April 1, 1901, and be paid for on delivery; plaintiff to deliver when wanted by defendant. The oranges were ripe and ready for market in January, but defendant refused to accept them until March 12th, and then only on being permitted to cull unmerchantable fruit, which became so by being left on the trees an unreasonable length of time. *Held*, that the implied warranty of merchantableness, if any, in such contract, only warranted merchantableness of the fruit on the tree, and that when gathered in due season it should be handled and delivered with care, and did not entitle defendant to refuse to accept oranges because they were too ripe for market.

2. In an action for breach of a contract for the purchase of oranges, evidence that some dwarfed, immature fruit, that dropped from the trees and decayed on the ground, had been picked up by plaintiff, did not warrant an inference that such fruit had been delivered to defendant under the contract.

3. Where, in an action for breach of a contract to purchase oranges, plaintiff had not been asked on direct examination with respect to the condition of the fruit, a question as to whether some of the crop had been softened by rain followed by hot weather was properly excluded as not proper cross-examination.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 949, 971.]

4. In an action for breach of a contract to purchase oranges, there being no issue as to plaintiff's care of his orchard, it was not error for the court to refuse to allow defendant to cross-examine plaintiff on such subject.

5. Where, in an action for breach of a contract to purchase oranges, there was no controversy over a small amount of fruit alleged to have been prematurely delivered, which had been paid for, it was not error for the court to

sustain an objection to a question put to plaintiff, whether he had himself broken the contract by such premature delivery.

6. Defendant entered into a written agreement providing that he "has this day bought all the oranges grown this year" by plaintiff, at certain specified rates, to be paid for on delivery; plaintiff to deliver the same when wanted by defendant. *Held*, that such contract imported a present sale of the oranges, under Civ. Code, § 1141, providing that title is transferred by an executory agreement for the sale of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer with intent to transfer the title thereto, and that the oranges remained on the trees at the buyer's risk.

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by W. T. Bill against Henry Fuller. From an order denying defendant's motion for a new trial, and to set aside a judgment on findings, defendant appeals. Affirmed.

Frank C. Prescott, for appellant. C. E. Chapman, for respondent.

SHAW, J. This was an action to recover the balance of the purchase price alleged to be due for a crop of oranges sold and delivered by the plaintiff to the defendant. The defendant appeals from an order denying his motion for a new trial, and from an order denying his motion, made under section 663, Code Civ. Proc., to set aside the judgment entered, and to enter another and different judgment upon the findings.

The plaintiff was an orange grower in the county of San Bernardino, and the defendant was engaged in the business of buying, selling, packing, and shipping fruit. Fuller inspected the plaintiff's orchards, and immediately afterwards they made the following agreement: "This agreement, made this 19th day of November, 1900, by and between W. T. Bill and Henry Fuller, witnesseth: That said Henry Fuller has this day bought all the oranges grown this year by W. T. Bill in West Redlands and Bryn Mawr, except the St. Michaels, at two cents per pound (except the Australian navels on the five acres known as the Mabry Ranch, for which said Fuller agrees to pay one cent per pound), and said W. T. Bill hereby sells to H. Fuller at said prices. All oranges to be taken by H. Fuller on or before April 1st, 1901, except the late Valencias, and paid for in cash as soon and at the time of delivery. And W. T. Bill agrees to deliver at Bryn Mawr Station when wanted by H. Fuller." The court found that, in pursuance of this agreement, plaintiff delivered 160,256 pounds of oranges at 2 cents per pound, and 5,197 pounds at 1 cent per pound; that the defendant rejected 60,888 pounds of the 2-cent oranges, and 2,492 pounds of the 1-cent oranges, and refused to pay for those so rejected; that at the contract price the rejected oranges would amount to $1,243.26, and for this amount judgment was given in favor of the plaintiff. The principal contention arises upon the construction of the contract. The defendant claims that there was an implied warranty of the merchantable quality of the fruit at the time of delivery, and that under the last clause of the agreement he had the right arbitrarily to fix the time of delivery, without regard to the condition of the oranges, or the effect of delay upon them. In this we think the defendant was mistaken. At the time the contract was made, the oranges were practically full grown, but not yet ripe enough for the market. The testimony shows, and the court found, that the oranges became ripe and ready for market in January of the year 1901; that the plaintiff at various times from that time forward until the 12th of March informed the defendant that they were ripe and ready for picking and shipment and that delay would injure them, but the defendant each time refused to receive them until March 12th; and that at that time he told the plaintiff to deliver the oranges as fast as he could, but that he would cull out all the unmerchantable fruit. The plaintiff objected to the culling, but said he would deliver them, and demand that they all be received as fruit properly delivered under the contract. A contract of sale must be construed with reference to the character of the property which is the subject of the sale, the situation of the parties, and the natural results of time and of the operation of natural forces. The court found that in January the fruit delivered was all merchantable, and that at the time of its delivery in the latter part of March it was in as good condition as it could be kept by reasonable care, and that the unmerchantable condition of the fruit at the time of its delivery was caused solely and only by reason of the fruit being left on the trees an unreasonable length of time. Under these circumstances, we think the contract should not be construed to give Fuller the absolute right to defer the delivery of the oranges to the injury of the plaintiff. It must be construed to mean that the oranges were to be taken by Fuller on or before April 1, 1901, and at such reasonable time as should be necessary to insure their good condition with respect to maturity and fitness for market. It cannot be that under this agreement the defendant was at liberty to refuse to accept the oranges, and compel the plaintiff to keep them on the trees until one-half of them had become unfit for market. The merchantability which was warranted by the contract, if there was any such warranty, was nothing more than a warranty that the fruit should be merchantable on the tree, and that when gathered in due season it should be handled and delivered with proper care. This being the case, under the findings we think the defendant was not justified in refusing to accept the oranges which he culled from the crop because of his claim that they were too ripe and puffy for the market. The fact that they had been allowed to remain so long on the trees, and thus become unfit for the market, was the fault of the defendant, and he should not be allowed to take advantage of that fault.

There are some minor objections which may be noticed:

There was no error in sustaining the objection to the question whether or not there was fruit on the trees at the time of making the contract, which fell off, and never was incorporated into the contract at all. The plaintiff did not claim payment for any such fruit, and there is no evidence that he ever delivered any of it to the defendant. His statement that there was some dwarfed, immature fruit that dropped off the trees and decayed on the ground, and that he endeavored to pick up the most of it, is misunderstood or misinterpreted by the appellant. It is clear that he did not intend by that statement to say that he had picked up this immature fruit and delivered it as fruit sold under the contract.

It was not error to sustain the objection to the question asked the plaintiff, while he was testifying as a witness, whether or not some of the crop had been softened by reason of a rain followed by hot weather. This was not cross-examination. The plaintiff had not been asked upon his examination in chief with respect to the condition of the fruit. Nor was there error in refusing to allow the defendant to cross-examine the plaintiff with respect to the care which he gave to the orchard. There was no issue involving that proposition.

The court did not err in sustaining the objection to the question put to the plaintiff, whether he had himself broken the contract by delivering a small quantity of fruit in January, which had been paid for. There was no controversy over this fruit, nor over any fruit except that delivered in March. The testimony was that all the fruit except the March deliveries was paid for without question, and whether the plaintiff had prematurely delivered the small quantity of oranges in January was immaterial, inasmuch as the defendant accepted the same without objection. The defendant claims that some of the findings are not supported by the evidence. We do not think it necessary to discuss this question in detail. An examination of the evidence shows that the findings are all fairly supported.

We have treated the case upon the theory that the title did not pass until delivery, and that the findings were all included within the issues made by the pleadings, although plaintiff contends with much force that all the findings other than the findings that the allegations of the complaint are true, and that the allegations of paragraph No. 3 of the answer are untrue, are outside the pleadings, and, although in favor of the plaintiff, are unnecessary to a decision of the case. The evidence upon which they are based was introduced over the plaintiff's objection, and consequently he could not be held to have allowed the case to be tried upon the theory that these findings were within the issues. But treating the findings as within the issues, we are of the opinion that no error was committed by the court.

Nor do we wish to be understood as holding that the title to the crop did not pass as soon as the contract was executed. The agreement, in form, imports a present sale. The thing sold was in existence, and was identified and separated from other things. Under section 1141, Civ. Code, it would seem that title passed at once, and that the oranges remained on the trees at the risk of the buyer.

The orders are affirmed.

We concur: VAN DYKE, J.; ANGELLOTTI, J.

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146 Cal. 55

ASTILL v. SOUTH YUBA WATER CO.

(Sac. 1,107.)*

(Supreme Court of California. Jan. 21, 1905.)

NUISANCES — ACTIONS — JOINT DEMURRER — ABATEMENT—DAMAGES—EVIDENCE—REMOTENESS—ISSUES.

1. Under Code Civ. Proc. § 427, authorizing joinder of two or more causes of action belonging to the same class, plaintiff was entitled to join two causes of action for distinct nuisances.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, § 425.]

2. That such causes of action were not separately stated in the complaint was not a cause of demurrer.

3. Under the express provisions of Code Civ. Proc. § 731, and independent thereof, a party injured by a nuisance may in the same action obtain a judgment abating the nuisance, and recover damages caused thereby.

4. Where, in an action for the abatement of certain nuisances and for damages, plaintiff's claim was based solely on the negligent use of an easement by defendant, which it was alleged caused the nuisances, evidence showing an adverse use of a part of the land on which the alleged nuisance existed to show title thereto in defendant, was not within the issues, and was therefore inadmissible.

5. Where defendant permitted a question to be answered without objection, and it did not appear that there was no chance to object before an answer was given, defendant's right to have the same stricken was waived.

6. In a suit for abatement of certain nuisances and for damages, evidence concerning the health of the neighborhood, or of particular persons residing therein, at a period some 15 years or more before trial, was too remote for comparison to disprove evidence as to the health of plaintiff and his family, alleged to have been affected by the nuisance.

Department 1. Appeal from Superior Court, Placer County; Albert G. Burnett, Judge.

Action by James Astill against the South Yuba Water Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

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*Rehearing denied February 20, 1905.

John M. Fulweiler and Fred Searles, for appellant. Holl & Dunn, for respondent.

SHAW, J. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

There is no misjoinder of causes of action. The plaintiff does, indeed, complain of what technically constitutes two distinct nuisances. One is caused by the negligence of the defendant in allowing water to escape from the banks of a ditch owned by the defendant, and extending over the plaintiff's land, whereby the land is made swampy and marshy, constituting a nuisance. The other is alleged to consist of a reservoir into which water from the ditch flows, which reservoir was allowed to become filled with vegetable matter, which became rotten and decayed, and thereby caused a nuisance. This, however, does not constitute a misjoinder. Section 427 of the Code of Civil Procedure allows the joinder of two or more causes of action belonging to the same class. Plaintiff might therefore in the same complaint set up any number of separate causes of action for distinct nuisances without being guilty of a misjoinder. The fact that they are not separately stated in the complaint is not a cause of demurrer; nor do different elements of damage, arising from the same nuisance, constitute different causes of action. Under section 731 of the Code of Civil Procedure, and at common law without the aid of that section, the party injured by a nuisance may in the same action obtain a judgment abating it and recover the damages caused thereby. Yolo Co. v. Sacramento, 36 Cal. 196; 14 Ency. of Pl. & Pr. 1116.

The defendant contends that the findings are not supported by the evidence, and assigns many particulars in which it is claimed the evidence is insufficient. On an examination of the record, however, we think there is ample evidence to support all the findings. There is evidence to the contrary, it is true, but it is not the province of this court to determine questions of the preponderance of evidence.

Several errors of law are complained of, in excluding testimony tending to show adverse use of a part of the land upon which it is alleged a nuisance existed, and which, it is claimed, would tend to prove title to such land in the defendant. There was no error in this ruling. There was no claim set up by the defendant to a fee-simple title to any land. The plaintiff was the grantee of the patentee of a certain subdivision of United States government land. He held the title subject to the rights of the defendant, acquired through its predecessor previous to the issuance of the patent, to maintain a reservoir thereon, and carry water thereto through a ditch over the plaintiff's land. The reservoir was in part situated on plaintiff's land, and in part on other lands adjoining thereto. This alleged right was not a fee-simple title, nor anything more than a mere easement, dependent upon use. The court found, and the evidence supported the finding, that the area of land covered by the water in the reservoir, if it was filled to the brim, was some 24 acres of land, of which 8.85 acres was on the land of the plaintiff. There was some contention on the part of the defendant that it had title to some land extending further up the ditch beyond this high-water line, with a right at some time to use the same as a reservoir. There was, however, no issue of this nature tendered in the answer. The only claim set up in the answer is a mere easement, consisting of the reservoir and ditch actually used; and the limit of the defendant's right under the answer is fixed by the area of land shown to be actually occupied by the reservoir and ditch, with sufficient ground for access thereto for the purposes of maintenance and repair and use. This right to the reservoir, and to the ditch connecting therewith, is not disputed by the plaintiff. The precise extent and boundary of the reservoir are not important. The plaintiff's claim is based solely upon the negligent use of the easement, which it is alleged has caused the nuisances. There being no issue with regard to the title of the land outside of the reservoir, it was not error to exclude the testimony.

There was no error in refusing to strike out the answer to the question put to the plaintiff, "How much was your time worth?" Conceding that the question was improper in form, the plaintiff did not object to it, but allowed the answer in, and thereby waived his right to strike it out. It does not appear that there was no chance to object before the answer was given.

There was no error in excluding testimony concerning the health of the neighborhood, or of particular persons residing in the neighborhood, at a period some 15 years and more before the trial. Even if a comparison could be made in this way to disprove the evidence of the effect of the alleged nuisance upon the health of the plaintiff and his family in 1898, when the nuisance is alleged to have been caused, the time referred to in the testimony offered to be given was too remote to furnish a safe standard of comparison.

We find no error in the record. The judgment and order are affirmed.

We concur: VAN DYKE, J.; ANGELLOTTI, J.

(146 Cal. 59)

DAVIS v. DIAMOND CARRIAGE & LIVERY CO. (L. A. 1,310.)

(Supreme Court of California. Jan. 21, 1905.)

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ANTICIPATION OF INJURY—RELEASE—QUESTIONS FOR JURY—FINDINGS—INSTRUCTIONS.

1. In an action for injuries to a servant while washing an insecurely fastened window pane, evidence *held* to require submission of the questions of defendant's negligence, plaintiff's contributory negligence, and whether the injury could reasonably have been anticipated by defendant, to the jury.

2. Where in an action for injuries to a servant plaintiff testified that a receipt executed by him was given for wages and $10 additional, which defendant proposed to pay on plaintiff's doctor bill, which amount the receipt exactly covered, a finding that, though it recited that it was "in full of all demands," it did not constitute a release of defendant's liability for plaintiff's injuries, was justified.

3. It is not error for the court to refuse requested instructions on subjects fully covered by the instructions given.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Charles F. Davis against the Diamond Carriage & Livery Company. From a judgment in favor of plaintiff and from an order denying defendant a new trial, defendant appeals. Affirmed.

Hendrick & Wright and James E. Wadham, for appellant. Luce & Sloane, for respondent.

GRAY, C. Suit for damages for personal injuries. Plaintiff had a verdict and judgment for $500. The defendant appeals from the judgment and from an order denying it a new trial.

The plaintiff was employed by defendant, and directed to wash windows in defendant's livery stable. He placed a chair at the window inside the harness room, and standing thereon he proceeded to wash the window, and, as he puts it, "at the very first pass" one corner of a plate of glass broke out, letting his hand through, and cutting it so severely at the wrist as to permanently cripple it. It appears that the window pane was whitewashed, and was insecurely fastened in the frame. The glass was fastened with zinc points instead of putty. These points still remained at the bottom of the pane and to some extent on the sides, but at the top, and particularly at the upper part of the side about the corner that gave way while being washed, there were no points to hold the glass to the sash, and under the pressure applied the corner broke out. The plaintiff testified that he had washed windows before, and in this instance applied the same pressure "as I would on any other window washing it." He also testified: "When I commenced to wash those windows, I could not see how the glass was fastened, or whether it was fastened in at all or not, but supposed it was properly fastened in. The glass was fastened in the sash from the outside of the building, and I was on the inside." The evidence further showed that it was usual to fasten glass in windows with points and putty all round the glass, thus securing the entire outer edge of the pane to the sash, and when thus secured it would resist much more force without breaking than when insecurely fastened, as in the present case. It also appeared that the insecure fastening of the panes was discernable from the outside of the building if a person would take the trouble to look at it. We think it was within the province of the jury to say on this evidence whether the injury to plaintiff was the result of the want of ordinary care on the part of the defendant. It is the duty of the master to furnish the servant with a safe place to work, and he must use reasonable care to see that any object is safe to work upon or with before he directs the servant to perform labor upon it. The servant has the right to presume that the master will perform his duty, and will not set him at work upon objects that contain hidden defects which make them unsafe to work upon, without warning him of the danger. It is urged that this injury occurred in a way and from a cause that could not have been reasonably anticipated by defendant. That was also a question for the jury. We cannot say, as a matter of law, that the defendant has exercised ordinary care to prevent injury to its servants when there is evidence tending to show that an examination of this window from the outside would have disclosed its dilapidated and dangerous condition. That it was dangerous the result shows, and we think (as the jury seem to have thought) that the danger might have been discovered by the men in charge of the stable by the exercise of ordinary care, and that it was negligence not to exercise such ordinary care. Whether the plaintiff was also negligent was again a question for the jury. If they believed his version of the matter, they were warranted in finding that he was not negligent; and we must presume, in support of the verdict, that they took his statement as true. We think the jury and the trial court were fully warranted in finding against defendant on its contention, based upon a "receipt in full of all demands," that the damages here sought to be recovered had been settled and paid for by defendant. The written receipt did not discharge the indebtedness unless it was so intended at the time it was made. Plaintiff testified that the receipt was for his wages, and the amount which was paid at the time of making the receipt exactly covers his wages and the $10 defendant proposed to pay on the doctor's bill. The plaintiff's testimony looks reasonable, and the jury were warranted in acting upon it. The same considerations which lead us to uphold the action of the trial court in refusing to set aside the verdict for insufficiency of evidence lead also to the conclusion that the denial of the motion for a nonsuit was warranted by the evidence.

Appellant complains of the refusal of the court to give certain instructions regarding contributory negligence, and as to the degree of care required of defendant, and also as to the effect of a receipt and the burden of proof in relation thereto. All these subjects are fully covered by the instructions which were given, and the rules of law concerning all those matters were fully and fairly stated to the jury.

We see no error in any action of the trial court, and advise that the judgment and order appealed from be affirmed.

We concur: HARRISON, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

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146 Cal. 62

SKINNER v. HORN et al. (L. A. 1,595.)

(Supreme Court of California. Jan. 21, 1905.

NEW TRIAL—APPEAL—RECORD—ERROR.

1. Where the record on appeal from an order granting a new trial contained a settled statement on motion for a new trial, and a copy of respondent's notice of his intention to move, but such notice was not incorporated in the statement, or in any bill of exceptions, and was therefore no part of the record, there was nothing in the record showing that the motion was not based on one or more of the grounds requiring affidavits for their support, or some other of the first four grounds for the motion specified by Code Civ. Proc. § 657, and hence error was not thereby conclusively shown.

In Bank. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by M. F. Skinner against T. L. Horn and others. From an order granting a new trial, plaintiff appeals. Affirmed.

Purington & Adair, for appellant. Wright & Lukens, for respondents.

BEATTY, C. J. On motion of one of several defendants the superior court ordered a new trial of this cause, and plaintiff appeals from the order.

After the transcript was filed, the respondent suggested a diminution of the record, and moved to amend the transcript by the addition of certified copies of affidavits alleged to have been used in support of his motion for a new trial. In denying that motion to amend we have practically decided this appeal. 77 Pac. 904. We held that a party appealing from an order must bring up a record demonstrating conclusively that the lower court erred in its ruling, or must fail in his appeal, and that an order granting a new trial must be affirmed when the record contains nothing but a statement on motion for a new trial, and fails to show that the motion was not based also upon one or more of the grounds which require affidavits for their support. Such is the condition of this record. It contains a settled statement on motion for a new trial, and there also appears in the transcript what purports to be a copy of respondents' notice of his intention to move. But this notice of intention is not incorporated in the statement or in any bill of exceptions, and therefore is no part of the record. Pico v. Cohn, 78 Cal. 384, 20 Pac. 706. If we could consider it, we might be justified in assuming that the motion for a new trial must have been based exclusively upon the grounds covered by the statement. But we have no more right to consider this notice of intention than we have to consider the affidavits which we have refused to order certified upon the ground that they are no part of the record. Non constat, therefore, that the order granting a new trial was not supported by affidavits disclosing newly discovered evidence, or some other of the first four grounds for the motion. Code Civ. Proc. § 657.

The order is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(146 Cal. 63)

NATHAN v. DIERSSEN. (Sac. 1,099.)

(Supreme Court of California. Feb. 23, 1905.)

QUIETING TITLE — EVIDENCE — POSSESSION — OWNERSHIP—RECORDS OF JUDICIAL PROCEEDINGS—STIPULATIONS — PAYMENT OF TAXES—APPEAL—HARMLESS ERROR.

1. A stipulation, entered into prior to the first trial, that the parties will admit certain facts upon the trial of the action, may be used as evidence by either party on subsequent trials, presenting substantially the same issues as the first trial, in the absence of anything limiting the effect of the stipulation to a single trial.*

2. Where the court erroneously ruled out a stipulation, it was within its discretion to subsequently vacate its ruling, and permit the stipulation to be introduced, in the absence of a showing of any injustice or hardship to the adverse party.

3. In an action to quiet title, a deed conveying the property to plaintiff's predecessor in interest, who was shown to have owned the land, was competent without preliminary proof that the grantor in the deed was possessed of the title at the time he made the conveyance.

4. In an action to quiet title, a question asked of a witness as to who was in possession of the property in a certain year was not objectionable as calling for the conclusion of the witness on legal possession, in the absence of anything in the form of the question or previous questions put to witnesses indicating that the word was used in its technical sense as synonymous with "seisin."

5. In an action to quiet title the inventory and appraisement filed in the matter of the estate of plaintiff's predecessor in title was not competent to show that plaintiff's predecessor in his lifetime exercised acts of ownership over the property.

6. The admission of incompetent evidence on an uncontroverted fact is harmless error.

7. In an action to quiet title obtained on a foreclosure sale, the record of the foreclosure action, the commissioner's deed, and the writ of assistance, with the sheriff's return, showing delivery of the property to plaintiff, are competent to show the complete divestiture and transfer of the judgment debtor's title to plaintiff.

8. Under the express provisions of Code Civ. Proc. § 321, an action to recover land in favor

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*See note at end of case.

of the holder of the legal title thereof is not barred unless it appears that the land has been possessed adversely to him for five years before the institution of the action.

9. Under the express provisions of Code Civ. Proc. § 325, one whose possession of land is not founded on a written instrument must, in order to prove adverse possession, show that he, or his predecessors and grantors, have paid all taxes levied and assessed upon the land; that their possession has been continuous and uninterrupted, and that it has been protected by a substantial inclosure, or that the land has been usually cultivated or improved.

10. In an action to quiet title, by the holder of the paper title, the burden of proving adverse possession is on defendant.

11. Under Code Civ. Proc., § 325, requiring one who claims land by adverse possession not founded on any written instrument, to show payment of all taxes which have been levied and assessed upon the land during the statutory period, one who had admitted that he had paid no taxes, and that there were no assessments other than those paid by the holder of the paper title, was not prejudiced by the introduction in evidence, by the holder of the paper title, of void assessments paid by him, as it would have been necessary for the adverse possessor himself to have introduced such void assessments in order to show that no valid assessment had been made.

Department 1. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Action by Charles P. Nathan against George E. Dierssen. From a judgment for plaintiff, defendant appeals. Affirmed.

A. M. Johnson, A. L. Shinn, and Devlin & Devlin, for appellant. Isaac Joseph and D. E. Alexander, for respondent.

SHAW, J. This is an action to quiet title to a strip of land constituting a part of swamp-land surveys numbered 755 and 851, in Yolo county, Cal. After trial, judgment was given in favor of the plaintiff, and the defendant, within 60 days after its rendition, appealed therefrom, and makes the proceedings on the trial a part of the record by a bill of exceptions. A number of errors are assigned by the appellant, which we will consider in their order.

1. The case was tried before. Judgment was given for the defendant, and on appeal to this court the judgment was reversed, and the cause remanded for a new trial. Nathan v. Dierssen, 134 Cal. 282, 66 Pac. 485. Some time prior to the former trial the plaintiff and defendant entered into a stipulation to the effect that one Herman Huber died seised and possessed of the land in question on February 3, 1889. The material part of the stipulation, so far as the question here raised is concerned, is as follows: "It is stipulated as follows: That the plaintiff and the defendant, George E. Dierssen, hereby admit, and will admit upon the trial of the above-entitled action," that the property was vested as aforesaid. At the beginning of the trial now under review the plaintiff offered in evidence this stipulation. The court at that time sustained an objection to the stipulation on the ground that it appeared to have been made merely for the purposes of the former trial, and was not binding upon the second trial. The trial was then continued for several weeks, and upon its being resumed the stipulation was again offered, and the court then changed its ruling, and allowed the stipulation to be admitted in evidence against the defendant. There was no error in this ruling. There is nothing in the stipulation or in the circumstances under which it was made to show that its operation was intended to be limited to the first trial. The issues on the last trial were substantially the same as when the stipulation was made. In the absence of anything limiting its effect the stipulation was available to both parties, and could be used at any subsequent trial. 20 Ency. of Pl. & Pr. 626. It was within the discretion of the court to vacate its ruling that the stipulation might be withdrawn, and give the plaintiff leave to introduce it as evidence. There was no claim by defendant that any facts or circumstances existed showing any injustice or hardship to him by reason of the change in the ruling which would make it an abuse of discretion. He offered no evidence to dispute the fact agreed to in the stipulation, and he does not claim that any such evidence could be produced.

2. There was no error in admitting the deed from the Capital Savings Bank to Herman Huber. It having been shown that Herman Huber owned the property, evidence of the deed conveying the same to him was competent, without preliminary proof that the grantor in the deed was possessed of the title at the time it made the conveyance.

3. The following question was asked of a witness: "Who was in possession of this De Grosse Ranch in '80?" The objection of the defendant to this question on the ground that it called for the conclusion of the witness as to the legal possession was properly overruled. It is true that there have been some intimations in some decisions that a question in this form calls for a conclusion of law, and if the word is to be taken as synonymous with "seisin," it may be that the answer would involve a conclusion. But witnesses are not supposed to be testifying with the technical accuracy of a lawyer, nor do they usually understand language with such precision. The ordinary meaning of the word "possession" is the same as "occupancy." It is defined as "the act of possessing; a having and holding or retaining of property in one's power or control." Cent. Dic. Unless there is something in the form of a question or of the previous questions put to witnesses indicating that the word is used in the narrow sense of "seisin," the question is unobjectionable. Nothing of the sort appears in the record in this case.

4. The court allowed the introduction of the inventory and appraisement in the matter of the estate of Herman Huber, deceased, for the purpose of showing that the deceased in his lifetime exercised acts of ownership

over the property. We do not think this was competent evidence for that purpose, but in view of the other evidence, and the fact there was really no controversy over the question of his ownership, we think the error was immaterial.

5. The evidence does not show that the action was barred by the statute of limitations.

By virtue of the stipulation that the legal title was in Herman Huber at his death in 1889, the deed of partition between Herman Louis Huber and Amanda J. Huggins, and the foreclosure deed to plaintiff, the plaintiff became vested with the legal title. Consequently the action would not be barred unless it appeared that the land had been held and possessed adversely to him for five years before the action was begun, which was on October 18, 1898. Code Civ. Proc. § 321. Defendant's possession and that of Herman Louis Huber, under whom he claims, was not founded on any written instrument. Hence, in order to prove adverse possession, it must be shown that the successive claimants have paid all taxes levied and assessed on the land, that the possession was continuous and uninterrupted, and either that such possession was protected by a substantial inclosure, or that the land was usually cultivated or improved. Code Civ. Proc., § 325; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100. Prior to March, 1895, there was no inclosure, nor was the land, except a small portion thereof, cultivated or improved. The testimony of Dierssen, the defendant, who was the only witness as to possession prior to that date, shows that he was not possessed of sufficient knowledge to state whether or not the possession of Herman L. Huber of any part of the land was continuous or uninterrupted from October 18, 1894, to March, 1895. The burden to show adverse possession was on the defendant, and upon this condition of the evidence the court was not bound to find that the action was barred, and its finding that it was not barred is therefore sustained by the evidence.

In order to prove the adverse possession, the defendant must further show either that he had paid all taxes levied and assessed on the land during the preceding five years, or that no valid assessment had been made. He admitted that he had paid no taxes and that there were no assessments other than those paid by plaintiff. He could not prove that there were no valid assessments without introducing in evidence the assessments introduced by plaintiff. Therefore if, in fact, they were void, or did not include all the land, the evidence was not injurious to the defendant, and if they were valid and included any part of the land the defense must have failed as to the part included. The descriptions in the assessments covered the north 156 acres of the lots. The southern boundary must therefore have been a true east and west line, and the evidence shows that this line would have included within the assessments all that portion of the land which the defendant's predecessor, Herman Louis Huber, ever actually occupied. The assessments paid by plaintiff were valid for the land described, and the description includes all of the land in controversy which the defendant could have had title to by adverse possession if he and his predecessors had paid the taxes.

6. The plaintiff obtained his title from the successor of Herman Huber, deceased, by commissioner's deed on foreclosure sale. He introduced in evidence the record in the foreclosure action and the deed of the commissioner therein to the plaintiff, and also a writ of assistance thereafter issued by the court, with the return of the sheriff thereon, showing the delivery of the property to the plaintiff in pursuance of the writ. We cannot perceive that this was error. It was a part of the record of the plaintiff's title showing that he had obtained not only the title, but the possession, so far as it could be obtained from the judgment debtor. It was not evidence to show that he had ousted the defendant, and it does not appear that it was received for that purpose, but it was competent to show the complete divestiture and transfer of the title and legal possession of the judgment debtor.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

NOTE.

[a] (U. S. 1833) Where by the written consent of counsel depositions taken in another cause were read in evidence at the hearing without objection, and the decree thereon was afterwards reversed on appeal, and the cause remanded for further proceedings, and on the second hearing the defendant objected to such depositions as evidence, on the ground that the reversal of the decree annulled the consent to their admission, it was *held* that such consent was coextensive with the cause, and not limited to the first hearing, and that the depositions were admissible.—Vattier v. Hinde, 32 U. S. (7 Pet.) 252, 8 L. Ed. 675.

[b] (U. S. 1891) A stipulation of record that certain testimony, already taken and filed in a foreclosure suit, "may be used in any future litigation" touching the property, "with the same effect as though originally taken therein, each party to such future litigation reserving the right to take additional testimony," does not make such testimony available on appeal, when the record fails to show that any part of it was used on the hearing below.—Kneeland v. Luce, 141 U. S. 437, 12 Sup. Ct. 39, 35 L. Ed. 808.

[c] (U. S. 1899) A stipulation of facts made by attorneys on the trial of an action is not binding upon either party in a subsequent action.—Board of Com'rs of Lake County, Colo., v. Sutliff, 97 Fed. 270, 38 C. C. A. 167.

[d] (Ill. 1871) An agreement as to what was proved on the hearing of a cause by the exhibits therein will not operate as evidence on a hearing subsequently had, upon a reversal of the decree rendered upon the first hearing.—Thomas v. Adams, 59 Ill. 223.

[e] (Iowa, 1893) In order to avoid a continuance on account of the absence of a sick witness, defendant consented that plaintiff should read his affidavit of what such witness would testify to, used on the motion for continuance, as the evidence of such witness on the trial. *Held* that, on a subsequent trial of the same

case, plaintiff could not use such affidavit again, though such witness had never been in condition to permit his testimony to be taken, and was now dead.—Hudson v. Applegate, 87 Iowa, 605. 54 N. W. 462.

[f] (N. Y. 1893) A stipulation allowing certain evidence to be read "on the trial" of another case applies to any trial of such case.—Herbst v. Vacuum Oil Co., 68 Hun, 222, 22 N. Y. Supp. 807.

[g] (N. Y. 1893) A stipulation allowing the evidence in a certain case to be read "on the trial" of another case applies to any trial of the case, whether first or second, so long as neither party is relieved from the obligation by an affirmative application to the court, and notwithstanding notice by one of the parties after a first trial that the party will no longer consider itself bound.—Herbst v. Vacuum Oil Co., 68 Hun, 222, 22 N. Y. Supp. 807.

[h] (N. Y. 1897) Written stipulations made at one trial bind the parties at a subsequent trial, and until the litigation is ended, unless the court on application has relieved them from their operation.—Clason v. Baldwin, 46 N. E. 322, 152 N. Y. 204.

[i] (S. C. 1899) Where parties to an action enter into a written stipulation of facts for the purposes of that action, the agreement is binding on both, throughout the entire progress of the action, unless the parties waive its terms by mutual consent, or are relieved by the court, under its discretionary power, on application by one of the parties.—Brown v. Pechman, 33 S. E. 732, 55 S. C. 555.

[j] (Tex. 1853) A stipulation that certain witnesses, if present, would testify in a certain way, is properly admitted in evidence on a subsequent trial to establish the same facts, since, if the stipulation were intended for use only during the term at which it was made, it would have been so expressed.—Lee v. Wharton, 11 Tex. 61.

[k] (Tex. 1904) A stipulation on an agreed statement of facts to be used in the trial of a cause that the same "shall constitute the evidence in the trial of said cause" does not prevent the introduction of further evidence on a second trial, nor authorize the Court of Civil Appeals to render judgment for appellant on reversal of a judgment for appellee. Rehearing, 82 S. W. 1056, denied.—Imhoff v. Whittle, 84 S. W. 243.

[l] (Wis. 1868.) A general stipulation that certain testimony taken on a former trial "may be read in evidence on the trial of this cause" applied to any subsequent trial, and not only to the first trial had after the stipulation was made.—Hinckley v. Beckwith, 23 Wis. 328.

[m] (Wis. 1889) A stipulation that the testimony of a witness on a former trial may be read in evidence gives a right to have it read on a new trial ordered by the Supreme Court.—United States Exp. Co. v. Jenkins, 73 Wis. 471, 41 N. W. 957.

7 Cal. Unrep. 200

RIDGLEY v. ABBOTT QUICKSILVER MIN. CO. OF ILLINOIS.* (S. F. 3,966, 3,982.)

(Supreme Court of California. Feb. 4, 1905.)

MORTGAGES—FORECLOSURE—DEFICIENCY JUDGMENT—RECITALS—SUFFICIENCY—APPEAL—PARTIES AGGRIEVED.

1. In a foreclosure suit, a finding that a certain sum was due and unpaid from defendant to plaintiff, which was not made a part of the judgment, and which was not accompanied by an order for a deficiency judgment, was not an adjudication of personal liability, gave the clerk no authority to docket a deficiency judgment, and confined plaintiff to the mortgaged property alone for the satisfaction of his judgment and costs.

2. A defendant in a suit to foreclose a mortgage, which had sold all its interest in the property before the suit was brought, and against which no personal or deficiency judgment was rendered, was not aggrieved either by the judgment or by an order allowing plaintiff receiver's costs and fees, in such sense as to entitle it to appeal from either the judgment or the order.

Department 1. Appeals from Superior Court, Lake County; George W. Buck, Judge.

Action by Edward Ridgley against the Abbott Quicksilver Mining Company of Illinois. From a judgment for plaintiff, and from an order allowing certain costs and fees, defendant appeals. Dismissed.

Gavin McNab, for appellant. William Denman, J. P. Langhorne, Haven & Haven, Page, McCutchen & Knight, and E. S. Pillsbury, for respondent. Frank M. Stone, pro se.

PER CURIAM. This is an action to foreclose a mortgage. The defendant, the Abbott Quicksilver Mining Company of Illinois, failed to answer, and judgment by default was entered against it. It brings two appeals—one from the judgment of foreclosure, and one from a subsequent order allowing certain receiver's costs and fees. A motion is made to dismiss these appeals upon the ground that the appellant is not a party aggrieved.

We think the appeals should be dismissed upon the ground and for the reasons stated. It appears that the appellant had sold all its right, title, and interest in the property upon which rested the foreclosed mortgage before the suit was brought. The judgment appealed from ordered a sale of the premises mortgaged, and that the proceeds be applied to the payment of the amounts found to be due from appellant to the plaintiff. There was no personal judgment against appellant, nor was there any order that a judgment be entered for any deficiency left after application of the proceeds of the sale to the debt. To be sure, it was found that a certain sum was due and unpaid from appellant to plaintiff; but this was only a finding, and no part of the subsequent decree or judgment, "and cannot be regarded as an adjudication of personal liability." Without this "adjudication of personal liability" the clerk had no authority to docket a deficiency judgment. Herd v. Tuohy, 133 Cal. 61, 65 Pac. 139, and cases therein cited.

It follows from the foregoing that, the appellant having no interest in the property to be sold and it being impossible to enter any valid deficiency judgment against it on the decree rendered by the court and here appealed from, the plaintiff must look to the mortgaged property alone for satisfaction of his judgment, as well as for the amount allowed him on the subsequent order, and that appellant cannot be held in any way or for any sum by either the judgment or order appealed from. It follows that appellant is in no way aggrieved by said judgment, or by said order.

The appeals are dismissed.

SHAW, J. I concur in the foregoing, and add the following: The Code provides that, if the proceeds of the mortgaged property are insufficient to pay the amount due the plaintiff, "judgment must then be docketed by the clerk * * * against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued." Code Civ. Proc. § 726. The docketing of a judgment is a proceeding, ministerial in character, which cannot occur until there is a judgment rendered. It is not the making or giving of a judgment. It is the act of a mere clerk, and it necessarily implies the pre-existence of the judgment to be docketed. In this state the docketing must not only await the rendition of the judgment, but, according to the directions of the Code, it is to be done after the filing of the judgment roll, which takes place after the judgment is entered. Code Civ. Proc. § 671. The direction in section 726 that a clerk must docket a judgment for the deficiency indicates that there must be an existing judgment of the court declaring, at least, the existence of a personal liability, the amount thereof, and the persons from whom and to whom the same is due. Neither findings, conclusions of law, nor recitals will suffice.

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*Rehearing denied March 6, 1905.

146 Cal. 147

CENTRAL EUREKA MIN. CO. v. EAST CENTRAL EUREKA MIN. CO. et al.

(Sac. 1,095.)*

(Supreme Court of California. Feb. 1, 1905.)

MINES—LOCATION—EXTRALATERAL RIGHTS—DIVERGENCE OF END LINES—REPEAL OF STATUTE—QUITCLAIM DEED.

1. Act Cong. July 26, 1866, c. 262, 14 Stat. 252, in relation to the location of mines, granted extralateral rights, but did not require the end lines of locations to be parallel. Act Cong. May 12, 1872, c. 152, 17 Stat. 91, also granted extralateral rights, required the end lines to run parallel to each other, repealed existing laws relating to the location and patent of mining claims, but excepted from its repealing operation all the rights of locators under previous laws. Plaintiff's application for a patent was made while the act of 1866 and the act amendatory thereof of July 9, 1870, c. 235, 16 Stat. 217, were in force, and was pending when the act of 1872 was enacted, awaiting the approval of the surveyor general; but the patent did not issue until subsequent to that act, when final payment was made. The patent purported to grant the mining premises described, "throughout its entire depth, although it may enter the land adjoining, provided that the right of possession thereby granted of any portion of the vein, outside of the vertical side lines of the survey, should be confined to such portions thereof as lay between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such interior parts of such vein," and recited that the proceedings were had under the acts of 1866, 1870, and 1872, and the patent was issued in conformity with such acts. *Held*, that the nonparallelism of the end lines of the location did not deprive plaintiff of the right to follow its vein on the dip beyond the side line of the surface.

2. A mining company having contracted to purchase a strip of agricultural land adjoining its mine, a quitclaim deed to another of its interest in the "real property described in said contract," and "lying east of that certain patented mining ground," described by name, did not convey any interest in the mine, though the vein thereof dipped beyond the surface line of the survey.

Department 1. Appeal from Superior Court, Amador County; R. C. Rust, Judge.

Action to quiet title by the Central Eureka Mining Company, a corporation, against the East Central Eureka Mining Company, a corporation, and James and Eliza A. Toman. From a judgment for plaintiff, defendants Toman appeal. Affirmed.

Campbell, Metson & Campbell (Galpin & Bolton, of counsel), for appellants. Carter & Rickets, amici curiæ. Olney & Olney, W. J. McGee, and C. H. Lindley, for respondent.

ANGELLOTTI, J. Defendants Toman appeal from a judgment quieting plaintiff's title to certain mining property, and from an order denying their motion for a new trial. The plaintiff is the owner of the Summit quartz mine, situated in Amador county, and the controversy here is as to so much of the vein of ore having its apex within the surface lines of plaintiff's location as lies within vertical planes drawn through the end lines of such location and those lines produced in their own direction, and underneath the surface of defendants' land. This vein, at the apex, traverses plaintiff's location, crossing both the southern and northern end lines. In its downward course the vein descends into the earth at an angle approximately of 65 deg. eastwardly, and on such downward course passes outside of a plane drawn down vertically through the east side line of plaintiff's surface location, and enters the adjoining land of defendants at a depth of 1,094 feet from the collar of plaintiff's shaft, and extends for a considerable distance therein. Plaintiff has already sunk its shaft to a depth of about 2,000 feet, and was at the time of the commencement of this action engaged in removing the ore and mineral-bearing rock from said vein at such depth of about 2,000 feet. The end lines of plaintiff's claim are not parallel, but converge in the direction of the dip of the vein.

Plaintiff's title to the Summit quartz mine is derived from Hall McAllister, the patentee from the United States. The patent was issued November 25, 1873, and the final entry and payment were made on October 11, 1872, several months after the passage of the act of Congress of May 10, 1872, relative to the promotion of the development of the mining resources of the United States. The application for the patent, based upon two locations made in the years 1863 and 1865, respectively, was filed on February 7, 1871, while the act of July 26, 1866, c. 262, 14 Stat. 252, commonly known as the "Lode and Water Law," was in force, and was pending on May 10, 1872, awaiting the approval by the surveyor general of the survey which had already been made and submitted for approval. The patent subsequently issued upon said application purported to grant to the patentee the mining premises described therein, with the exclusive right of possession and enjoyment of 1,165.56 linear feet of said vein (the length thereof on the apex between plaintiff's end lines) throughout its entire depth, although it might enter the land adjoining, provided that the right of possession thereby granted to any portion of the vein outside of the vertical side lines of the survey should be confined to such portions thereof as lay between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of such vein. The patent recites that the proceedings were had in pursuance of the act of July 26, 1866, the act amendatory thereof approved July 9, 1870, c. 235, 16 Stat. 217, and the act of May 10, 1872, c. 152, 17 Stat. 91, and that the patent is issued in conformity with said acts. The defendants own the adjoining land, known as the "Toman Ranch"; their title being derived through mesne conveyances from patents issued under the laws of the United States providing for the sale and disposition of agricultural lands, which patents were junior in point of time to the patent for the Summit quartz mine, and contained a reservation giving the right to the proprietor "of a vein or ledge to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted."

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*Rehearing denied March 2, 1905.

It will be seen from the foregoing that the mining patent purported, upon its face, to grant to plaintiff's predecessor all that portion of the vein of ore which is here in controversy. Defendants contend, however, that notwithstanding the attempted conveyance, in terms, of the property in dispute, the patent failed to convey any extralateral rights, by reason of the fact that the end lines of plaintiff's claim, as located, surveyed, and granted, were not parallel, as required by the act of May 10, 1872.

It appears to be recognized by the authorities that compliance with the requirements of the act of May 10, 1872, that the end lines shall be parallel, is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes down through the side lines, in all cases where the location was made under such act. Iron S. M. Co. v. Elgin, M. & S. Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Argonaut M. Co. v. Kennedy M. & M. Co., 131 Cal. 15, 25, 63 Pac. 148, 82 Am. St. Rep. 317.

Plaintiff urges that as the only object of such requirement was to prevent the locator, in following his vein downward, from acquiring a greater length underneath the surface than he had apex at the surface, a grant of extralateral rights within converging end line planes, as in this case, would be within the spirit and intent of the act of 1872, and therefore valid. This view is opposed to statements made in the opinions in the cases last cited, which appear to incline to the conclusion that extralateral rights are granted under the act of 1872 only when the end lines are parallel. However, it is unnecessary to definitely decide this point in this case, for we are satisfied that as the locations upon which the patent was based were made prior to May 10, 1872, the requirement as to parallelism of end lines was not applicable thereto. It was not until the passage of the act of 1872 that there was any such requirement, and it is not disputed that, had the patent issued prior to the passage of such act, it would have conveyed the extralateral right between the converging end planes. While the act of May 10, 1872, repealed the previous statutes regarding the location and patenting of mining claims of the character here involved, the framers thereof were very careful to manifest their intention that existing rights should not be affected by such repeal. By section 2322, Rev. St. [U. S. Comp. St. 1901, p. 1425]—one of the sections of said act—it was declared that "the locators of all mining locations heretofore made * * * so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict therewith, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations," provided that their right of possession to such outside parts of such veins shall be confined between vertical planes drawn downward through the end lines of their locations, continued in their own direction. It was further expressly provided in the act that "such repeal shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision in the General Land Office, but in such cases, where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act." And further: "Nor shall this act affect any right acquired under said act" (the act of 1866). And still further: "Provided that nothing contained in this act shall be construed to impair in any way rights or interests in mining property acquired under existing laws." In the face of such provisions, it cannot be held that it was the intention of Congress to deprive a previous locator, by any new requirement, of any existing right, unless such intention is very clearly manifested. So far as the particular requirement as to parallelism of end lines is concerned, it would appear to be well settled that it has no application to locations made prior to the act of May 10, 1872. The objection of want of parallelism in end lines, where the patent was issued subsequent to the passage of said act, based upon locations made prior thereto, has been several times disposed of by the simple statement that when the locations were made there was no law requiring such parallelism. See Carson City G. & S. M. Co. v. North Star M. Co. (C. C.) 73 Fed. 597, 599; Id., 83 Fed. 658, 669, 28 C. C. A. 333. In Iron S. M. Co. v. Elgin M. & S. Co., 118 U. S. 196, 208, 6 Sup. Ct. 1177, 30 L. Ed. 98, the Supreme Court of the United States said, in effect, that a locator under the act of 1866 has in such a case extralateral right, notwithstanding the lack of parallelism. The question was fully considered and definitely decided by this court in favor of such right in Argonaut Min. Co. v. Kennedy M. & M. Co., supra. It was said therein that it would have been competent for Congress, in the law of 1872, to have required parties who had equitable rights to patents to have made their end lines parallel before a patent issued, on pain of losing all extralateral rights, but there were no such provisions in the act of 1872, and that the rights of locators under former laws were by said act expressly confirmed to them. The extralateral right was in that case confirmed, although the end lines diverged; it being held that it could be determined, as matter of law, from the patent, what portion of the vein between those lines, not exceeding at any depth the stated number of linear feet at the apex, was conveyed. Where the end lines converge, as in this case, there can, of course, be no question as to the definiteness of the description of the extralateral right conveyed. By reason of such converging, the patentee is confined, within well-defined boundaries, to less on the dip below the surface than he had upon the surface.

It is sought to distinguish this case from the Argonaut Case, and other cases relied on by plaintiff, by showing that in all these cases the applicant for a patent had made his application, and paid his money thereon, prior to the passage of the act of May 10, 1872, and thereby had acquired an equity susceptible of enforcement against the government, while in the case at bar, although the locations and application for a patent had been made prior to May 10, 1872, the payment was not made or the survey finally approved by the surveyor general until after that date. We find nothing in the report of the case of Carson City v. North Star, etc., Co., supra, showing that the money had been paid prior to May 10, 1872, and, so far as appears therein, the case was an exact parallel to this case. We are, however, of the opinion that the distinction alleged is not at all material. We are not concerned here with the question as to how far a locator must have proceeded with his claim, to put it beyond the power of the government to interfere with him in the enjoyment of the same. As we read the act of 1872, it seems very clear that it was the intention of Congress to preserve to the prior locator everything that his location would have given him, had the act of 1872 not been enacted, except possibly the width of the claim on the surface. See Lakin v. Roberts, 54 Fed. 461, 4 C. C. A. 438.

We have already referred to the various provisions upon this subject contained in the act of 1872, and it is unnecessary to here restate them. The rights sought by the act to be preserved were such rights as had been acquired under the prior acts, by the making of a valid location, even though those rights were not of such a nature that the government might not, if it had seen fit so to do, deprive the locator thereof; and the right to obtain a patent in accordance therewith under the provisions of the act of 1872 was given for the reason that the previous laws as to the issuance of such patents were repealed, and there was no other law under which a patent could be issued for any such mining claim. It was left to the Land Department to determine, as to any such alleged prior location, what the rights of the locator were under the previous acts, and, in accordance with the procedure laid down by the act of 1872, to issue a patent conveying the title of the government, so far as might be necessary to effectuate such rights.

The patentee did not waive or renounce any extralateral right by the acceptance of the patent. It is true that the patent did, in accordance with the express provisions of the act of 1872, purport to grant, in addition to the vein or lode originally located, the right to all other veins or lodes, the top or apex of which lay inside of the surface lines of the location extended downward vertically, to their entire depth, although in their course downward they extended outside of the vertical side lines. It might, perhaps, be contended with some force that as to these other veins and lodes, which were not embraced within the original location, and the right to which was for the first time given by the act of 1872, the requirement as to parallelism of end lines might preclude any extralateral right. But the patent, in terms, also purported to grant the 1165.56 linear feet of the original vein, throughout its entire depth, between the end lines continued in their own direction. By the acceptance of such a patent, there was no indication of any intent to waive or renounce any right to follow the vein, between the end lines, given by the original location, for those rights were expressly confirmed thereby, and plaintiff bases its claim entirely thereon. We cannot see that the legal effect of such an acceptance was a waiver or renouncing of any such right. These particular rights the patentee was entitled to, even though his end lines were not parallel, and the fact that the patent purported to also grant something else to which he may not have been entitled cannot affect his rights as to the original vein, which are also confirmed by the patent. It is true that the patent recites on its face that it is issued in pursuance of the act of 1872, but it also recites that it is issued in pursuance of the act of July 26, 1866, and the act amendatory thereof, approved July 9, 1870, and, in conjunction with the public records in evidence, shows that it was issued upon locations made prior to May 10, 1872, and upon an application pending at that date.

The decision in the case of New Dunderberg v. Old, 79 Fed. 598, 25 C. C. A. 116, relied upon by appellants, does not sustain their claim. The Dunderberg owners claimed the right to follow their vein on its course or strike outside of and beyond their patented boundaries, and into a prior claim (the Frostberg). They claimed that they had this right under the claim of 1866, but they had so located their claim on the surface that the lode crossed both side lines of the claim diagonally on its strike, and passed out of the claim more than 300 feet before it entered the Frostberg claim, and had accepted a patent for this location. This patent did not purport to grant the extralateral right alleged, and could not, under the law, grant it upon the surface location, which had to be made under either act, for under both acts the locator was confined, in following the strike of his vein, within the surface boundaries he had himself defined. To include the extralateral right sought in that case, it was necessary for the Dunderberg owners to go beyond their location, entry, and patent, and claim something not embraced therein at all. It was in regard to such a case that the Circuit Court of Appeals said that the claimant was bound by his own location, entry, and application, and a patent in accordance therewith, and that his location and entry for a patent was a notice of abandonment of everything not included therein. It was said: "A claimant who discovered and located a lode mining claim under the act of 1866 renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he located it upon the surface of the ground, enters it, and accepts a patent for it under the act of May 10, 1872." Since the side lines of the Dunderberg claim crossed the course of the strike of the vein, they were held to constitute end lines, and it was held that, under the express terms of the patent, the owner of the claim was without right to the possession of the lode outside of those lines after he obtained his patent. This case is in no way applicable here.

A question is raised as to the effect upon plaintiff's extralateral right of a quitclaim deed made by plaintiff to the defendants Toman on December 31, 1898. By this deed, plaintiff purported to remise, release, and forever quitclaim unto the Tomans "All those certain lots, pieces, or parcels of land situate, lying and being in the said County of Amador, State of California, and bounded and particularly described as follows, to wit: First, That portion of Sections Eight (8) and Seventeen (17) Township Six (6) North Range Eleven (11) East, Mount Diablo Base and Meridian, lying north of the center of that certain wagon road extending between the towns of Ione and Volcano and known as the Ione and Volcano wagon road, and lying east of that certain patented mining ground known as the Summit Quartz Mine, and also east of that certain patented mining ground known as the Amador Consolidated Mine." The second parcel described lay to the west of the Summit quartz mine, and is in no way here involved. By this deed the plaintiff further purported to remise and release the Tomans from all claims, bonds, and contracts made by the Tomans to it or its predecessors, and specially from any covenant contained in an agreement between the parties dated October 23, 1897, and duly recorded. The deed recited that it was made pursuant to a resolution of the board of directors adopted December 31, 1898. The making of the deed was subsequently ratified by two-thirds of the stockholders. The objection made by plaintiff when defendants offered this deed in evidence was sustained, and the deed excluded, upon the ground, as stated by the court, that it did not purport to convey any portion of the mining ground of plaintiff. Admittedly, the description in the deed does include the land of the Tomans adjoining plaintiff's claim, through which the vein in controversy has its dip. Defendants, relying upon the well-recognized principle that a conveyance of land, in the absence of express reservation, carries not only the surface of the earth, but everything under it and over it, including the minerals therein contained, claim that the effect of this deed was to convey to defendants the portion of the vein here in dispute. As the plaintiff was at the date of the deed the owner of such portion of said vein, such must be held to be the effect of the quitclaim deed if the description in the deed includes the same. As has already been seen, the deed purported to convey only such portions of the sections of land as lay east of "that certain patented mining ground known as the Summit Quartz Mine and also east of that certain patented mining ground known as the Amador Consolidated Mine." It is only by construing this language as referring exclusively to the lines of the surface location that defendants' contention that this description included the vein can be upheld. As a matter of fact, the vein under the Toman surface was, so far as it lay between the converging end line planes of plaintiff's claim, as much a part of the Summit quartz mine, and of the patented mining ground known as such mine, as was the land within the surface lines of plaintiff's location. Tyler Min. Co. v. Last Chance M. Co., 90 Fed. 15, 21, 32 C. C. A. 498; Empire State, etc., Co. v. Bunker Hill, etc., Co., 121 Fed. 973–977, 58 C. C. A. 311; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57. It had been by the United States government severed from the Toman land, and granted to plaintiff's predecessor, as an integral part of the Summit quartz mine, and the agricultural patents of defendants' predecessors contained a corresponding limitation upon the estate granted to them. Unquestionably it would have been conveyed by any instrument purporting to grant the Summit quartz mining claim or the Summit quartz mining ground, for it was part and parcel thereof. The reasons which would require us to hold that the vein was conveyed by a deed purporting to convey the Summit quartz mining claim or mining ground are equally applicable to a deed purporting to convey only lands lying east of such claim or ground, and forbid the conclusion that it was intended to convey any part of the mining claim or ground itself. A very different case would be presented if we were dealing with a deed which contained a description of a parcel of land simply by metes and bounds, or a deed which purported to convey all lands lying east of a certain defined surface line. We have no such deed here, but one which, in terms, limits its operation to such portions of the designated sections as lie east of the "mining ground" of plaintiff. Taking into consideration simply the character of plaintiff's property, we are of the opinion that the deed did not purport to convey any portion of any vein that had its apex within the surface lines of plaintiff's location, so far as it lay between the converging end lines of plaintiff's claim.

When we examine the deed in the light of the circumstances surrounding its execution, as disclosed by the evidence introduced by defendants, it is apparent that there was no intention to convey any part of the mining claim. The resolution of the board of directors of plaintiff authorizing the execution of the deed, which is referred to in the deed, and the instrument of ratification signed by the stockholders of plaintiff, show that the object of the quitclaim deed was to free the land and title of the defendants from the effect of a contract made on October 23, 1897, by the Tomans and plaintiff, whereby the Tomans had agreed to sell and convey to plaintiff their lands adjoining plaintiff's claim. It appears from the resolution of the board of directors that the Tomans, owning the agricultural lands lying east of plaintiff's claim, had agreed to sell and convey to plaintiff, the owners of the Summit quartz mine, certain real property, the description being apparently the same as that in the quitclaim deed, and that it had been mutually agreed that the agreement should be canceled—the plaintiff to pay the Tomans $1,000 in consideration of such cancellation—and the president and secretary were authorized to execute on behalf of the corporation "a quitclaim deed of all the right, title and interest of the corporation in and to the real property described in said contract of sale, and particularly described as follows." Then follows the description contained in the deed. The ratification by the stockholders recites the execution to the Tomans of "a quitclaim deed, conveying all their right, title and interest of said corporation in and to the property described in said contract," and ratifies such a deed. It is very clear that it was not the intention of either directors or stockholders to remise or release or quitclaim any interest of plaintiff in or to anything that was not covered by the agreement of sale executed by the Tomans. The manifest object was to place the Tomans, so far as title was concerned, exactly where they were at the date of the execution of the agreement of sale. Only "the property described in said contract" was to be quitclaimed. The only property described in said contract of sale was property adjoining plaintiff's mining claim. No part of such mining claim was included therein.

We are therefore of the opinion that there was no error in refusing to receive the deed in evidence, for the reason that, quitclaiming only lands lying east of the "mining grounds known as the Summit Quartz Mine," it did not purport on its face to affect any portion of plaintiff's mining claim, and there is nothing in the surrounding circumstances shown by the evidence introduced by defendants, conceding that the language of the deed is such as to justify consideration of those circumstances, that would justify such a construction of the deed as would make it a conveyance of any portion of plaintiff's interest in its mining claim.

The judgment and ordered are affirmed.

We concur: SHAW, J.; VAN DYKE, J.

146 Cal. 184

GARRETSON v. PACIFIC CRUDE OIL CO. et al. (L. A. 1,306.)

(Supreme Court of California. Feb. 2, 1905.)

CORPORATIONS — CONTRACTS BETWEEN STOCKHOLDERS—EXCHANGE OF PROPERTY FOR STOCK.

1. If acting in good faith, it is valid for all the stockholders to agree that shares of stock be issued to themselves in exchange for property conveyed by them to the corporation, and to acquire which, in part, the corporation is formed.

2. After corporate stock has been issued in good faith by agreement of all the stockholders in payment for leases transferred to the corporation, the remedy of a subsequent stockholder, who was misled by false representations of some of the stockholders, is personal to himself, and not in the name and for the benefit of the cor-

poration, whose transaction was valid when made.

3. The fact that defendant was secretary of the corporation did not prevent him from procuring oil leases from third persons, which were valuable, and transfer them to the corporation in exchange for corporate stock issued to him, where the transaction is free from fraud or concealment of facts.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by D. F. Garretson against the Pacific Crude Oil Company and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Goodrich & McCutchen and Oscar A. Trippet, for appellant. Geo. P. Adams, J. W. McKinley, and Cochran & Williams, for respondents.

CHIPMAN, C. Plaintiff is a stockholder in defendant corporation, and as such sues for its benefit and that of all the stockholders, the corporation having, on plaintiff's demand, refused to bring the action. The complaint sets forth two causes of action: First, to cancel an issue of 68,000 shares of the capital stock of defendant corporation; second, an issue of 250,000 shares. The first of these issues was made to defendant Corbin for himself and the original corporators, who, with the corporation and one Wilbur, constitute the defendants in this action. The stock will be referred to as the "Corbin shares." The second issue was made to defendant Wilbur, and will be referred to as the "Wilbur shares." The cause was tried by the court, and the findings of fact were in favor of defendants. Judgment passed dismissing the action, with costs to defendants. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

It is not distinctly claimed in plaintiff's brief that the findings do not sustain the judgment, although the argument in effect is that the court drew wrong conclusions from the facts found, and that in some respects the facts were not just inferences from the evidence. No point is made that the court committed any errors of law in ruling upon the evidence admitted or excluded. Plaintiff's brief is not as helpful as it might otherwise have been, nor is it conformable to the spirit of the rules of the court, for it fails to specify the particulars wherein the findings are unsupported by the evidence except in a very general way, and in its statement of facts it fails to cite the folios of the transcript in support thereof. Turning to the specifications in the transcript wherein the findings are claimed to be unsupported, there is almost an entire failure to point out the ground of the insufficiency of the evidence. An examination of the record, however, convinces us that the findings of fact have support in the evidence, and, unless the trial court drew wrong conclusions from these findings, the judgment and order must be affirmed.

The 68,000 Corbin Shares. It appears that defendant Corbin held an option on certain leases of oil lands. By arrangement among the defendants other than Wilbur, it came about that for a consideration Corbin conveyed to these defendants an interest in the option held by him, and defendant corporation was formed for the purpose of taking over these leases, in consideration of which 68,000 shares of the capital stock of the corporation were to be issued to Corbin, he to be entitled to certain of those shares, and the balance to be divided among the other defendants except the corporation and defendant Wilbur, who at this time knew nothing of the transaction, and had no interest in it. The capital stock of the corporation was 1,000,000 shares of the par value of $1 each. It was also agreed by these original corporators that each of them should subscribe for 2,000 shares of the corporation at 10 cents per share, and pay the money into the treasury, which was accordingly done, and the shares were issued to them. The organization of the corporation was effected on April 8, 1900, the defendants other than Wilbur being the only stockholders and directors. The first meeting of the directors and stockholders was held on the day last above named, and, all being present and agreeing thereto, resolutions were duly passed accepting the Corbin option for leases, and authorizing 68,000 shares of the capital stock of the corporation to be issued to Corbin pursuant to the agreement above referred to, and the leases were executed and delivered to the corporation by the companies which had given the options. The shares issued to Corbin bear date April 25, 1900, and on May 29, 1900, certificates for 6,785 shares were issued to each of defendants except defendant corporation, which had been transferred by Corbin pursuant to the agreement already referred to, he retaining the remaining shares. Defendant Wilbur had, previous to April 23d, come into the company, and had subscribed for 2,000 shares of the company's stock on the same terms as the original shareholders and directors, and received 6,785 shares of the Corbin stock in common with them. About 2,500 shares had been sold to other persons, whose certificates are dated April 23, 1900, and on May 31, 1900, plaintiff's shares were issued to him.

Plaintiff alleged that the defendant stockholders combined and confederated to cheat and defraud the corporation and the bona fide stockholders thereof in the issue of this Corbin stock; that Corbin paid nothing for the leases transferred by him to the corporation; that said leases had no value, all of which the directors knew when they passed the resolutions referred to above; that defendants paid nothing for said Corbin shares issued to them, and the corporation received no consideration, nor was there any property received by said corporation therefor. The court found otherwise on these issues; that the corporation "did receive a full and valuable consideration for the issuance of said stock to said Corbin, and labor was done for and on account thereof, and property actually received by said corporation for the issue of said 68,000 shares of stock," and the same was not fictitious, nor was it issued without consideration, nor is it void. The court also found "that neither the acts of said directors nor of said Wilbur or of any of them in the issuance of said 68,000 shares of stock were done in bad faith, or with intent to appropriate to themselves the property or the stock of the corporation without compensation." The court also found that when the 68,000 shares were issued there were other stockholders (although plaintiff was not then a stockholder), but that "when the resolutions were passed for said issuance of stock to defendant Corbin in consideration of said leases, defendants herein, other than defendant corporation and Wilbur, were the only stockholders in said corporation, and all of said defendants were present at the meeting of the directors at which said resolutions were passed, and were fully familiar with all the facts with reference to the issuance of said stock to said Corbin and the agreements with reference to the disposition thereof, and consented and agreed to the issuance of said stock, and to all the agreements with reference thereto," and said transaction, except as to the formal issue of the certificates for said stock, was fully completed and the agreements performed by the parties thereto before any person other than defendants became a stockholder in said corporation, and no persons other than defendants became stockholders in such corporation prior to April 21, 1900.

It was also alleged in the complaint that before plaintiff had purchased his said shares the officers and directors of defendant corporation falsely represented that they "have all paid for their stock at the rate of ten cents per share." The court found that this statement was caused to be published by defendant Corbin, as secretary of the company, with knowledge of the directors, and that at the time plaintiff purchased his stock he believed it to be true. Acting in good faith, it was competent for all the stockholders to agree by unanimous concurrence that shares of the corporation should be issued to themselves in exchange for property conveyed by them to the corporation, and to acquire which in part the corporation was formed. Kellerman v. Maier, 116 Cal. 416, 48 Pac. 377; Scadden Flat G. M. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Smith v. Ferry & C. H. Ry. Co. (Cal.) 51 Pac. 710; Morawetz on Corp. § 267; Cook on Stockholders, § 38, notes p. 50. The fact that the Corbin shares were not issued until after other shares had been issued is immaterial, for the Corbin stock passed upon the completion of the agreement by which the consideration was conveyed to the corporation. Nothing remained to be done but the formal issuance of the certificate, upon which the ownership of the stock did not depend. Cal. S. Hotel Co. v. Callender, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99; San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Pacific Fruit Co. v. Coon, 107 Cal. 446, at page 452, 40 Pac. 542.

As to the alleged false representations concerning the price paid by defendants for their stock, the statement was true as to their cash purchases, and there was evidence tending to show that the Corbin leases had a value, when acquired, nearly or not quite equal to 10 cents per share of the stock. However this may be, the purchase of the Corbin leases with stock was done in good faith, and was a legitimate transaction, and no other stockholder could complain, for all of them agreed to the purchase. If plaintiff was misled to his injury by subsequent false representations of defendants, the fact could not affect the corporation. His remedy would be one personal to himself, and not in the name and for the benefit of the corporation, whose corporate transaction was valid when made.

The 250,000 Wilbur Shares. The complaint alleges that defendant Wilbur was appointed secretary and general manager of defendant corporation, and that while acting in these capacities, and for the corporation, he secured from one Treadwell and others certain leases of oil lands; that he subsequently assigned these leases to the corporation, and was given 250,000 of its shares therefor. The claim is that he was the agent and trustee of the corporation when he took the Treadwell leases, and in equity the corporation was entitled to the benefits of the transaction. The court found that Wilbur was not the general manager of the corporation when he acquired these leases or at any other time; that he had been elected as secretary previously thereto, but "it was upon the express agreement that he should devote but little of his time to the duties of such office, and should be free to deal in all properties on his own account." The court found further that in negotiating for and examining these Treadwell leasehold properties Wilbur paid his own expenses, and acted wholly in his individual capacity, and "he was not acting for or on behalf of said corporation, and did not secure said lease for said corporation"; and "said corporation was not entitled to have said lease made direct to it or to have said assignment made to said corporation by said Wilbur without compensation or consideration"; and that "the assignment of said lease to said corporation" constituted "a full, adequate and valuable consideration for said stock, and the said issue was not fictitious or without consideration." The court found against plaintiff's claim that these shares were issued to Wilbur through a corrupt combination with the other defendants, and for their mutual benefit, and found that they were issued in good faith, and for a valuable consideration, to Wilbur alone, in which neither the other defendants nor the corporation at the time had any interest. The evidence is full and explicit as to all the circumstances attending this deal, and justified the ultimate facts found by the court. There was evidence, and the court found, that there was no fraud in the dealings complained of, and no concealment of the facts, but that the various steps in the transactions set forth in the complaint were duly entered on the books of the corporation, and that there were no secret agreements between the parties in respect to the acts complained of.

It is not necessary to controvert the principles of law stated by plaintiff as governing officers and directors of corporations in their dealings as such. Plaintiff's case is grounded on the alleged fraud of defendants other than the corporation, and upon the corrupt concealment of their official acts and their fraudulent combination to cheat and defraud the other stockholders and the corporation. Proof of these averments was essential to plaintiff's case, and was not forthcoming. On the contrary, the evidence justified the court in finding that there was neither actual nor constructive fraud in respect of the two transactions, the subject of plaintiff's complaint. The facts do not bring the case within the rules relied on by plaintiff. The purchase of the Treadwell leases was made by the directors openly and free from any taint of fraud, and the evidence is that these leases had great value. We do not think the plaintiff has made a case which would warrant the court in canceling the shares given in payment for the leases, and at the same time allow the corporation to retain the consideration, and plaintiff does not offer to restore the leases. Plaintiff is seeking equity for the benefit of the corporation while wholly failing to do equity or requiring the corporation to do equity.

The judgment and order should be affirmed and it is so advised.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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146 Cal. 139

In re GIANELLI'S ESTATE. (Sac. 1,315.)

(Supreme Court of California. Jan. 31, 1905.)

EXECUTORS — ACCOUNTING — PROFITS—LOSSES —FINDINGS—CONFLICTING EVIDENCE —REVIEW.

1. Under the express provisions of Code Civ. Proc. §§ 1613, 1614, an executor is chargeable in his account with the whole of his decedent's estate which may come into his possession at the value of the appraisement contained in the inventory, and is neither entitled to profits derived from a sale thereof nor liable for losses on sales justly made.

2. Where there is a substantial conflict in the evidence, the court's findings thereon will not be disturbed on appeal.

Department 1. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Judicial settlement of the accounts of Bertha Gianelli, as executrix of the estate of B. Gianelli, deceased. From a decree charging the executrix with certain sums, she appeals. Affirmed.

Louttit & Middlecoff, for appellant. E. P. Foltz, Buck, Miller & Clark, and Miller & Clark, for respondent.

VAN DYKE, J. This is an appeal by Bertha Gianelli from the judgment and order of the superior court of San Joaquin county settling her account as executrix of the last will and testament of B. Gianelli, deceased. B. Gianelli died December 21, 1902. After his death, on January 9, 1903, his widow was appointed by said court executrix without bonds, in accordance with the terms of the decedent's last will and testament. Decedent left certain real estate and two grocery stores in Stockton—one at California and Fremont streets, and one at Weber avenue and El Dorado street, in said city. After the said executrix had been running the stores in question for some five months, certain creditors of the deceased became dissatisfied with the management of the estate, and petitioned said court to compel the executrix to give bonds. Thereupon, after hearing, the court ordered the executrix to give bonds in the sum of $19,000, whereupon she resigned, and J. S. Moulton, the public administrator of San Joaquin county, was appointed administrator with the will annexed of said estate, and took possession of both stores. The executrix, under order of the court, filed her account and report of her administration of said estate. Said creditors and the public administrator, respondents herein, objected to the same, and filed a contest, with the result that the court disallowed certain items of the account, and also charged the executrix with the estate not accounted for, and thereupon "ordered, adjudged, and decreed that the said executrix, Bertha Gianelli, pay to J. S. Moulton, as the public administrator of the county of San Joaquin, state of California, as administrator with the will annexed of the estate of B. Gianelli, the sum of $2,215.57, but out of said sum of $2,215.57 said Bertha Gianelli shall be entitled to retain the sum of $720 family allowance, and $156.65, her compensation as said executrix, and subject to the above payment; and said account is hereby in all respects as rendered, approved, allowed, and settled." It is contended on behalf of the appellant that the evidence does not sustain or justify the findings and decree that the executrix failed to turn over all the goods in the store when she resigned, and, further, that the court erred in finding and decreeing that the executrix had made a gain of $614.98 in carrying on the business of the decedent. We have read the evidence, taken at the hearing on the settlement of the account of the executrix, and the most that can be said in favor of the contention of appellant is that in some particulars the court might have found the other way. Still, the evidence as a whole is but substantially conflicting. Under the law the executor is chargeable in his account with the whole of the estate of the decedent which may come into his possession at the value of the appraisement contained in the inventory. Code Civ. Proc. § 1613. He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement he is not responsible for the loss, if the sale has been justly made. Code Civ. Proc. § 1614. As already stated, the executrix carried on the business of these two stores for some five months, and the evidence shows very clearly that she was in many respects lacking in the necessary knowledge of the business to conduct it in a proper businesslike manner, and failed to account satisfactorily for some of the alleged losses. It also shows that her agent, Gus Gianelli, brother of the deceased, in the management of one of the stores was incompetent or unfit to carry on the business. In his cross-examination he was asked: "Q. Would you consider the services of a manager who run his store behind some $700 in less than six months a proper manager, or consider his services worth $200 [per month] if he didn't discover sooner than six months that he was running his store behind? A. I don't know about that. I don't know anything about it. * * * Q. But you rendered an account to the executrix showing a loss, did you not? A. I could not say." Again, he says, in speaking of some of the accounts: "I have not turned these accounts over to the public administrator because they have not been asked for. I will turn them over whenever they are asked for or demanded. I do not know exactly how many of these outstanding accounts for merchandise sold since Mr. Gianelli's death have been collected." The judge of the court below, with the witnesses giving their testimony before him, and observing their demeanor while testifying, is better able to give proper weight and credibility to such evidence than is the appellate tribunal. This fact is the reason of the rule that, where there is a substantial conflict in the evidence, the finding or judgment of the trial court will not be disturbed. Mahan v. Wood, 105 Cal. 12, 38 Pac. 507; Adams v. Burbank, 103 Cal. 646, 37 Pac. 640; Moore v. Douglas, 132 Cal. 399, 64 Pac. 705.

The judgment appealed from, settling the account, is affirmed.

I concur: SHAW, J.

I concur in the judgment: ANGELLOTTI, J.

146 Cal. 142

PEOPLE v. MODINA. (Cr. 1,173.)

(Supreme Court of California. Jan. 31, 1905.)

CRIMINAL LAW—ROBBERY—INSTRUCTIONS—NECESSITY OF REQUEST—APPEAL—ORAL ARGUMENT—POINTS NOT RAISED IN BRIEF—MISCONDUCT OF COURT—PREJUDICE.

1. Where, in a prosecution for robbery, the evidence established that the robbery was committed by force, and there was no testimony that prosecutor was compelled to part with his money through fear, it was not error to omit to charge with reference to robbery committed through fear, as defined by Pen. Code, § 211.

2. In a prosecution for robbery, it was not error, in the absence of a request, to omit to charge that defendant, under the information, might be convicted of petit larceny.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1996, 1997.]

3. On appeal in a criminal case, it is improper for defendant's counsel, in oral argument, to raise a point as to alleged misconduct of the trial court, not referred to in the briefs, and which counsel for the state has had no opportunity to consider and reply to.

4. In a criminal prosecution, alleged misconduct of the court in addressing defendant's counsel in an emphatic and abrupt manner, criticising him for alleged unnecessary repetition of questions propounded to the prosecuting witness, was not ground for reversal, where it did not appear that accused was prejudiced by such remarks.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3085, 3127.]

Department 2. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Albert Modina was convicted of robbery, and he appeals. Affirmed.

J. Marion Brooks and E. H. Bentley, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

LORIGAN, J. Defendant was convicted of robbery, and this appeal is from the judgment, and the order denying his motion for a new trial.

The information charged the crime of robbery by means of force and fear. As defined by the Penal Code (section 211), robbery is the "felonious taking of personal property in the possession of another, from his person or immediate presence and against his will, accomplished by means of force or fear." And section 212, following, specifies what may constitute fear, as an element in robbery. The court instructed the jury relative to what constitutes robbery by reading to them section 211. It is insisted by appellant that the court should have also read them section 212, defining fear, and the failure to do so is assigned as error. The court however, should only give such instructions as are applicable to the evidence in a case. The evidence in the case at bar shows that the robbery charged was committed by means of force. There was no evidence in any way tending to show that the prosecuting witness had been compelled to part with his money through fear. As no element of fear entered into the perpetration of the crime, there was no necessity or propriety in the court instructing the jury on that subject.

It is next insisted that the court should have instructed the jury that under the information the defendant might be convicted of petit larceny. It is too well settled, however, by the decisions of this court to be open to further discussion, that if a defendant wishes an instruction to be given to the jury of their right to find him guilty, if the evidence warrants, of any lesser crime included in the greater one with which he is charged, it is his duty to ask it. If he fails to do so, he cannot complain that it was not given. People v. Wilson, 135 Cal. 334, 67 Pac. 322; People v. Bailey, 142 Cal. 435, 76 Pac. 49; and a long line of decisions referred to in both those cases.

These points are the only ones made in the brief of counsel for the appellant. Upon the oral argument, however, it was claimed that a new trial should be awarded on account of misconduct upon the part of the court occurring during the trial. This alleged misconduct consisted of remarks of the court addressed to counsel for appellant during his cross-examination of the prosecuting witness, and it is claimed that these remarks created a prejudice with the jury against counsel, and therefore against the defendant, whom he represented. This point was not made in appellant's brief, and the practice of making points in criminal cases upon oral argument which were not made in the appellant's brief is not to be approved, especially when no reason appears or is given why they were not made there. Unless there is some reasonable excuse for it, it is unfair to counsel on the other side to permit them to be made or considered. Counsel appear in court prepared to argue such points as in the appellant's brief it is indicated he relies on, and, when new points are raised on oral argument, it usually necessitates the granting of leave to respondent to file a brief in reply, thus creating unnecessary delay in the final submission of a cause. In this case this neglect to make the point originally would be sufficient reason for our declining to now consider it, as it is also some indication that counsel did not think it of sufficient merit then to present it. Examining it, however, we do not think it discloses any ground for a reversal. The remarks of the court were addressed to counsel with reference to what the court deemed an unnecessary repetition by him of questions propounded to the prosecuting witness, and the asking of other questions which had no relevancy or bearing in the case, and which all served only to waste time. While counsel seems to have been perfectly courteous to the court, the record discloses that many unnecessary repetitions of questions and irrelevant inquiries were made, which warranted the court in warning counsel to cease making them. The language of the court was quite emphatic and abrupt, but it was addressed solely to that point. Attention might have been called to this impropriety of counsel in wasting the time of the court in a more urbane manner and in more courteous language. But the proper courtesy which shall be exercised between court and counsel must, of course, be left to the judge's own sense of propriety, and we are only concerned with its exercise, in any given case, to the extent of considering how far the want of it affected the jury, if at all, to the prejudice of the defendant; and, from a consideration of the entire case, we do not perceive that the cause of defendant was prejudiced by the remarks of the court.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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146 Cal. 134

BROOKS et al. v. UNION TRUST & REALTY CO. (L. A. 1,293.)

(Supreme Court of California, Jan. 31, 1905. On Rehearing, Feb. 28, 1905.)

RESULTING AND CONSTRUCTIVE TRUSTS—PAROL EVIDENCE—REHEARING—PETITION—SERVICE.

1. Though a consideration is recited in a conveyance, parol evidence is admissible to establish a resulting and constructive trust in favor of another than the grantor.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 129–133.]

2. Under Sup. Ct. Rule 30, authorized by Const. art. 6, § 4, as amended November 8, 1904, and providing that applications for rehearing must be filed and a copy served on the adverse party within a certain time, and the adverse party shall have a certain time to answer, and such times shall not be extended, a petition for rehearing, not served on the adverse party, must be disregarded.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Francis Brooks (formerly Burkhart) and another against the Union Trust & Realty Company. From an order denying plaintiffs' motion for a new trial, they appeal. Reversed.

Dunnigan & Dunnigan, for appellants. Walter Bordwell, for respondent.

SMITH, C. This is a suit to enforce an alleged trust (resulting and constructive) in land conveyed to defendant's grantors by plaintiffs' alleged trustee. The findings and judgment were for the defendant, and the plaintiffs appeal from an order denying their motion for a new trial. Both parties—with an exception that will be noted—rely on the same deraignment of title, which is as follows: (1) Judgment in favor of plaintiff Burkhart against Teresa Luhring, of date September 19, 1891, for the sum of $85.85, afterwards assigned to plaintiff Brooks, who was then the wife of Burkhart, but afterwards divorced. (2) Sheriff's sale under execution on the judgment for the sum of $135.75, and certificate of sale to plaintiff Brooks, of date July, 1895; at which time, it is alleged in the complaint, and not denied, she was still the wife of Burkhart. On this point there seems to be some confusion. The finding of the court is to the contrary of the allegation, and in the respondent's brief it is said that the parties had been divorced nearly two years prior to the sale. But we are cited to no evidence in support of this assertion, and have not been able to find any. The point is material only to the matter of evidence. (3) Assignment of certificate of sale for recited consideration of $135.75, and subsequent sheriff's deed, January 22, 1896, to Daniel Burkhart and Leonard Brooks; sons, the former of plaintiff Burkhart, the latter of plaintiff Brooks. (4) Conveyance by Leonard Brooks to Daniel Burkhart, and allotment of the land in question to the latter by judgment in a partition suit in the year 1899. (5) Deed of Daniel Burkhart, during his last illness, to Sexton & Grider, of date January 8, 1901. (6) Deed from Sexton & Grider to defendant, of date January 9, 1901. In addition to the above, it is alleged in the second count of the complaint that during the last illness of Daniel Burkhart, and before his deed to Sexton & Grider, a deed in execution of the trust was made and delivered by him to his father and brother John Burkhart. But there will be no occasion to consider this aspect of the case.

It is alleged by the plaintiff, in effect, that the plaintiff Mrs. Brooks, under agreement to that effect, took the certificate of purchase at the sheriff's sale for the joint use and benefit of herself and husband, in certain definite proportions; that the certificate was assigned by her, and, by the direction of plaintiffs, the sheriff's deed made, to Leonard Brooks and Daniel Burkhart, without consideration, and upon a parol agreement and understanding that they should hold the land in trust for plaintiffs; that the deed of the former to the latter was made by direction of plaintiff Burkhart upon the same trust and confidence; that the trust was repeatedly admitted by Leonard and Daniel; and, finally, that the deeds from Daniel to Sexton & Grider, and from the latter to the defendant, were taken by the grantees, respectively, with full knowledge of the trust. It is further alleged, in effect, that the deed to Sexton & Grider was procured by the fraud and undue influence of the grantees, acting in conspiracy with one Bigelow and others; and that the defendant took the deed with knowledge of the trust relations between Daniel and the plaintiffs and of the fraud and conspiracy of its grantors and Bigelow. These allegations occur in the second count of the complaint, wherein all the facts set out in the first count are also alleged. On all of the issues thus raised the findings were adverse to the plaintiffs.

The points urged by the appellants are that the material findings are not supported by the evidence, that a new trial should have been granted on the affidavits of newly discovered evidence, and that the court erred in sustaining the objections of the defendant to questions put to the plaintiff Brooks and her son Leonard as to the agreement or understanding under which they took their respective titles. The last point, if sustained, or held to be untenable, will dispose of the appeal, and, as we are of the opinion that it is well taken, it will be sufficient to say of the others that evidence was introduced by the plaintiffs tending to prove their material allegations—some of it of a very cogent nature—and that it is claimed by the appellant, not without some plausibility, that, "had the court not been in error upon the law of this matter, it would doubtless have granted a new trial on the affidavits." Our attention will therefore be confined to the point raised by the exclusion of the testimony of Mrs. Brooks and her son Leonard. As to the former, it is urged by the respondent that the evidence offered was inadmissible, because it appeared that Mrs. Brooks was "the owner of the judgment which was the consideration of the sale." But—leaving out of view that it appears that advances for sheriff's costs were made by Burkhart, which would constitute part of the consideration—her testimony as to her part interest with her husband in the property purchased (the fruit of the judgment) would have been cogent to prove that she was similarly interested in the judgment itself; and the justice of this inference is confirmed by her own express testimony to that effect. Nor, were it otherwise, are we to be understood as holding that the point would be tenable. But the principal point urged relates to the testimony of Leonard, and is that, a money consideration being recited in the assignment of the certificate and in the sheriff's deed to him, parol evidence was inadmissible to establish the alleged trust; in support of which contention Russ v. Mebius, 16 Cal. 350, and other cases, are cited. But these were cases where the trusts sought to be established were in favor of the grantor; and if it be assumed, for the purposes of the decision, that such trusts continue to exist, as resulting trusts, under the Codes (Feeney v. Howard, 79 Cal. 530, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162), yet the principle announced in Russ v. Mebius is peculiar to that class of cases, and has no application to the kind of resulting trusts referred to in section 853 of the Civil Code. In trusts of this kind the consideration is usually recited, yet parol testimony is always admissible. Hidden v. Jordan, 21 Cal. 93; Bayles v. Baxter, 22 Cal. 575; Millard v. Hathaway, 27 Cal. 119, 142; cases cited Pomeroy's Ed. Civ. Code, section cited. The evidence offered was, we think, clearly admissible, and its exclusion material error.

We advise that the order appealed from be reversed, and the cause remanded for a new trial.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the order appealed from is reversed and the cause remanded for a new trial: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

In bank. On petition for rehearing.

PER CURIAM. The respondent has filed with the clerk a petition for rehearing without serving a copy thereof on the adverse party. Section 4 of article 6 of the Constitution, as amended November 8, 1904, contains the following provision: "The Supreme Court shall make and adopt rules not inconsistent with law for the government of the Supreme Court and of the district courts of appeal and of the officers thereof, and for regulating the practice in said courts." In pursuance of this authority and command the Supreme Court has adopted rules of practice which are now in force. Rule 30 provides as follows: "(1) Applications for a rehearing of a cause by the court rendering judgment therein must be filed, and a copy served on the adverse party, within twenty days after the judgment is pronounced. The adverse party may file an answer thereto not less than two days before the expiration of the time within which the rehearing can be granted. * * * (4) The times herein prescribed shall not be extended, and the clerk must not file any such application or answer after the time therefor has expired." By virtue of the power conferred by the amendment, the Supreme Court now has authority to make rules of practice which have the force of positive law, so far as the rights of the parties are concerned, provided such rules do not conflict with any act of the Legislature. The provisions of rule 30, above quoted, are consistent with the law. They confer a positive right upon the prevailing party to have a copy of such application served upon him at least ten days before the expiration of the time within which the application can be considered by the court, and give him at least eight days thereafter within which to file an answer thereto. These are substantial advantages to adverse parties, and, if they are wisely used, the court will be materially aided in the disposition of the application. Where rules of court are of such a nature that important rights are given by them, a compliance therewith must be strictly enforced. In cases where it is shown that by unavoidable accident or excusable mistake parties have been prevented from observing such rules, and it appears that substantial injury will be inflicted by their enforcement, the court may, on proper terms, allow a departure therefrom. Such cases, however, must be extremely rare, and the circumstances extraordinary, and the court will be reluctant to vary in the least from the exact practice prescribed. Under the circumstances here shown the petition should not have been filed without the service upon the adverse party, and it must be disregarded.

146 Cal. 145

PEOPLE v. HILL. (Cr. 1,174.)

(Supreme Court of California. Jan. 31, 1905.)

CRIMINAL LAW—ACQUITTAL—APPEAL BY STATE.

Where accused was tried in a court of competent jurisdiction on a valid information for attempting to bribe a witness, and was acquitted by a verdict, jeopardy attached, and, as she could not again be tried, the case will not be reviewed on appeal by the state.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 345-361; vol. 15, Cent. Dig. Criminal Law, §§ 2604, 2605.]

Department 2. Appeal from Superior Court, Los Angeles County; B. N. Spencer, Judge.

Laura Hill was indicted for attempting to bribe a witness, and from a verdict of not guilty the state appeals. Affirmed.

U. S. Webb, Atty. Gen., J. D. Fredericks, Dist. Atty., and C. C. McComas, Dep. Dist. Atty., for the State. Emmet H. Wilson and Yoakum Spencer, for respondent.

McFARLAND, J. Defendant was charged in the information with a felony, to wit, an attempt to bribe a witness, contrary to the provisions of section 137 of the Penal Code. The defendant pleaded not guilty. A trial was had on the issue. Evidence was introduced by both parties, and after it was all in, and the parties had rested, the court advised and directed the jury to find for defendant upon the ground that the evidence was not sufficient to warrant a conviction. Thereupon the jury rendered a verdict of not guilty. The people appeal from the order advising and directing the jury to acquit.

The respondent was tried on a valid information, in a court of competent jurisdiction, and was acquitted by the verdict of the jury. "Jeopardy" therefore attached, and respondent cannot again be tried for the said alleged crime. Under these circumstances, and as held in prior decisions of this court, it would be a vain thing to consider the general questions discussed by appellant. People v. Horn, 70 Cal. 17, 11 Pac. 470; People v. Roberts, 114 Cal. 67, 45 Pac. 1016; People v. Terrill, 132 Cal. 497, 64 Pac. 894. In the cases just cited the orders appealed from were affirmed, and we will follow that course here.

The order appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

146 Cal. 119

PEOPLE v. KELLY. (Cr. 1,186.)

(Supreme Court of California. Jan. 30, 1905.)

CRIMINAL LAW—ROBBERY—EVIDENCE—PRESUMPTIONS—INSTRUCTIONS—HARMLESS ERROR.

1. Where, on appeal in a criminal case, a point is argued at length in the opening brief, but is abandoned in the reply brief, it will not be considered.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3012.]

2. Where, in a prosecution for robbery, the person robbed testified explicitly to all the circumstances of the crime, and clearly identified defendant as one of its perpetrators, the evidence was sufficient to justify a conviction.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, § 34.]

3. Where evidence, though immaterial, could not have injured accused, the court's refusal to strike it out was not reversible error.

4. Code Civ. Proc. § 1832, defines "indirect evidence" as that which tends to establish the fact in dispute by proving another which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence; and section 1963 (subdivision 20), with reference to presumptions, declares that it is presumed that the ordinary course of business has been followed (subdivision 28), that things have happened according to the ordinary course of nature and the ordinary habits of life, and (subdivision 32) that a thing once proved to exist continues as long as is usual with things of that nature. *Held*, that where in a prosecution for robbery a witness had testified that he was city electrician, and that he knew of the electric lights at the intersection of certain streets in the city, and that no report came in from there on January 14, 1902, he was entitled to testify that reports were not made unless a light went out, to show the ordinary course of business of the city with regard to its lights and their general or usual condition.

5. In a prosecution for robbery, testimony of a witness that he made a visit to the place of the crime with a detective, who "located the place where he understood the hold-up occurred," followed by testimony as to the condition of the electric light at that point, was inadmissible, in the absence of evidence that the place referred to was the true place of the crime.

6. Such evidence was harmless, however, in view of evidence that the place shown the witness was midway between two lights, prosecutor having testified that the place where the hold-up occurred was an open space in the middle of a block between certain trees, since, if the place was elsewhere than at the middle of the block, the light would have been stronger.

7. Where, in a prosecution for robbery, prosecutor testified that he pointed out to N., in company with others, the place where the crime was committed, evidence of N. that he, in company with such others, went to the place of the crime and made certain measurements from the point so shown by prosecutor, was admissible.

8. Code Civ. Proc. § 2051, provides that it may be shown by the examination of a witness or the record of the judgment that he has been convicted of a felony, and section 17 provides that words used in the singular number include the plural. *Held*, that where, after an information for robbery had been dismissed as against M. on his pleading guilty to robbery in another case, he appeared as a witness for defendant, he was properly interrogated as to five different felonies of which he had been convicted prior to the robbery as to which he pleaded guilty.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1127.]

9. Where, in a prosecution for robbery, two ex-convicts testified as witnesses for defendant, it was not error for the district attorney to emphasize such convictions in his argument to the jury.

10. Where, in a prosecution for robbery, a witness answered in the negative a question as to whether he had not stated that K., defendant, and himself came to L. together, defendant was not prejudiced thereby.

11. In a prosecution for robbery, evidence that defendant was booked at the police station by an assumed name was inadmissible.

12. Where M., C., and K. were charged with robbery, evidence of the keeper of a boarding house, at which they stopped prior to the commission of the offense, that C. and K. registered under assumed names, was admissible.

13. In a prosecution for robbery, evidence of a conversation had between witness and defendant, in which the latter stated that on the night of the offense he slept in a box car down by the bridge, was not a confession of guilt, and therefore did not require proof that it was voluntary, in order to justify its admission.

14. An instruction that, if the jury is convinced that a witness has willfully stated what is untrue with intent to deceive, the jury must treat all his testimony with distrust and suspicion, and reject it unless they are convinced that, notwithstanding his base character, he had in other respects sworn to the truth, was not objectionable as withdrawing the credibility of the witness from the jury.

15. Where, in a prosecution for robbery, the prosecutor's ownership of the property taken was not controverted, an instruction requiring a verdict of guilty if the jury believed from the evidence facts hypothetically stated, which included all the facts constituting the offense except that the property taken from prosecutor was his property, was not error.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

William Kelly was convicted of robbery, and he appeals. Affirmed.

C. L. Shinn and F. H. Thompson, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

SMITH, C. The defendant was convicted in the lower court of the crime of robbery, committed by him and two others on one Powers in the city of Los Angeles, the precise place of the crime being on the west side of Olive street between Ninth and Tenth streets. He appeals from the judgment and from an order denying his motion for a new trial. Numerous points are urged by his counsel as grounds for reversal, and these will be considered in the order in which they occur in the brief. It will be understood that the several rulings complained of were made over the objections and exceptions of the defendant.

1. The point is made and argued at length in appellant's opening brief that the court

erred in refusing to set aside the information, but in the reply brief this point is abandoned.

2. It is claimed that the evidence was insufficient to justify the verdict. But Powers, the man who was robbed, testifies explicitly to all the circumstances of the crime, and clearly identifies the defendant as one of its perpetrators. The argument of the counsel goes only to the credibility of his testimony, which was a matter for the jury to consider.

3. It is objected that the court erred in refusing to strike out the testimony of the witness Smith as to the whereabouts of one Ah Hing. Doubtless this testimony was immaterial, but it could not have injured the defendant in any way.

4. The witness Manihon had testified, without objection, that he was the city electrician, and that he knew of the electric lights at the intersection of Ninth and Tenth streets and Olive, and that no report came in from there on the 14th of January, 1902. He then testified that reports were not made unless a light went out. But it was competent, we think, for the prosecution to show the ordinary course of business of the city with regard to its lights and their general or usual condition. Code Civ. Proc. § 1832 and section 1963, subds. 20, 28, 32. As to the effect of the evidence, that was for the jury to determine. The same witness testified that he had made a visit to the place of the crime the night before with Detective Steele who "located the place where he understood the hold-up occurred"; and he then testified as to the condition of the light at that point. We have been unable to find in the record any evidence tending to show that the place referred to was the true place of the crime, and, in the absence of such evidence, we think the testimony was improperly admitted. But it appears from the testimony of the witness that the place showed him by Steele was about midway between the two lights, from which it may be inferred that it was the darkest point between them (except under the trees), and consequently, for the defendant, the spot most favorable for observation. For it appears from the testimony of Powers that the place of the crime was in the open space towards the middle of the block between the trees to the north and to the south, and, if the place of the crime was elsewhere than at the middle of the block, the light would have been better. Under these circumstances the evidence could not have injured the defendant.

5. The same objection was made to the testimony of the witness Noble, who, in company with Steele, Powers, and others, went to the place of the crime and made certain measurements from the point shown by Powers as the place of the crime. But here Powers himself had testified that he had pointed out to Noble, in company with other persons named, the place of the crime, and the evidence was therefore unobjectionable.

6. The witness Myrtle, with defendant and Case, were originally parties to the information in this case, but as to Myrtle and Case, upon their pleading guilty to a charge of robbery in the case referred to as the "Klokke Case," the information was dismissed. Both were called as witnesses for the defendant, and Myrtle was asked as to five different felonies prior to the Klokke Case of which he has been convicted, and which he admitted. This testimony, we think, was admissible. By section 2051, Code Civ. Proc., it is expressly provided that "it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a felony"—which means that as many felonies as he has been convicted of may be thus shown. Code Civ. Proc. § 17.

7. Similar questions were asked of the defendant Kelly, and the same observations will apply as to the case of Myrtle.

8. Another objection urged is that the district attorney in his argument to the jury dwelt with much emphasis upon previous convictions of the witnesses Myrtle and Case and of the defendant. This was objected to by defendant's counsel, but we see nothing reprehensible in what was said. Nor, indeed, do we find any ruling by the court except in the observation that the former convictions were admissible only in attacking the credibility of the witness, which seems to have been all that the defendant could reasonably have asked for, and to which, at least, he took no exception.

9. The witness Case was asked whether he did not tell Officer Kelly or some one in his presence that he and Kelly, the defendant, came down to Los Angeles together from Alameda county, and it is claimed that the question should not have been allowed. But as the question was answered in the negative, the defendant was in no way prejudiced.

10. Defendant also claims that the court erred in refusing to permit him to prove that he, the defendant, was booked at the police station by the name of Badger, but this evidence was clearly inadmissible.

11. Another objection is to the testimony of Mrs. Lightfoot, keeper of the boarding house at which Myrtle, Case, and Kelly put up prior to the commission of the crime, who testified that Case and the defendant registered under the names of Russel and Truan. This evidence, we think, was clearly admissible.

12. The witness Steele testified to a conversation with the defendant, in which, among other things, the latter said that on the night of the 14th he slept in a box car down by the bridge; and it is objected that the evidence should not have been admitted, both because it was immaterial, and because it was not shown to have been made without inducement of hope or fear from the witness.

But the evidence, we think, was material, and the statement of the defendant was not a confession of guilt, and therefore did not require proof that it was voluntary. People v. Hickman, 113 Cal. 86, 45 Pac. 175.

13. One of the instructions of the court objected to is the following: "The jury being convinced that the witness has stated what is untrue, not as the result of a mistake or inadvertence, but willfully and with the design to deceive, must treat all of his testimony with distrust and suspicion, and reject all unless they shall be convinced, notwithstanding the base character of the witness that he had in other particulars sworn to the truth." But the effect of this instruction is simply that the jury must reject the testimony of the witness referred to unless they shall be convinced of its truth, which is to leave the credibility of the witness to the jury.

14. Other instructions are objected to as "giving undue prominence by repetition to the impeaching instructions" found in the record, but we think the instructions are unobjectionable in this or any other particular.

15. In another part of the charge the jury is instructed to find the defendant guilty if they should believe from the evidence certain facts hypothetically stated, which included all the facts constituting the crime of robbery, except that the property taken from the party robbed was his property. But there was no dispute as to the ownership of property, which was proved to be that of Powers, the party robbed, and hence the jury could not have been misled by the instructions.

We advise that the judgment and order appealed from be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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146 Cal. 114

PEOPLE v. WONG FOOK SAM. (Cr. 1,183.)

(Supreme Court of California. Jan. 30, 1905.)

CRIMINAL LAW—PERJURY—APPEAL FROM JUDGMENT—INSTRUCTIONS—REVIEW.

1. On an appeal in a criminal case on the judgment roll alone, the judgment will not be reversed for the giving of an instruction, unless such instruction would be erroneous in every conceivable state of the case.

2. Where an indictment for perjury charged, not only that the testimony given was false, but that it was willfully given with knowledge on defendant's part that it was false, as provided by Pen. Code, § 118, and the court charged in terms that all the allegations of the information except the falsity of the testimony were admitted, an instruction that if the jury believed beyond all reasonable doubt by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances, that the testimony in question was false, they should convict, did not constitute reversible error, on an appeal on the judgment roll alone.

3. The term "false," as used in Pen. Code, § 118, defining perjury, and providing that every person who, having taken an oath that he will testify truly, willfully and contrary to such oath states as true any material fact which he knows to be false, is guilty of perjury, means "false in fact," as distinguished from legal falsity.

Department 1. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Wong Fook Sam was convicted of perjury, and he appeals. Affirmed.

Henry C. Dibble & Dibble and Edgar D. Peixotto, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Dep. Atty. Gen. (George D. Collins, of counsel), for the People.

ANGELLOTTI, J. The defendant was convicted of perjury, and appeals from the judgment. There is no bill of exceptions, the appeal being on the judgment roll alone.

The only point made for reversal is that the court erred in instructing the jury as follows, viz.: "The only question for you to determine is, was it true or false? * * * If you are satisfied beyond all reasonable doubt by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances, that the testimony given in that trial was false, your verdict in that case would be, 'We, the jury, find the defendant guilty as charged in the information.'" The contention is that this instruction omits an essential element of the crime of perjury, viz.: that the testimony upon which the charge is based was not only false, but was willfully given, with the intent that it should be taken as true, and was given with the knowledge on the part of the witness that it was false. It is not disputed that this was an essential element. People v. Von Tiedeman, 120 Cal. 128, 52 Pac. 155, and cases there cited. The Code, in defining perjury, provides that "every person who, having taken an oath that he will testify * * * truly, * * * willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury." Pen. Code, § 118. The information against defendant was drawn in accordance with this well-settled principle, charging not only that the testimony was false, but that it was willfully given, with the knowledge on the part of the defendant that it was false and untrue.

It is, however, a well-established rule that, in the absence of the evidence, this court will not reverse a judgment for the giving of an instruction, unless such instruction would be erroneous in every conceivable state of the case. People v. Mendenhall, 135 Cal. 344, 347, 67 Pac. 325; People v. Strong, 46 Cal. 302; People v. Donahue, 45 Cal. 321; People v. Torres, 38 Cal. 141. In People v. Donahue, supra, this rule was applied in a capital case, and this court, in affirming the judgment, while admitting that the instruction may have been erroneous, said: "Still, if any state of facts might have been proved in view of which it would be proper, then we must suppose that that state of facts was proved, and that the defendant was not prejudiced. The rule is that judgments will be reversed for alleged errors in instructions only when, looking at the testimony, we can see that the jury may have been misled by them to the prejudice of the defendant, or when, in the absence of the testimony, it is apparent that the instruction would be improper under any possible condition of the evidence. * * * It would not be difficult to suppose a case that would justify the instruction, and under the rule announced we cannot reverse the judgment." We are of the opinion that this rule must be held applicable to this case. It is conceivable that all the elements essential to perjury, except the single one of the untruth or falsity of the testimony, were, on the trial and for all the purposes of the trial, effectually admitted to exist, and that the only real question left for determination by the jury was as to whether the alleged false testimony had been satisfactorily proved to be false by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances. If this was the state of the case, it cannot be held that the instruction was improper. It may seem unlikely that one on trial for perjury should, for the purposes of the trial, deny the allegation that the alleged false testimony was untrue, and at the same time admit the truth of the allegation to the effect that he willfully gave the testimony with the knowledge that it was untrue. Yet such a condition of affairs is conceivable, and that is all that is necessary to preclude us, in the absence of a bill of exceptions showing the proceedings, from holding that the instruction was erroneous. The essential as to knowledge of falsity pertains to the condition of mind of the witness at the time he gives the alleged false statement. The question in that connection is, did he at the time know the statement to be false in fact? If the statement was in fact true, he could not, of course, have known it to be false; but the subject-matter of the statement may be such that the defendant well knows that if such falsity can be shown by the testimony of two witnesses, or one witness and corroborating circumstances (as is required by section 1968, Code Civ. Proc.), it would be useless for him to deny that he knew it to be false. He might, therefore, choose to put the prosecution upon proof only as to the question as to whether the alleged false testimony was in fact true or false, and for all the purposes of the trial effectually admit all the other allegations of the information, including the one as to his knowledge. Such a state of the case is clearly conceivable, and, if it existed, the instruction was not erroneous.

The instruction in question was part of a general instruction upon the evidence essential to show perjury. The court had already defined perjury in the language of section 118, Penal Code, and then informed the jury that under the Code of Civil Procedure the statement alleged to have been testified to falsely must be proved to be false, either by the testimony of two witnesses or one witness and corroborating circumstances. In this connection the court said: "In this case all of the allegations of the information, except the question as to whether the testimony given was true or false, are admitted. All the allegations of the information, with the exception of that stated, are admitted, and the court instructs you that on those facts, of course, there is no question—that the trial was had as charged in the information, and the oath administered as charged in the information, the oath taken as charged in the information, and the testimony so given as charged in the information, and that the testimony was material as charged in the information. The only question for you to determine is, was it true or false? You must determine that yourselves. It is a question of fact, resting solely with you, and you must find that it was false, either from the testimony of two witnesses, or from the testimony of one witness with corroborating circumstances; and if such testimony is not before you, of course, you cannot convict, or if you have a reasonable doubt, from all the testimony in the case, as to whether it was true or false—whether the testimony given on the trial mentioned in the information was true or false—he is entitled to an acquittal at your hands." Then followed the concluding paragraph of the portion hereinbefore quoted. It thus appears that the court told the jury in terms, that all of the allegations of the information, except the single one as to the falsity of the testimony, were in fact admitted. This absolute statement is not qualified or limited by the subsequent paragraph, in which the court further stated several particulars wherein the allegations of the information were admitted. Such statement in no way purports to be a limitation on the preceding statement, and is not at all inconsistent therewith. With the question as to whether the fact was in accord with the statement of the court that all of the allegations were admitted, except the single one as to the falsity of the testimony, we are not here concerned. That question could arise only on a bill of exceptions, showing the proceedings.

It is suggested that the issue really left for the consideration of the jury, after the admissions made on the trial, was as to the "legal truth or falsity" of the testimony, as distinguished from its truth or falsity in point of fact, and that this is shown by the instructions of the court. The word "false," in the statute defining perjury, means false in point of fact. As used in the instruction, it undoubtedly means the same thing. If the instruction could be construed as meaning what is called by appellant "legal falsity," it would not be open to the criticism made by him; for it would have required the jury to find the existence of all the elements essential to such "legal falsity" before they could convict. But the term "legal falsity" is meaningless in this connection. To constitute perjury, the testimony given must be false in point of fact, and must have been given with knowledge that it was so false in point of fact. These are separate and distinct elements, and each must be alleged in the information. "To say that a witness testified falsely does not necessarily imply that he did it willfully or knowingly; and saying that he so testified contrary to his oath is merely to say in another form that he testified falsely. The language of the statute is 'willfully, and contrary to such oath, states as true any material matters which he knows to be false.' Pen. Code, § 118. This, or language of like import, must be employed to satisfy the statute." People v. Ross, 103 Cal. 425, 37 Pac. 379. According to the statement of the court, as shown by its instructions, the only allegation of the information that had not been admitted was the allegation to the effect that the testimony was false in point of fact.

The judgment is affirmed.

We concur: VAN DYKE, J.; SHAW, J.

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146 Cal. 91

WILLEY et al. v. CLEMENTS. (L. A. 1,607.)*

(Supreme Court of California. Jan. 28, 1905.)

EXCHANGE OF PROPERTY—FRAUD—RATIFICATION—RESCISSION—RETURN OF CONSIDERATION—FINDINGS—CONFLICTING EVIDENCE—APPEAL—CONCLUSIVENESS.

1. Where, in a suit to set aside a conveyance for fraud, the evidence was contradictory, findings of the court that the representations were made to induce plaintiff to make the trade, in accordance with plaintiff's testimony, and that they were false and known to be false by defendant, will be accepted as conclusive on appeal.

2. In a suit to set aside an exchange of property for fraud, evidence *held* to justify a finding that K., who was active in furthering the exchange, and who deceived plaintiff with reference thereto, represented defendant, and was not plaintiff's agent.

3. In a suit to set aside an exchange of property for fraud, oral misrepresentations made to induce plaintiff to enter into the contract were not inadmissible under Civ. Code, § 1625, providing that a written contract supersedes previous verbal negotiations, such section being inapplicable until after the contract in writing has been executed.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2013.]

4. Where plaintiff, after making an exchange of properties, signed an instrument expressing her satisfaction with the exchange, knowing of defendant's fraudulent representations concerning a deficiency in the quantity of the land conveyed to her and concerning an incumbrance thereon, but without notice of the falsity of other representations concerning the quality of the land, its productiveness, and water rights appurtenant thereto, which would not be disclosed by a mere examination of the property, she was not estopped by her ratification from subsequently rescinding the exchange therefor.

5. Plaintiff, on discovering such further fraudulent representations, was entitled to rescind the ratification as well as the original transaction, under Civ. Code, § 2314, providing that a ratification may be rescinded when made with an imperfect knowledge of the material facts of the transaction ratified.

6. Where, in a suit to set aside an exchange of real estate for fraud, the court found that K. acted in the transaction as defendant's agent, though he represented to plaintiff that he was acting in her behalf, plaintiff was not required to return a sum paid K. by defendant, as a condition to her right to rescind the exchange.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Warner E. Willey and another against James I. Clements. From a decree in favor of plaintiffs, defendant appeals. Affirmed.

John W. Kemp and Byron L. Oliver, for appellant. J. Wiseman MacDonald and Clarence A. Miller, for respondents.

HARRISON, C. Action for rescission and to set aside certain instruments of transfer executed between the plaintiffs and the defendant.

In January, 1902, the plaintiff Lulu K. Willey was the owner of certain real estate in Los Angeles, which she subsequently conveyed to the defendant in exchange for a tract of land in Tulare county conveyed to her by him. She seeks by this action to rescind the transaction upon the ground that she was induced to make the exchange by reason of certain false and fraudulent representations made to her by and on behalf of the defendant. The plaintiff Warner E. Willey is the husband of Lulu, and for that reason is joined with her as a party plaintiff.

At the trial of the cause the court found that, among the inducements to make the exchange the defendant represented to Mrs. Willey that his tract of land in Tulare county consisted of 380 acres, of which 100 acres had been planted to alfalfa, and had produced crops of alfalfa each year; that there were 25 tons of alfalfa stacked on the place, and in the barn, which had been produced on the ranch; that the ranch had produced in the preceding year 5,400 sacks of grain; that the profits of the ranch for that year amounted to $6,000; that there was a water ditch running across the place, which furnished all the water necessary for the crops upon the land, at a cost of 50 cents per acre; that there was appurtenant to the land 500 shares of water stock, which he held, and which entitled the ranch to an abundant supply of water free of charge; that the property was incumbered by a mortgage of $2,000, bearing interest at 6 per cent.; that all the personal property on the place went with it; that with said personal property there was a valuable gang plow. The court found that the ranch consisted of only 320 acres; that there was an incumbrance of $6,000 upon it, which also covered certain other property; that, with the exception of about 20 acres, no part of the ranch had ever been planted to alfalfa or produced any alfalfa, and that this 20 acres had never yielded a crop of alfalfa; that no part of the 25 tons of alfalfa then stacked there had been produced upon the place, but that all of it had been cut from an adjoining ranch; that the ranch did not produce 5,400 sacks of grain in the year 1901, but produced only 1,100 sacks in that year, and that that was the largest crop that had ever been produced in one year on the ranch; that the profits of the ranch for the year 1901 did not amount to $6,000, or to any sum of money whatever; that there was no water stock appurtenant to said ranch, or entitling the ranch to any supply of water whatever, free of charge, or at all; that no water could be obtained for the ranch except at the cost of $1.50 per acre; that there was no gang plow on the ranch belonging to the defendant. The superior court thereupon rendered judgment in favor of the plaintiffs, from which, and from an order denying a new trial, the defendant has appealed.

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*Rehearing denied February 27, 1905.

In support of the appeal, the appellant urges that the evidence before the court was insufficient to justify its decision in favor of the plaintiff; that before the deeds of exchange were executed Mrs. Willey had caused an examination of the Tulare property to be made, and relied upon such examination and her judgment thereon, instead of the representations made to her by the defendant; that after the deeds of exchange had been executed and recorded she ratified the transaction by a subsequent instrument in writing.

Upon the issue whether the above representations were made to the plaintiff, as well as upon many other issues in the case, the testimony on behalf of the respective parties was directly contradictory, and the above findings of the court that the representations were made in accordance with the testimony given on behalf of the plaintiff, rather than in accordance with the testimony on behalf of the defendant, must be accepted as correct. That the representations were false, and were known to the defendant to be false when they were made, is not controverted by him. That they were made in reference to facts which were material to the transaction is evident from their nature.

Some of the above representations to the plaintiff were made by one MacKnight, who acted quite prominently in the transaction, and the finding of the court that he was the agent of the defendant for the purpose of effecting the exchange, and that therefore his representations to Mrs. Willey as to the character of the Tulare property are to have the same effect as if made by the defendant himself, is challenged by the appellant as not sustained by the evidence. Whether he was such agent was an issue sharply contested at the trial, and was to be determined by the court upon a consideration of the entire evidence respecting the course pursued by him during the negotiations, rather than upon any specific testimony by him or by the defendant as to the fact; and the inference which the trial court might reasonably make from such evidence is entitled to the same consideration as its finding of a fact upon contradictory evidence. The evidence before the court, however, fully justified it in finding, not only that MacKnight was the agent of the defendant for the purpose of effecting the exchange, but that during all the negotiations in reference thereto he falsely pretended to Mrs. Willey that he was acting in her interest, while he was in fact acting in the interest of the defendant and against her interest. Although he had for some years prior thereto been her agent in collecting rents, and had aided her in other business transactions to the extent that she reposed trust and confidence in him, she did not employ him for this transaction, but received the proposition for the exchange from him. This proposition was made, in the first instance, by the defendant to MacKnight, and was typewritten and signed by the defendant in the office of MacKnight. MacKnight thereupon requested Mrs. Willey to come to his office, and there she first met the defendant, and in his presence MacKnight then read the proposition to her. During this interview oral representations as to the character of the Tulare property were made by both the defendant and MacKnight, and MacKnight strongly urged her to accept the proposition. The contention of the appellant that these oral representations cannot be considered, for the reason that they were superseded by the written proposition, is without merit. The representations, whether oral or written, were made as inducements for entering into the contract, and the provision of section 1625, Civ. Code, cited by the appellant, that the writing supersedes the previous verbal negotiations, has no application until after the contract in writing has been executed. The subsequent conduct of MacKnight during the course of the transaction fully supports the conclusion of the court that he was at all times acting as the agent for the defendant and in his behalf, and consequently that the defendant is accountable for his representations made in his absence, as well as for those made in his presence.

The facts relied upon as a ratification are as follows: At the time the appellant's proposition to exchange the properties was submitted to Mrs. Willey (January 10th), she wrote at the bottom thereof, "If the property is satisfactory upon investigation I will trade," and signed her name thereto. On

January 16th she was taken seriously ill, and for several weeks thereafter was confined to her bed, and by reason of her illness was unfitted during that time to do business. While she was in this condition, MacKnight, on January 17th, falsely stated to her that the defendant had received an offer of $5,000 more for his Tulare property, and that he was likely to accept the same, and presented her a document, the nature of which he concealed from her, but which he represented to her to be an instrument which would have the effect of holding the defendant to his bargain, and urged her to sign it, stating to her that the document was to be held by him in escrow. Upon these representations she signed the document without reading it, or having it read to her, and MacKnight took it away with him. The instrument was in fact a conveyance of her Los Angeles property to the defendant, and although she was ignorant of this fact, and did not in fact acknowledge her execution of it, MacKnight on the same date, after leaving her, affixed to it his certificate, as a notary public, that she had acknowledged its execution to him, and, instead of keeping it as he had promised, he delivered it to the defendant, at whose request it was recorded in the office of the county recorder of Tulare county on January 24th. On January 27th she learned that the instrument was a conveyance of her Los Angeles property, and that the Tulare property consisted of only 320 acres, and upon calling the attention of MacKnight to this fact he said to her that he had got the paper and finished the thing up through his zeal for her welfare, but that if she did not want the ranch he could fix it; that, if she would indorse her acceptance upon the defendant's original proposition, that would make it a contract, and the defendant could be made to pay her the full value of the 60 acres shortage, or she could knock the trade over if she wished. Thereupon she wrote upon the document of January 10th, "Above proposition accepted," and signed her name thereto, and MacKnight took the paper away. This indorsement was written by her on January 27th, but MacKnight caused it to be dated January 16th, thus making it appear that she had accepted the proposition prior to the execution of her deed. A day or two later she consulted an attorney in reference to the transaction, and on January 30th he wrote to the defendant, calling his attention to the discrepancy in acreage of the Tulare tract. On the next day the defendant, instead of responding to the letter of the attorney, sent to Mrs. Willey through the post office a registered letter, in which he stated to her that he knew no reason why she should be dissatisfied with the deal, but that he was perfectly willing to trade back, and offered to do so, stating also that his offer would remain open for 10 days. At the time he sent this letter he knew that Mrs. Willey was ill, and would not for that reason be able to act upon it during the 10 days therein named, and that she had not ascertained, and could not during that time ascertain, the truth as to the aforesaid representations made by him. MacKnight also advised her, upon her receipt of the letter, to disregard it, saying to her: "Do not pay any attention to that offer of Clements to rescind. I will fix matters up." A few days after this MacKnight again visited the plaintiff, and falsely represented to her that she was indebted to him in the sum of $925 as a commission for his services in the transaction, and stated to her that the defendant would pay him this commission, and would allow her certain other money connected with the transaction, and would extinguish the incumbrance on the Tulare property in excess of $2,000 if she would ratify the transaction of exchange and waive any claim on account of the 60 acres shortage; and on February 14th presented to her an instrument purporting to express her satisfaction with the exchange, which, at his request, she thereupon signed.

At the time she signed this document she knew that the Tulare property was 60 acres less in extent than defendant had represented it to be, and she accepted the plaintiff's agreement to reduce the incumbrance thereon to $2,000. If these had been the only items of misrepresentation, her execution of the instrument would have rightly estopped her from claiming any rescission. The defendant had, however, made the other representations above mentioned of the character and condition of his property, whose falsity she did not ascertain until after she went to the property in April. These were statements of facts which were peculiarly within his knowledge, and which would not be disclosed by a mere examination of the property, and upon which she had the right to rely without any investigation for the purpose of ascertaining their truth. Bank of Woodland v. Hyatt, 58 Cal. 234; Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486. Her subsequent ascertainment of their falsity gave her the right, under section 2314, Civ. Code, to rescind the ratification as well as the original transaction.

The court rightly held that defendant was not entitled to be reimbursed for the $925 paid to MacKnight. The plaintiff was only required to restore what she had received from the defendant. As she was under no obligation to MacKnight, the payment to him by the defendant was not for her benefit, and she was not required to refund it to him.

We advise that the judgment and order appealed from be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons stated in the foregoing opinion, the judgment and order appealed from are affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

(146 Cal. 132)

Ex parte HOAR. (Cr. 1,232.)

(Supreme Court of California. Jan. 31, 1905.)

CONTEMPT—JURISDICTION—RECORD—REPORTER'S NOTES.

1. Code Civ. Proc. § 1211, provides that, when a contempt is committed in the immediate view or presence of the court or judge in chambers, it may be punished summarily, and that an order must be made reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed. *Held*, that under such section the jurisdiction of every court to punish for contempt is special and limited, and its authority to render judgment must be shown by the record of conviction.

2. A certified copy of the minutes of a superior court, reciting that in a certain case petitioner, the district attorney, was sworn and examined as a witness for the defense, and on refusing to answer, after being ordered to do so by the court, was adjudged in contempt and ordered committed to jail until he should answer the interrogatories, was insufficient to show jurisdiction of the court to punish petitioner for contempt or to sustain his incarceration.

3. Where a district attorney, on being sworn as a witness in a criminal case, refused to testify, after being ordered to do so by the court, and was thereupon committed for contempt, the reporter's notes of the proceedings leading up to the order of contempt was no part of the record of such contempt proceedings.

Application for writ of habeas corpus to obtain a release of E. H. Hoar, incarcerated for contempt. Petitioner discharged.

J. K. Law and F. W. Henderson, for petitioner. Frank H. Farrar and F. G. Ostrander, for respondent.

BEATTY, C. J. On petition of E. H. Hoar, alleging that he was unlawfully imprisoned by the sheriff of Merced county, a writ of habeas corpus was issued, and has been duly served and returned. Both by the petition and the return an attempt has been made to raise questions of some importance relating to the procedure in criminal cases, and to those questions the argument of counsel has been mainly directed. The case, however, does not call for a decision or any discussion of those questions, for it is clear upon the face of the sheriff's return that, whichever contention might be sustained, it would equally follow that the prisoner must be discharged.

The only authority for his detention is a certified copy of the following order:

"Minutes of the Superior Court. Merced County. Tuesday, Jan. 24th, 1905. Present: Hon. E. N. Rector, Judge. The People of the State of California v. F. A. Robinson. The defendant and respective counsel return into court. E. H. Hoar, district attorney, is sworn and examined as a witness for the defense, but refuses to answer certain interrogatories after being ordered to do so by the court, and he is again adjudged to be in contempt of court, and the court orders that he be committed to the county jail until he shall answer said interrogatories."

In cases of contempt every court exercises a special and limited jurisdiction, and its authority to impose a fine or term of imprisonment must be shown by the record of conviction. Code Civ. Proc. § 1211; **Overend v. Superior Court, 131 Cal. 284, 63 Pac. 372, and** cases cited. This order is wholly insufficient to show jurisdiction, and the official reporter's notes of the proceedings leading up to the order are no part of the record.

The petitioner is discharged.

(146 Cal. 110)

DE LUCCA v. PRICE, Justice of the Peace. (L. A. 1,470.)

(Supreme Court of California. Jan. 28, 1905.)

SUBMISSION OF CONTROVERSY—SEARCH WARRANT—JUSTICE OF THE PEACE—JURISDICTION—MATTER OF DIFFERENCE—CERTIORARI.

1. Code Civ. Proc. § 1138, declares that parties to a question in difference which might be the subject of a civil action may, without action, agree on a case containing the facts on which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. *Held*, that where a justice of the peace had issued a search warrant against L., which had been delivered to the sheriff, but the sheriff had taken no steps to serve it, no "question in difference" existed betwen the justice and L. which could be the subject of an action, so as to authorize a submission by them of the question whether the justice had jurisdiction to receive and file the affidavit for the warrant, and to issue the same.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Submission of Controversy, §§ 4, 5.]

2. It was immaterial, under such circumstances, that the action of the justice in issuing the warrant might be reviewed by certiorari.

In Bank. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Controversy without action, between F. A. De Lucca and William H. Price, justice of the peace. From a judgment in favor of the former, the latter appeals. Reversed.

Cassius Carter, Dist. Atty., and W. R. Andrews, Dep. Dist. Atty., for appellant. Hendrick & Wright, for respondent.

ANGELLOTTI, J. This is an attempt, without action and under the provisions of section 1138 et seq. of the Code of Civil Procedure, to obtain a decision as to whether a search warrant, requiring a search of the premises of respondent for certain property, and the taking of the same, if found, already issued by the appellant, as justice of the peace, and in the hands of the sheriff of San Diego county, who was about to execute the same, was issued without jurisdiction and authority of law. The agreed case was submitted to the superior court of San Diego county by respondent and appellant alone, the officer holding said warrant not being a party to the submission. The question to be decided, as stated in the submission, was "whether the said William H. Price, as he is justice of said Julian township, county of San Diego, state of California, have power, authority, and jurisdiction to entertain, receive, and file said affidavit for said search warrant, * * * and whether he have power, authority, or jurisdiction to issue said search warrant." The superior court ordered and adjudged that said justice had no such jurisdiction, and that the warrant was issued without authority of law. The justice of the peace appeals from such judgment.

We are clearly of the opinion that the superior court was without jurisdiction, upon the submission presented to it, to determine the question stated therein. The special jurisdiction conferred by section 1138, Code Civ. Proc., is limited, in terms, to the hearing and determination of such questions in difference as might at the time of the submission be the subject of a "civil action" between the parties making the submission, and it must appear in such a proceeding, by affidavit, that the controversy is real, and the proceedings in good faith, "to determine the rights of the parties." In other words, there must at the time of the submission be a real controversy between the parties thereto, which might then be settled in a civil action brought by one or more of such parties against the others. The language of the statute is, "Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction, if an action had been brought." Section 1138, Code Civ. Proc. As has been said by this court, "this provision has reference to interested parties, authorized and capable of litigating the question involved" (Bailey v. Johnson, 121 Cal. 562, 54 Pac. 80), and only such parties may, by their agreement, confer jurisdiction upon the court "to hear and determine the case, and render judgment thereon, as if an action were depending." The record shows no "question in difference" between De Lucca and the justice of the peace which could at the time of the submission have been the subject of a civil action between them. Even if it should be contended that for any damage caused De Lucca by the execution of a void search warrant the justice of the peace issuing the same would be in any degree liable to De Lucca, there certainly could be no liability on his part until the possession of De Lucca had been invaded. At the time of the institution of this proceeding the justice of the peace had issued the warrant, and it was in the hands of the sheriff, unexecuted. Whatever remedy De Lucca might then have had, in the way of civil action, against the sheriff who was threatening to execute the warrant, no possible claim which could then be the subject of a civil action was asserted by him against the justice. His only claim was that the justice of the peace had, in the exercise of the duties of his office, exceeded his jurisdiction in the issuance of the warrant, and that another officer, not a party to the proceeding, acting under the void warrant, was about to cause him damage. Manifestly, no civil action known to our law could at that time have been maintained by him against the justice. If any "question in difference" then existed, which might be the subject of a civil action, it was a question between himself and the officer who was proceeding to execute the warrant. It is doubtful, however, whether there was any such "question in difference," as is within the meaning of section 1138, Code Civ. Proc., between De Lucca and such sheriff. See, also, Bailey v. Johnson, supra.

It may be suggested that certiorari would lie, on the application of De Lucca, to review the action of the justice's court, and this may be true. See Quan Chick v. Coffey, 75 Cal. 371, 17 Pac. 427. But that fact does not show any such question in difference between De Lucca and the justice of the peace as is within the contemplation of section 1138, Code Civ. Proc. A tribunal, board, or officer exercising judicial functions is not authorized to litigate, as a party, the mere question as to whether it has, in the doing of an official act, exceeded its jurisdiction. The law has provided methods by which the party aggrieved may have such an act reviewed by a superior tribunal. Ordinarily this is accomplished by an appeal. Where there is no appeal, or any other plain, speedy, and adequate remedy, such act may be reviewed on certiorari. The proceeding in certiorari is simply an additional method of reviewing the action of an inferior tribunal exercising judicial functions, being similar in its nature to an appeal; and the tribunal whose act is assailed thereby has no interest in the matter, in which it has simply acted in a judicial capacity (I X L Lime Co. v. Superior Court, 143 Cal. 170, 174, 175, 76 Pac. 973), to any greater extent or in any different degree than such interest as it may have when an ordinary appeal is taken from its order or judgment. The proceeding is against the completed act alleged to have been in excess of jurisdiction, rather than against the inferior tribunal; and, while the writ runs to the tribunal whose action is sought to be reviewed, the real adverse party in interest is the one in whose favor the act complained of has been done. In this matter the real parties in interest upon the question of the validity of the search warrant were the people of the state of California, in their collective capacity, and De Lucca. The tribunal which, on the application of the people, in the exercise of its judicial functions, issued the search warrant, was not competent, under the law, to agree upon a case containing the facts upon which its jurisdiction depended, and was not authorized by any provision of statute to submit to a superior tribunal for review a transcript of its record and proceedings in the matter until it had been ordered to do so by a writ issued from such superior tribunal.

The superior court had no jurisdiction, in the proceeding before us, to affirm or annul the proceeding in the justice's court, and could not render any enforceable judgment in the matter.

We are satisfied that the judgment must be reversed, and the matter remanded, with directions to the superior court to dismiss the proceeding, and it is so ordered.

We concur: SHAW, J.; McFARLAND, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

146 Cal. 105

In re GEARY'S ESTATE. (L. A. 1,550.)

(Supreme Court of California. Jan. 28, 1905.)

HOMESTEAD—UNSURVEYED PUBLIC DOMAIN—DESCRIPTION — CONVEYANCE — FAILURE OF WIFE TO JOIN—ABANDONMENT—PROBATE ORDER—APPEAL—MOTION FOR NEW TRIAL.

1. The merits of an appeal from a probate order can ordinarily be fully reached on a bill of exceptions to the order itself, without a motion for a new trial.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1650, 1659.]

2. Petitioner settled on a tract of the unsurveyed public domain, marking the corners by a pile of stones, and named the same "G.'s Ranch." He thereafter filed a declaration of homestead, which described the property as "known by name of 'G.'s Ranch,'" and also by imaginary legal subdivisions, which were afterwards found to be erroneous, on the land being surveyed. Thereafter petitioner obtained a patent for the land, which described it by correct legal subdivisions, as they had then been established. *Held*, that the erroneous description by legal subdivisions in the declaration might be disregarded as surplusage, and that the remaining description by name was sufficient.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 61.]

3. Petitioner conveyed his homestead in question to B. in fee, by deed in which petitioner's wife did not join, and some two years thereafter B. reconveyed the premises in fee to petitioner's wife, then living. *Held* that, since the deed to B. was void for failure of the wife to join, it did not constitute an abandonment of petitioner's homestead rights in the property.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 203, 331.]

Department 2. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Petition by Daniel Geary for an order setting off a homestead from the estate of Catherine Geary, deceased, to which Mary Ellen Boardman filed objections, and, from an order granting the relief prayed, appeals. Affirmed.

Luce & Sloane, for appellant. W. T. McNealy and J. B. Mannix, for respondent.

McFARLAND, J. In the administration of the estate of Catherine Geary, deceased, her surviving husband, Daniel Geary, petitioned the court to set off to him as a homestead certain lands described in the petition, under sections 1474, 1475, et seq., of the Code of Civil Procedure. The court made the order setting off the homestead as prayed for. The contestant made a motion for a new trial, and, for the purposes of such motion, presented and had settled a statement. The motion for a new trial was denied, and contestant appeals from the order setting off the homestead, and also from the order denying the motion for a new trial. On the appeal from the first order there is no bill of exceptions.

Respondent contends that the motion for a new trial was entirely unwarranted, and the appeal therefrom cannot be considered—citing Estate of Franklin, 133 Cal. 584, 65 Pac. 1081, and other cases—and that, as there is no bill of exceptions to the original order, this appeal must be considered on the judgment roll alone. Under our views of the case, it is not necessary to decide this question, and we will not do so. But it is, perhaps, well to remark that the disposition of many attorneys to inject the procedure of a motion for a new trial into probate litigation uselessly raises difficult questions. The merits of an appeal from a probate order can ordinarily be fully reached on a bill of exceptions to the order itself which is sought to be reviewed.

Appellant's first contention is that the declaration of homestead on which respondent relies is fatally defective for want of a sufficient description of the homestead premises, but, in our opinion, this contention is not maintainable. The premises consist of a tract of 160 acres, which at the time of the declaration of homestead was upon unsurveyed United States public lands, in an unsettled region of country. Petitioner went upon the land with his family, consisting of his wife and her daughter, and at that time there was on the land a small adobe house, which he occupied. A couple of months afterwards he built a frame house, into which he moved with his family. He plowed some of the land, built a brush fence around 10 or 15 acres, and put in a crop. A couple of years afterward he built a larger frame house, into which he moved with his family, built a board fence where the brush fence had been, built a stone fence around a large corral, fenced in an additional 40 acres with a board fence, and used the land for farming and cattle raising. He located and claimed 160 acres, and marked it by a pile of stones at each corner. His place was known as "Vicetus," and afterwards as "Geary's Ranch." In his declaration of homestead the land is first described as a lot of 160 acres, "on which I now reside with my family," in San Diego county, Cal.; and then follows an attempted description by legal subdivisions, which, after the land had been surveyed by the United States government, was found to be incorrect. But the description continues as follows: "Said homestead known by the name of 'Geary's Ranch,' and being the piece of or parcel of land occupied by me and my family nearly three years from the date hereof, together with all the improvements thereon, and it is my intention to use and claim the said lot of land and premises, together with the dwelling house thereon and its appurtenances, as a homestead, and I do hereby select and claim the same as a homestead," etc. This description by name designated with sufficient certainty the premises intended to be covered by the declaration of homestead, and the other erroneous descriptions by legal subdivisions may be disregarded. It was, no doubt, unwise to attempt to describe the land by imaginary legal subdivisions which then had no existence, and the lines of which, when afterwards established, could only be guessed at. It was an isolated place on which petitioner lived with his family and had marked by monuments, upon which he had erected buildings and fences, and thus distinguished it from the wild country around it; and, as this place was known as "Geary's Ranch," the description by that name was, under the circumstances, sufficient. Petitioner afterwards obtained a United States patent for the land after it had been surveyed, which described it by correct legal subdivisions as they then had been established. It was averred in the petition that the land thus patented was the same land upon which he had placed his declaration of homestead, and the court so found, upon sufficient evidence to sustain the finding. We think, therefore, that the point that the declaration of homestead is void for want of sufficient description of the homestead premises is not tenable. See Stanley v. Green, 12 Cal. 148, where Field, J., delivering the opinion of the court, elaborately discusses the subject. There was also a subsequent declaration of homestead by petitioner's wife, which need not be noticed.

The other main point made by appellant is that before the death of petitioner's wife he conveyed to her the said homestead premises, and thus lost his homestead right therein, or at least only retained the right to have the homestead set apart to him for a limited period. But petitioner did not convey the premises to his wife, and therefore we need not consider the vexed question as to what extent, if any, the conveyance by a husband to his wife of homestead premises affects his homestead right therein. In November, 1887, the petitioner executed a deed to one L. A. Blochman, purporting to convey the said homestead premises in fee to said Blochman, but petitioner's wife did not join in this deed. About two years afterward Blochman executed a deed purporting to convey said premises in fee to petitioner's wife, Catherine Geary, who was then living. It was averred in appellant's answer that the said deed from petitioner to Blochman was made "in trust for, and with the understanding and agreement that said L. A. Blochman should thereafter deed and convey the said premises to, the said Catherine Geary, as her separate property"; and it is contended that the deed to Blochman and the deed from the latter to Catherine should be taken as substantially a direct conveyance from petitioner to his wife. But the court found that the deed to Blochman was not in trust for Mrs. Geary, "nor was the same executed for the purpose or with any understanding or agreement that said L. A. Blochman should thereafter deed or reconvey the said premises to the said Catherine Geary"; and this finding is amply supported by the evidence, for it appears very clearly that it was made for an entirely different purpose. Therefore the deed of the homestead premises to Blochman by the petitioner alone did not convey any title to the former, and, of course, his deed to Catherine conveyed nothing, even if petitioner consented to or directed it.

The foregoing conclusions as to the two main points above noticed are determinative of the other contentions of appellant, which are merely incidental to the main points, and we see nothing further in the case which calls for special notice.

The orders appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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146 Cal. 100

PEOPLE v. MANNING. (Cr. 1,156.)

(Supreme Court of California. Jan. 28, 1905.)

CRIMINAL LAW—HOMICIDE—ISSUES—SELF-DEFENSE—INSTRUCTIONS.

Where in a prosecution for homicide there was nothing showing that defendant was acting in self-defense, his contention being that the killing was purely accidental, it was not error to refuse instructions presenting the issue of self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 624.]

Department 1. Appeal from Superior Court, City and County of San Francisco; W. P. Lawlor, Judge.

Cornelius Manning was convicted of manslaughter, and he appeals. Affirmed.

Nathan C. Coghlan and Robert Ferral, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., C. N. Post, Asst. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

VAN DYKE, J. The defendant by the information was charged with murder. He was tried and convicted of manslaughter, and sentenced to 10 years' imprisonment in the state prison. The trial commenced in July, 1901, and judgment was rendered September 21, 1901. The appeal is taken from the order denying a new trial and from the judgment and sentence. The bill of exceptions on appeal was not settled until January 9, 1904.

The facts concerning the homicide are

about as follows: On the evening of July 4, 1899, Mr. and Mrs. Kennedy, with their children, made a friendly visit to the home of Mrs. Manning, on Jones street, in San Francisco. The visitors and the family of Mrs. Manning, except the defendant, took dinner together, and, after the meal had been finished and the table cleared, the defendant came home and asked for his dinner, and his mother told him to help himself. After he had dined, defendant entered into a conversation with the Kennedys, when John Tarleton came in and was engaged in conversation by the defendant. The conversation between defendant and Tarleton resulted in defendant, who was considerably under the influence of liquor, applying to Tarleton offensive and obscene names, and repeating them several times. Thereupon Tarleton left the house. According to the testimony of Kennedy, Mrs. Manning upbraided her son for insulting the guest Tarleton. In this, however, there is some conflict. Mrs. Manning in her testimony says: "Tarleton bid them good night, and went to the door to go, and I went with him. At the door I had a conversation with him. * * * Tarleton was pretty drunk. After I let him out of the door I returned to the kitchen, and when I came into the kitchen Kennedy and Mrs. Kennedy had Connie down on the lounge. Mr. Kennedy had him by the throat, and Mrs. Kennedy had him grabbed by the legs, and sitting on him and holding him down, grabbed by her hand. And I said to Mr. Kennedy: 'Please let him get up.' * * * And when he got up he ran out towards the dining room, and they knocked me down, some of them. I don't know whether it was Mrs. Kennedy or Mr. Kennedy. They shoved up against me, I guess, and I fell down near the sink." She says after her son got up from the lounge he started to run out through the dining room, and Mr. Kennedy and Mrs. Kennedy followed. She stayed in the kitchen, and did not see the occurrence in reference to the throwing of the lamp or the burning of Mrs. Kennedy, except when she was brought back into the kitchen and laid on the lounge. Kennedy and the defendant are the only witnesses to the act that caused Mrs. Kennedy's death. In Kennedy's testimony he says: "My hat dropped off in the scuffle putting him on the lounge, and I stooped down to look for my hat. I was about to leave at that time. My wife had the children dressed, and we were about to leave, and I thought everything would be all right, and we were going out. And so all at once I heard his mother exclaim, 'For God's sake, Connie, don't throw that lamp.' That drawed my attention, and I turned around without picking up my hat, and I saw him in the dining room with a small lamp in his hand. * * * When I first saw him he had a small lamp in his hand. And then there was a bright light in the dining room as if the lamp had exploded—overturned or something—and then my mind was on the children, because I knew that they were in there dressed. And then he came forward to the end of the dining room table—that would be on the north end—and he grasped the large lamp in his right hand and picked it up in this manner (showing), and he caught it in his left hand as if to unscrew it. And he threw it right forward in the line of my wife. She was going forward and going into the dining room at the time from the kitchen. The lamp struck her —must have struck her in the face. She received the contents of the coal oil right over her face and arms here, on her waist here (showing), and of course it burned her in such a manner that she only lived— She died inside of six days afterwards." In the defendant's version of the transaction he says that after he got up from the lounge he went out of the kitchen into the dining room, and that Kennedy followed him, and "he either tripped me or I tripped myself, and I grabbed at the door and fell over on the table and knocked the lamp over, and when I reached for the lamp with my left hand the position of the table was such that anybody in the kitchen would be directly back, and not in front of me or to the side of me. This door was just as it is now. I mean the position it is in now. I caught hold of the lamp with my left hand. The oil ran out and burned me, and I tried to right the lamp. That was my intention—to right the lamp—and, when my hand took fire and a portion of my coat, I threw the lamp from me and kept on going. I didn't stop. I did not take the lamp up in my hand and throw it."

The testimony of Kennedy and the defendant are in direct conflict. That of Kennedy seems to be supported by the circumstances surrounding the transaction, and was accepted by the jury in rendering their verdict. The appeal in this case is based upon the refusal of the court to give four different instructions requested by the defendant, numbered 8, 9, 13, and 16. These, in their order, are as follows, with the indorsement of the judge of the trial court giving reasons for the refusal to give them: "(8) When the defendant interposed his plea of not guilty, he put in issue every fact necessary to establish his guilt. Therefore if you believe, under all the evidence, that in what he did he acted in self-defense, believing as a reasonable man that he was then and there in imminent danger of death or great bodily harm, your verdict should be not guilty. (Refused—no claim of self-defense either in the evidence or the theories of the parties; calculated to mislead the jury; contravenes defendant's proposed instructions Nos. 10 and 11, which were properly requested and pertinently given.)" Instructions Nos. 10 and 11, referred to, are as follows: "(10) If there is a reasonable doubt whether the defendant threw the lamp in this case, your verdict should be not guilty. (11) If you are in reasonable doubt whether the defendant intended to throw the lamp at anybody, your verdict should be not guilty." Instructions 9, 13, and 16, refused by the court, are as follows: "(9) If the evidence shows that the defendant, in his own house, while not assaulting nor threatening the life of anybody, nor threatening nor attempting to do bodily harm, was assaulted and thrown down, he had the right to resist such assault with all the force in his power, even to the extent of taking life. (Refused, for the same reasons as given in refusing defendant's proposed instruction No. 8.)" "(13) If you believe the defendant threw the lamp at Mr. Kennedy, and in such throwing was acting in self-defense, your verdict should be not guilty, no matter how serious the consequences may have resulted to anybody else. (Refused; no claim in the evidence that the defendant acted in self-defense; incorrect as a statement of the law thereof; leaves out the element whether the action of the defendant in throwing the lamp, if he did throw it in self-defense, was proportioned to the danger presented, real or apparent. See annotation to defendant's proposed instruction No. 12.)" "(16) When the defendant interposed his plea of not guilty, he thereby put in issue every fact necessary to establish guilt. [Therefore, if you believe from the testimony that the defendant was assaulted by Mr. Kennedy in the dining room and thrown with force and violence on the lounge in the kitchen; that defendant struggled to free himself from Kennedy; that he succeeded in getting up, and then ran out of the kitchen; that Kennedy pursued him, and while in hot pursuit caught up with the defendant at or close to the dining-room table; that thereupon the defendant feared and had good reason to fear that he was in imminent danger of great bodily harm at the hands of Kennedy—then I charge you that under such circumstances the defendant would be justified in defending himself against Kennedy by any and every means within his power. And if in so doing a lamp was thrown, and Mrs. Kennedy received burns which resulted in her death, the defendant would not be responsible therefor.] (First sentence given. Portion in brackets refused—calculated to confuse and mislead jury in the light of the evidence; no such state of facts contained in the evidence; it is not contended that the defendant acted in self-defense; incorrect as a statement of the law thereof; leaves out the element as to whether the action of the defendant in throwing the lamp, if he did throw it in self-defense, was proportioned to the danger presented, real or apparent; and for reasons assigned in refusing defendant's proposed instruction No. 12.)"

It is hardly necessary to add anything to what is said by his honor the judge of the lower court in refusing the instructions in question. The charges of the court and instructions given are 30 in number, and cover every point necessary to be presented to the jury to aid them in arriving at a proper verdict upon the testimony introduced before them. Appellant in his brief claims the defense was twofold, and says: "The whole force of this twofold defense * * * was taken away by the wholesale refusal and modification of defendant's instructions, and by the ruling of the lower court which prevented defendant from proving that he acted in self-defense." There is nothing in the testimony showing that the defendant was acting in self-defense. According to his testimony, it was accidental. According to the testimony of Mr. Kennedy, he purposely threw the lamp on Mrs. Kennedy, which caused her death. The trial court should only give such instructions as are applicable to the evidence in the case. The court is not required, nor would it be proper, to give instructions applicable to some theory that might be advanced, but which theory is entirely outside of the case, as shown by the evidence.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

146 Cal. 124

PEOPLE v. ANTONY. (Cr. 1,187.)

(Supreme Court of California. Jan. 30, 1905.)

HOMICIDE—EVIDENCE—ADMISSIBILITY — CRIMINAL APPEAL—HARMLESS ERROR—NEW TRIAL —STATUTES—JURY—RECEPTION OF EVIDENCE OUT OF COURT.

1. Where the theory of the prosecution on a trial for homicide was that the murder had been committed in defendant's kitchen by the defendant about 1 o'clock on a particular day, and that defendant's wife had participated in it, any error in permitting a witness to state the appearance of defendant's wife when the defendant and his wife called at the house of the witness at about 3 o'clock of the day in question was harmless as to defendant, the answer being that "she looked all right."

2. On a prosecution for homicide, the admission of a trunk belonging to defendant's wife was not erroneous, it appearing that the trunk was used by both; and especially where the offer did not so much relate to the trunk as to its contents, which consisted in part of bloodstained garments of defendant, found therein, and which were offered in evidence.

3. Where the theory of the prosecution on a trial for homicide was that the motive for the murder was robbery, and that it was participated in by defendant and his wife, the admission of evidence that, after the defendant and his wife were arrested and they were locked up. the officer entered the wife's cell and took off her shoe and found concealed in her stocking a pouch containing money, in addition to some taken from defendant, was not prejudicial to defendant; it appearing that, subsequent to the search of his wife, defendant had said that all of the money was his.

4. On a prosecution for homicide, certain diagrams of the premises where the killing occurred were introduced in evidence without objection, and were tacked to a blackboard in view of the jury. During a recess, one of the jurors

left the jury box and stepped over and casually inspected the diagrams. *Held* no ground for new trial under Pen. Code, § 1181, subd. 2, forbidding the jury to receive evidence out of court other than that resulting from a view of the premises, as against an objection that the diagrams purported to represent not only the house in which the homicide occurred, but the surrounding premises, including an outhouse or closet in which was found some of the material objects introduced in evidence, and that there was also on the diagrams the representation of a building occupied by other parties; there being no suggestion as to what the "surrounding premises" were, or what the "building occupied by parties other than the defendant" was, and there being no question as to the other portions of the diagram having been accurately represented.

In Bank. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Miguel Antony was convicted of murder in the first degree, and he appeals. Affirmed.

John L. Campbell and John Brown, Jr., for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

LORIGAN, J. The appellant and one Trinidad Figeroa were jointly charged by information with the murder of one Lee Gar, at Needles, in San Bernardino county. Appellant demanded a separate trial, was convicted of murder in the first degree, and sentenced to death. He appeals from the judgment and an order denying his motion for a new trial.

It is not claimed on this appeal that the evidence was not sufficient to sustain the verdict, but it is insisted that a reversal should be had on account of certain alleged errors committed by the lower court in its rulings during the trial, and upon other grounds specially assigned.

A general statement of the facts will serve to illustrate these points as we take them up. The appellant and Trinidad Figeroa, his wife, both dissolute characters, in company with Victor Montajo and Maria Candalaria, arrived at Needles about a month prior to December 20, 1903, the date on which the murder took place. When they arrived at Needles the appellant had but five dollars, of which he gave his wife two, for the purpose of hiring a "crib" for herself and the woman Maria. About a week thereafter appellant and his wife rented a small house in what is characterized by the witnesses as the "Redlight District" of the town, and lived there together until they left Needles, on the night of the day on which the murder with which they are charged was committed. There resided at Needles a Chinaman named Lee Gar, who conducted a laundry, and whose custom it was to call at the house of defendant every Sunday for the washing. On Saturday, the day prior to the murder, Lee Gar was paid $250 in gold, which he placed in his purse with other gold coin contained therein, and it was shown that on Sunday morning, after paying out $30 from this purse, he still had a good deal of gold money in it. On this Sunday—December 20, 1903—Lee Gar took his lunch at a Chinese restaurant in the town, and about 12 o'clock left the restaurant, and was not again seen alive. About half past 12 of that day the woman Maria Candalaria went over to the house occupied by defendant and his wife to return a borrowed hatchet. Before she reached the door defendant's wife came out, took the hatchet from her, placed it on the porch, and, directing Maria to come with her, started away from the premises. Maria inquired of her why it was she did not let her in the house, to which she responded that her husband was taking a bath. At 7 o'clock in the evening an officer called at the house of defendant, inquired about Lee Gar, and was told by defendant's wife that he had not been there that day, and that she did not expect him until the next day. During his visit he observed that a piece of matting had been cut away from the kitchen floor. Late that night the defendant and his wife left Needles for San Francisco, taking with them a trunk, which was checked by the wife on her ticket, and on the afternoon of December 21st they were both taken into custody on the train at Bakersfield. About 8 o'clock on Monday morning, December 21st, the body of Lee Gar, with the throat cut, was found by searchers, shallowly buried beneath a mound of sand back of a water-closet on the premises which had been occupied by defendant. There was nothing found in his pockets except a silver watch, 25 cents in money, and a bunch of keys. In the vault of the closet was found a roll of matting tied with shoe strings. This piece was similar to that with which the kitchen floor of the house occupied by defendant was covered, and was undoubtedly cut from it. This roll when opened was found clotted with blood, and within its folds was found a razor, also covered with blood, and evidently the weapon with which the murder had been committed. Blood stains were also found in the kitchen in the vicinity of where the matting had been cut out. In the vault was also found the purse in which the deceased carried his money, but empty. In the trunk which had been checked to San Francisco were found a pair of pants, an undershirt, shoes, and other articles admitted to belong to defendant, stained with human blood. This recital does not contain all the incriminating evidence against the defendant appearing in the record, but is sufficient to present the general features of the case, to be supplemented by reference to other items, if necessary, as the points made are discussed. There is nothing in the bill of exceptions showing that any evidence was offered on behalf of defendant. Now, as to the points urged for reversal.

1. The woman Maria Candalaria was called as a witness, and testified that about 3 o'clock in the afternoon of Sunday, December 20th, the defendant and his wife called

at her house. She was asked as to the appearance of defendant's wife when they arrived—how she looked. That the court permitted this inquiry, over the objection of counsel for the defendant, is urged as error. The theory of the prosecution was that the murder had been committed in the kitchen by the defendant, somewhere about 1 o'clock on this Sunday, and that his wife had participated in it, and the question was doubtless asked with a view of showing from her appearance a consciousness of guilt. But, if it be conceded that the question was improper, the defendant was not injured by it, because the witness answered that "she looked all right." The error, assuming it was such, was harmless.

2. It is insisted that the court erred in admitting in evidence the trunk which defendant's wife had checked to San Francisco. The point is that it was his wife's trunk, and that its admission had no bearing in the case. There is no merit in this claim. The evidence shows it was used by both parties, but, aside from this, the offer did not so much relate to the trunk as to its contents, which consisted in part of the blood-stained garments of defendant which were found therein, as heretofore stated, and which were offered in evidence.

3. Objections were made to inquiries as to when a certain train left Needles on the night of December 20th, and whether defendant's wife was seen at the depot on the evening of that day. This may or may not have been material, but, if it was not, it is difficult to perceive how defendant was injured by it. It is shown, without objection, that his wife was at the depot that evening, purchased a ticket, checked the trunk on it, and was in the company of the defendant when arrested at Bakersfield.

4. When the officer arrested defendant and his wife at Bakersfield, he took them to the county jail and searched them. He found on the person of defendant a canvas or buckskin sack purse containing $80 in gold and less than $5 in silver, and in the hand purse of his wife $16 or $18. After locking them up, he entered the cell occupied by the defendant's wife, took off her shoe, and found concealed in her stocking a buckskin pouch containing $60 or $70. Counsel for defendant objected to the testimony relative to the last search and the discovery of this money on the person of the wife, and insisted that it was error on the part of the court to have permitted its introduction. But when we consider the evidence in the case before the jury up to this point, we do not think the defendant was prejudiced by the testimony relative to this search, or that he has any cause to complain of it. The evidence at this stage of the case showed that the defendant and his wife had been arrested and lodged in jail at Bakersfield; that when Mr. Lane and Mr. Medlin, officers of San Bernardino county, went to the county jail at Bakersfield in Kern county to bring defendant and his wife to San Bernardino county, they brought back two bags of money which the sheriff of Kern county delivered to them, together with the prisoners. These bags were delivered to the jailer of the county jail of San Bernardino county when the defendant and his wife were surrendered to him by Lane and Medlin, and when called as a witness the jailer testified: "The money that I received from Mr. Lane and Mr. Medlin consisted of three $20 pieces, four $10's and eleven $5 pieces, and some silver, amounting altogether to $167.70. The money was in two different bags, and the amount was about equally divided between them. I had a conversation with the defendant, either the same day he came or the next day after, about this money, and he said it was his money." The theory of the prosecution was that the motive for the murder of deceased was robbery. In support of that theory the state had introduced evidence tending to show the possession by deceased, on the day he was murdered, of a large sum of money; that the purse in which he carried this money was found empty in the vicinity of where his body was buried; that defendant had but $5 when he reached Needles; that shortly after his arrival there he began to work in the roundhouse of the railroad company, and had worked there until December 15th, when he quit. It was proper to show, under these circumstances, that when arrested the next day the defendant was in possession of a large sum of money independent of the $41.40 which the tickets for himself and wife from Needles to San Francisco had cost. The jury would have a right, with this evidence before them, to determine whether it had a tendency, taken in connection with the other evidence in the case, to connect the defendant directly with the perpetration of the crime with which he was charged, and also to disclose a motive for its commission, and, in that regard, it was for the jury to determine whether the money which was in possession of the defendant on the day succeeding the killing of Lee Gar was the fruits of his murder. Having admitted the possession of this money, the testimony objected to only went to show the circumstances under which it was found. That testimony showed that part of it was in his immediate possession; part of it secreted about the person of his wife. The fact that she was in possession of a portion of it, under his statement that the aggregate amount taken into possession by the jailer at Bakersfield was his, did not affect the right of the state to prove the circumstances under which it was taken into possession by the officers. As far as defendant was concerned, having previously admitted that all of it was his, the proof of possession by his wife at the time of her arrest of a portion of it only tended to show that he had delivered it to her for secretion or custody.

5. The next error assigned is in denying

defendant's motion for a new trial on the ground "that the jury received evidence out of court other than that resulting from a view of the premises," in violation of subdivision 2 of section 1181 of the Penal Code. It appears that after the noon recess of court, and on the last day of the trial, while the jury and counsel for both sides were awaiting the arrival of the judge to resume the session, one of the jurors left the jury box and stepped over and casually inspected a couple of diagrams which upon the first day of the trial had been admitted in evidence and were tacked to a blackboard in view of the jury. These diagrams purported to show the house where defendant resided when the murder was committed, and the location of certain articles of furniture therein; also the location of an adjoining house, and the location of the closet behind which the body of the deceased was found. There are no copies of the diagram in the record, but the testimony of the draftsman who made them showed what was intended to be represented upon them. These diagrams were admitted in evidence without objection, and there was no suggestion made that they did not accurately and properly show upon their face everything that they purported to represent. During the trial they were constantly referred to by the witnesses in the case, and the objects and articles shown upon them were pointed out and referred to for the benefit of the jury, without any objection thereto upon defendant's part. It is unnecessary to discuss whether, under these circumstances, the jury had not the right to examine the diagrams, because, even if they did not, it is not shown in what possible way the inspection of them by the juror, as complained of, could have injuriously affected the defendant. Counsel in his affidavit stated that the diagrams purported to represent "not only the house in which the homicide occurred, but the surrounding premises, including an outhouse or closet in which was found some of the material objects introduced in evidence; that there was also upon such diagram represented a building occupied by parties other than defendant." As far as the location of the closet is concerned, there is no question but what it was accurately indicated upon the diagram, and was frequently referred to and pointed out by witnesses during the trial, and it cannot be claimed that by looking at the diagrams the juror obtained any additional evidence relative to it. It is not suggested what the "surrounding premises" were, or what the "building occupied by parties other than the defendant" was, or how the delineation of these things upon the diagrams, and the inspection of those diagrams by the juror, could have affected the defendant. For aught that appears, it was pertinent and material to a proper presentation of the case upon the part of the prosecution that the situation of surrounding premises, and other buildings in proximity to the house occupied by defendant, should be shown on the diagrams, so that evidence produced before the jury relative to them might be clearly illustrated and understood. An examination of the bill of exceptions shows that testimony relative to premises other than those occupied by the defendant, and relative to other buildings than the house he lived in, was given in the case without objection, and was pertinent evidence. Now if, aside from these surroundings and buildings so testified to, there were other premises or buildings indicated upon the map, concerning which no testimony was given and which the inspecting juror should not have seen, it was incumbent on defendant, in support of his motion upon the ground urged, to show that from an inspection of the diagrams by the juror he received evidence of something that had not already been testified to, or that he acquired thereby some additional evidence. It was necessary to make such a showing in order to authorize the court to award a new trial upon the ground urged, and, having failed to make it, for that reason alone the motion was properly denied.

6. The last point urged by appellant is that certain objects introduced in evidence during the trial—the blood-stained clothing of defendant, the matting and razor found in the closet, etc.—were not properly before the jury for consideration, or use by the district attorney during his argument, because, when offered and received in evidence, they were not then "exhibited to the jury," within the provisions of section 1954 of the Code of Civil Procedure. There is nothing in this point, and it is made in face of the record, which shows explicitly that they were so exhibited.

We have discussed and disposed of every point made by appellant, and, finding no error in the record, the judgment and order are affirmed.

We concur: McFARLAND, J; HENSHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; SHAW, J.; BEATTY, C. J.

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146 Cal. 172

BUTLER v. GRAND LODGE A. O. U. W. OF CALIFORNIA. (Sac. 1,112.)

(Supreme Court of California. Feb. 2, 1905.)

MUTUAL BENEFIT INSURANCE—ASSESSMENTS—FAILURE TO PAY—SUSPENSION—REINSTATEMENT — REQUISITES — VOTE OF SOCIETY—BY-LAWS—CONSTRUCTION.

1. The by-laws of a mutual benefit association provided for suspension of a benefit certificate for nonpayment of premium, but provided for renewal within three months, "in case the member be living," on payment of all assessments pending, provided the lodge by a majority vote declared the member's certificate renewed, and that if the lodge should refuse to renew his certificate the moneys paid should be returned, after which no further application by the member should be entertained for six months. *Held* that, where the member's certificate was suspended for failure to pay an assessment levied, a vote of the lodge reinstating him, as well as payment of matured assess-

ments, was essential to the renewal of his certificate.

2. Such by-laws contemplated that the vote of reinstatement should be taken during the life of the member, and, he having died prior to the next meeting of the lodge after payment of his matured assessments, failure of the lodge at such meeting to pass on his reinstatement could not avail the beneficiary.

Department 1. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Roxanna L. Butler against the Grand Lodge of the Ancient Order of United Workmen of California. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Bruner & Bros. and Joseph Abrams, for appellant. William H. Jordan and D. S. Hirshberg, for respondent.

ANGELLOTTI, J. This is an action to recover upon a beneficiary certificate issued by defendant corporation to Stephen W. Butler, and payable to plaintiff, his wife, upon his death.

Defendant is a corporation, fraternal in character, organized for the promotion of the welfare of its members and for the protection of their families. It has numerous subordinate lodges under its jurisdiction and control. Said Butler was at the time of his death, December 15, 1898, a master workman degree member of a subordinate lodge of defendant, known as "Sacramento Lodge, No. 80," and had been such a member for many years. There had been, in July, 1885, issued to him as such member, by defendant, the beneficiary certificate in suit. This certificate stated that as such member he was entitled to participate in the beneficiary fund of the order to the amount of $2,000, payable upon his death to his wife, the plaintiff. The certificate stated that it was issued upon the express condition that he should in every particular, while a member of the order, comply with all the laws, rules, and requirements thereof. In his application for such certificate, Butler stated that such compliance was the express condition upon which he is to be entitled to participate in such beneficiary fund. The law relating to such fund provided that, upon the death of a member in good standing, his nominee should be entitled to receive therefrom the amount due under the certificate, provided that said member had fully complied with all the laws, rules, and regulations of the order, and particularly with the conditions relative to the payment of assessments. The beneficiary fund referred to was one created and kept in existence by contributions from all the members of the order, made at such time as the said order by its laws and regulations required, and denominated "assessments," and was under the exclusive control and management of defendant grand lodge. From this fund is paid the amounts due on all beneficiary certificates. The laws of the order provided for the assessment of all the members for the purpose of paying death losses. According thereto, when an assessment was levied, it was payable on or before the 28th day of the month, and if not then paid it became delinquent. The law provided as follows, viz.:

"Section 42t. Suspension of Members for Non-Payment. The beneficiary certificate of each member who has not paid such assessment or assessments to the financier of his lodge, the only authorized officer to receive and receipt for all assessments and dues, on or before the 28th of said month, shall by the fact of such non-payment to said financier stand suspended, and no action upon the part of the lodge, or any officer thereof, shall be required as essential to such suspension."

It was further provided as follows in section 42, "u" and "w":

"(u) Renewal of Beneficiary Certificate within Three Months. Any beneficiary certificate suspended by reason of non-payment of assessments thereon may be renewed, if the member be living, at any time within a period of three months from the date of such suspension upon the following conditions and none other; that is to say:

"(1) All assessments that have been made during that time, including the pending assessments, shall be paid, and also any relief fund assessments due.

"(2) This fact shall be reported to the lodge at a stated meeting.

"(3) The lodge may, by a majority vote, declare said certificate renewed. When all these conditions have been complied with, the beneficiary certificate shall be held as renewed and in full force, and not before. Should the lodge refuse to renew said certificate, all moneys paid (as provided in subdivision 1) shall be returned to the member immediately, and no other application shall be entertained for the period of six months.

"(w) Agency of Officers. The officers of subordinate lodges shall be and are the agents of the members of the lodge to which they belong, in the transaction of all the official business required of them by this Constitution, and are not the agents of the Grand Lodge."

On November 1, 1898, defendant regularly levied and gave notice of an assessment upon all of its members. This assessment became delinquent on November 28, 1898. Butler failed to pay the same. After the same had become delinquent, namely, on December 12, 1898, as stated by appellant, plaintiff, acting for Butler, paid to the financier of said Sacramento Lodge, at his place of business, the amount of the assessment, together with the amount of a subsequent assessment which had accrued. Subsequent to such payment to said financier, and prior to the next meeting of Sacramento Lodge, namely, on December 15, 1898, Butler died. The facts of the payment to the financier and the death of Butler were reported to said lodge at its next meeting succeeding the receipt by such officer of the money, but the lodge did not at such meeting, or at any other meeting, by a majority vote, declare such certificate renewed.

The trial court found that by reason of the failure to pay the assessment on or before November 28, 1898, the beneficiary certificate of Butler became suspended, and was never reinstated in the manner provided by the laws of defendant, and that, by reason of such suspension, plaintiff was not entitled to participate in the beneficiary fund. Judgment, therefore, went for defendant, and plaintiff appeals therefrom upon the judgment roll. The findings of the trial court disclose the facts hereinbefore stated.

The laws of defendant constituted a part of the contract between Butler and defendant. The plain effect of those laws was to make the right of a member to participate, through his nominee, in the beneficiary fund, dependent upon the standing of his beneficiary certificate at the time of his death. It is admitted by appellant that under these laws Butler's failure to pay the November assessment on or before November 28, 1898, had the effect of suspending his beneficiary certificate. No action upon the part of the lodge or any officer thereof was essential to such suspension, but the failure to pay ipso facto operated as a suspension. Such was the plain provision of defendant's law. See Marshall v. Grand Lodge, 133 Cal. 686, 66 Pac. 25; Carlson v. Supreme Council, 115 Cal. 466, 474, 47 Pac. 375, 35 L. R. A. 643; Bacon on Benefit Societies, § 385. He had failed to comply with all the laws, rules, and regulations of the order, and the effect thereof was, under his contract, suspension of his certificate. While Butler was still a master workman degree member, as found by the court, he was no longer a member entitled to participate in the beneficiary fund, and could not, under the terms of this contract, become entitled to so participate, until his suspension had been set aside and his certificate had been renewed in conformity with the rules of the order. Bacon on Benefit Societies, § 385; Carlson v. Supreme Council, supra; McDonald v. Chosen Friends, 78 Cal. 49, 54, 20 Pac. 41.

The question, then, is as to whether the suspension had been so set aside and the certificate renewed, at the time of his death. The laws of the defendant prescribe the conditions essential to reinstatement and renewal in plain and unequivocal language. There must be not only payment by the delinquent of all assessments to the financier of the lodge, but, such payment having been reported to the lodge at a stated meeting, there must be a majority vote of the lodge declaring such renewal. The law of the order, which was the contract of the parties, declared that "when all these conditions have been complied with, the beneficiary certificate shall be held as renewed and in full force, and not before." The affirmative vote of the lodge declaring a renewal is expressly made as essential to a renewal, as is the payment of the assessments, and until such vote there is no renewal. It was entirely within the power of the parties to agree as to the terms and conditions of reinstatement. The question in such case is as to what the agreement of the parties was, and, where the language of the agreement is clear and unequivocal, the courts have no choice but to enforce the contract as it is written. The agreement here was that the certificate should be held as renewed only when the lodge, by a majority vote, declared it renewed, and not before. As Butler died before the first meeting of the lodge following the payment to the financier, it seems very clear that the suspension of his certificate had not been set aside at the time of his death.

It is declared by Mr. Bacon, in his work on Benefit Societies, that the view generally sustained by the authorities is that, where a suspension attaches, by operation of law, upon an event named, and the member dies before the suspension has been set aside, there can be no recovery upon his benefit certificate (section 385); and, further, that, "if a member neglects to become reinstated during his lifetime, he cannot be reinstated after his death, though the period in which he might be reinstated, if living, has not expired" (section 385b). In Carlson v. Supreme Council, supra, this court said that these views were sustained by the authorities, and held that where the sole condition of reinstatement was payment of arrearages within 60 days, and the member failed to avail himself of that right, and died before the expiration of the 60 days, he could not be reinstated after his death. In the case at bar, the member failed to make the necessary payments in time to enable the lodge to act prior to his death, upon what was, in effect, his application for reinstatement of his certificate. Such action by the lodge, as we have seen, was essential to such reinstatement, and, there having been no opportunity for the lodge to act prior to his death, he died before the suspension had been removed. It is entirely immaterial here what would have been the situation had Butler lived until the meeting of the lodge, and it had arbitrarily refused to restore him, or had arbitrarily refused to take any action in his case. Under the terms of the contract, there could not possibly be a reinstatement of the certificate prior to the stated meeting of the lodge following the payment.

The provisions of defendant's laws already quoted show very clearly that it was the express agreement of the parties that a beneficiary certificate could be reinstated and renewed only during the life of the member. The language is that it "may be renewed, if the member be living * * * upon the following conditions and none other; that is to say"—and then follows, in three separately numbered paragraphs, the enumeration of the various conditions already specified, including the report to the lodge at a stated meeting, and the declaration of renewal by the lodge by a majority vote. The phrase "if the member be living" applies with equal force to each of the specified conditions, and it was thereunder essential to the renewal of the certificate by the lodge that the member be living at the time the renewal is effected and the certificate reinstated.

As stated before, the question as to what would have been the situation had Butler lived until the first meeting of the lodge following payment to the financier is immaterial here. It may be conceded, purely for the purposes of this case, that the lodge could not then have arbitrarily refused to take action on his application or renew his certificate. As to this we express no opinion. If, however, this be so, and the time had arrived during Butler's life when the lodge could and should have taken such action as he was entitled to, under his contract, looking to a renewal of the certificate, and had failed to so do, it may be that it could be held that he had at the time of his death acquired rights which could be enforced by his beneficiary after his death. This conclusion would, however, have to be based upon the theory that his certificate was in effect reinstated before his death, and was in full force at that time. In such case, it may be that his death prior to the formal declaration that he was entitled to have been reinstated during his life could not affect the right of his beneficiary to recover. Such a case was that of Van Houten v. Pine, 38 N. J. Eq. 72. In support of their contention that the death of Butler prior to the first meeting of the lodge at which the renewal could be effected is immaterial, counsel for appellant cite several cases. Those cases generally are not applicable under the facts of this case. In Connelly v. Masonic Mutual Benefit Association, 58 Conn. 558, 20 Atl. 671, 9 L. R. A. 428, 18 Am. St. Rep. 296, the question was as to whether the deceased had been legally suspended from the Masonic lodge, good standing in which was essential to any right under a benefit certificate, and the decision of the grand master declaring the suspension illegal, and reversing the judgment of the lodge, was not rendered until after the death. It was held that the death produced no change in the rights of the plaintiff to have the suspension set aside, if it was illegal. Substantially similar in principle is the case of Marck v. Supreme Lodge (C. C.) 29 Fed. 896. Our own case of Berlin v. Eureka Lodge K. P., 132 Cal. 294, 64 Pac. 254, was a case involving the question as to what amount of sick benefits has become due Berlin under the by-laws of the lodge, and it was held the death of Berlin pending his appeal to the grand lodge from the determination of his lodge did not affect the right of his representatives to have the appeal determined upon its merits, and that if the order refused to decide the matter upon the merits they could appeal to the courts. Such cases all have reference to the determination as to the status existing at the date of death, and do not in the slightest degree support the theory that there can be a reinstatement after death. The ruling in Jackson v. N. W. Mutual Relief Association, 78 Wis. 463, 47 N. W. 733, was based upon the conclusion that the insured was reinstated prior to death. The case of Grand Lodge v. Lachmann, 199 Ill. 140, 64 N. E. 1022, was decided upon a question of waiver. We cannot assent to what is said in the opinion, purely by way of argument, as to the vote of reinstatement by the lodge. The trouble with the plaintiff's case is that, at the time of the death of her husband, his beneficiary certificate had been suspended, and there had then been no reinstatement thereof. That was the status at the time of his death. Under the contract, there could be no reinstatement after death.

It is urged that the findings show that the lodge failed to take any action whatever after the death of Butler in relation to the matter of renewal, but retained the money paid, and that this constituted a waiver of the suspension on the part of defendant. If it be conceded that the findings show that the lodge did not take any vote upon the question of renewing the certificate, we do not see that it can avail plaintiff. His death having occurred prior to such meeting, the lodge was not authorized to renew the certificate. The proceedings for a renewal had ended with the death, and the failure of the lodge to say that it would not do what it could not do, under the law and the contract, cannot be held to indicate any intention on the part of the lodge to waive any rights of the defendant, even if the lodge could have waived any of such rights. See Marshall v. Grand Lodge, supra. Nor could such failure to act prejudice plaintiff in the slightest degree. An entirely different question would have been presented if Butler had been alive at the time of the meeting.

What became of the money properly received by the financier of the lodge during the life of Butler does not appear in the findings. There is nothing therein to compel the conclusion that it was retained by the lodge, or forwarded to the grand lodge and retained by it. There is nothing in the facts specified in the findings to indicate any waiver by either the subordinate or grand lodge, and we cannot assume the existence of facts in this behalf that are not shown. The findings, as they stand, cover all the issues and fully sustain the judgment. It is found that Butler did not comply with all the laws relative to the payment of assessments, and that his beneficiary certificate was by reason thereof suspended, and never reinstated during his lifetime, or at all. The more specific findings relied on by appellant are entirely consistent with this.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

146 Cal. 179

LOS ANGELES RY. CO. v. DAVIES et al.
(L. A. 1,312.)

(Supreme Court of California. Feb. 2, 1905.)

ACTION BY CORPORATION—CAPACITY OF PLAINTIFF TO SUE—OBJECTION—HOW RAISED—GENERAL DEMURRER.

1. The objection that the complaint does not show that plaintiff is a corporation goes to want of capacity to sue, and is a ground for demurrer, under Code Civ. Proc. § 430, subd. 2, when such want of capacity "appears on the face" of the complaint, and is not raised by a general demurrer that the complaint does not state facts sufficient to constitute a cause of action.

2. If want of capacity of plaintiff to sue as a corporation does not "appear on the face" of the complaint, so as to be subject to demurrer on that ground, under Code Civ. Proc. § 430, subd. 2, that objection can be raised only by answer pursuant to section 433.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Los Angeles Railway Company, a corporation, against James M. Davies and others. From a judgment for plaintiff, defendants appeal. Affirmed.

F. G. Hentig and T. M. Stewart, for appellants. Bicknell, Gibson & Trask, for respondent.

McFARLAND, J. This is an action to quiet title to certain land. Defendants demurred to the complaint upon the general ground that it does not state facts sufficient to constitute a cause of action, no other ground of demurrer being stated. The demurrer was overruled. Defendants then answered, denying plaintiff's title to the land, and setting up title in themselves. The court found for the plaintiff, and rendered judgment accordingly. Defendants appealed from the judgment upon the judgment roll.

The only point made by appellants for a reversal is that the complaint does not contain an averment that plaintiff is a corporation. The fact as to this contention is that, while in the title of the case, as it appears at the commencement of the complaint, the plaintiff is designated as "a corporation," there is no averment in the body of the complaint of plaintiff's corporate existence. The court found that plaintiff was a corporation.

Waiving other questions discussed by counsel, we are satisfied that the point sought to be made by appellants is not raised by the general demurrer. The point that plaintiff was not a corporation goes only to its capacity to maintain an action, and not to the sufficiency of the facts averred to constitute the alleged cause of action; and therefore it could be raised by demurrer to the complaint only under subdivision 2 of section 430 of the Code of Civil Procedure, which provides as a cause of demurrer "that plaintiff has not legal capacity to sue," and then only where said want of capacity "appears on the face" of the complaint. If it does not so appear, the objection must be taken by answer pursuant to section 433.

There are some authorities which appear to support appellants' contention, and the principal one cited by them is Miller v. Pine Mining Co. (Idaho) 31 Pac. 803, 35 Am. St. Rep. 290; but in the notes to the case the author of the work, after expressing his disapproval of the doctrine announced therein, cites a multitude of cases holding the other way. We will notice only the first case cited by the author—Phœnix Bank v. Donnell, 40 N. Y. 410—because it has more than once been referred to and approved by this court. In that case there was no averment in the complaint that the plaintiff was a corporation, and it is not even called a corporation in the title, and the demurrer there was upon the ground that it appeared that "plaintiff has no legal capacity to sue," and also upon the general ground that it did not state facts sufficient to constitute a cause of action. (Section 144 of the New York Code [Voorheis Code 1868] is the same as section 430 of our Code [Code Civ. Proc.] and section 147 the same as our section 433.) The demurrer was overruled in the lower court, and the judgment was affirmed in the Court of Appeals. As to the first ground of demurrer the court said: "All that the argument proves is that the complaint does not show upon its face, affirmatively, that the plaintiff has capacity to sue. But to sustain the demurrer the Code requires that it should appear upon its face that it had not such capacity, which in no respect appears. For aught appearing upon the face of the complaint, the plaintiff may be a corporation entitled to sue as such. Section 147 provides that, when any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer. This would seem to indicate the proper practice with sufficient clearness. If it appears upon the face of the complaint that a plaintiff suing as a corporation is not such in fact, a demurrer is the proper remedy of the defendant under section 144. If the complaint does not show that the plaintiff is not a corporation on its face, the objection that it is not such must be taken by answer, under section 147. This would seem to render further discussion of the question unnecessary." With respect to the second ground of demurrer in that case—which is the only ground in the case at bar—the court says: "The appellant's counsel insists that, if the demurrer is not sustainable upon the second ground specified in section 144, it is upon the sixth. In this, the counsel is in error. That relates only to the statement of facts constituting the cause of action. If this statement fails to show a right of action, then a demurrer on this ground may be interposed. But it has no application to the capacity of the plaintiff to sue or to the other grounds of demurrer specified."

This case was expressly approved, and the rule there stated declared to be right, by this court in Swamp Land District No. 110 v. Feck, 60 Cal. 403. In that action the plaintiff was designated in the title of the case as "Swamp and Overflowed Land Reclamation District No. 110 of the State of California," but there was no averment in the complaint that plaintiff was ever a swamp and overflowed land district, and for this omission the complaint was demurred to because it did not state facts sufficient to constitute a cause of action. (There was also a second cause of demurrer—that two separate causes of action had been improperly united.) The court said: "The first ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The objections specified are in substance that it does not appear from the complaint that the plaintiff was ever duly created a swamp and overflowed land district. That objection, however, if well taken, would go to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action. Phœnix Bank v. Donnell, 40 N. Y. 410." And the court, following the New York case, said further: "A demurrer on the ground that the plaintiff has not legal capacity to sue would be bad, because it does not appear upon the face of the complaint that the plaintiff has not. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer. Code Civ. Proc. § 432; Phœnix Bank v. Donnell, supra." In Miller v. Luco, 80 Cal. 257, 22 Pac. 195, the said case of Swamp Land District v. Feck is expressly approved, and quotations made from it which refer to Phœnix Bank v. Donnell; and the same thing occurs in Wilhoit v. Cunningham, 87 Cal. 458, 25 Pac. 675.

Appellant cites, as supporting a different rule, Oroville, etc., v. Plumas Co., 37 Cal. 360, Loup v. Cal. So. R. R. Co., 63 Cal. 97, and People v. C. P. R. R. Co., 83 Cal. 393, 23 Pac. 303. In the Oroville Case the legal existence of the plaintiff as a corporation was denied in the answer, and no question as to the sufficiency of the complaint was involved. In the Loup Case the author of the leading opinion, after holding that the demurrer to the complaint ought to have been sustained for various other reasons, merely adds, as a sort of further assurance, that "in the fourth count of the complaint there is no averment of the defendant's corporate existence"; but no one of the other justices concurred in that expression. In People v. C. P. R. R. Co., 83 Cal. 393, 23 Pac. 303, the writer of the main opinion, after holding that the demurrer to the complaint was properly sustained upon various grounds which are elaborately discussed, does say that "an averment of defendant's corporate existence is necessary in every count of the complaint against a corporation"—citing the Loup Case; but there is no discussion of the question, and no reference to the cases above referred to, where the question was directly before the court and expressly adjudicated, approving and restating the rule announced in Phœnix Bank v. Donnell. The sentence quoted was not necessary to the decision, and it cannot be taken as overruling those cases. Moreover, Wilhoit v. Cunningham, 87 Cal. 458, 25 Pac. 675, was the latest declaration of the court on that subject. And we are satisfied that in Swamp Land District No. 110 v. Feck, 60 Cal. 403, and in the subsequent cases approving it above cited, the rule is correctly declared.

Under the above views, it is not necessary to consider respondent's discussion of "aider by verdict" and other points made by it.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

146 Cal. 168

ELIZALDE v. MURPHY et al. (L. A. 1,553.)

(Supreme Court of California. Feb. 1, 1905.)

ADMINISTRATORS—BONDS—ADDITIONAL BONDS —RELEASE OF SURETIES.

1. The liability of the sureties on an administrator's bond cannot be terminated by the filing of a void bond as a substitute for the original.

2. Where, after the filing of an administrator's bond, one of the sureties became insolvent, and another bond was filed—the order of court accepting it reciting that it had been introduced as a substitute for the former bond, but ordering merely that the new bond be accepted—such new bond was cumulative, and not a substitute for the original bond, so as to terminate the liability of the sureties on that bond.

3. Under Civ. Code, § 1543, declaring that a release of one joint debtor does not extinguish the obligation of any of the others, an order releasing a surety on an administrator's bond, upon application of the heirs at law, does not release a co-surety, though Code Civ. Proc. § 1403, authorizes the release of a surety only on his own application.

Commissioners' Decision. Department 2. Appeal from Superior Court, San Luis Obispo County; W. B. Cope, Judge.

Action by Elisa P. Elizalde, as administratrix, against P. W. Murphy and others. From a judgment for plaintiff, defendant A. McAllister appeals. Affirmed.

Wm. Shipsey, for appellant. B. F. Thomas, for respondent.

HARRISON, C. Action against the sureties upon an administrator's bond. In January, 1894, Ernest Graves was appointed by the superior court of Santa Barbara county administrator of the estate of Marcos A. Elizalde, deceased, and thereupon, and under the direction of the court, he, as principal, with Meyer Greenberg and A. McAllister as sureties, executed and filed therein a joint and several bond in the sum of $20,000, for his faithful discharge of the duties of his office. August 2, 1895, upon the petition of the heirs at law of the deceased, representing to the court that Meyer Greenberg had become insolvent, the administrator, as additional security for the faithful discharge of his trust, caused to be executed and filed in said court a further undertaking purporting to be for the sum of $20,000, in which he was named as principal and J. T. Murphy and the aforesaid A. McAllister were named as sureties, which was by the court approved and ordered to be accepted; and thereupon the court ordered that Meyer Greenberg, surety upon the former bond, be released from all liability thereafter to accrue. The court finds that this undertaking was originally made and signed by McAllister for the sum of $4,000, but that before it was approved and filed it was altered and raised, without his consent or knowledge, so as to read in the sum of $20,000. November 16, 1898, J. T. Murphy, one of the sureties on this bond, died, and thereafter under an order of the court requiring the administrator to furnish additional security, he caused a further undertaking in the sum of $10,000 to be executed and filed, with himself as principal, and the defendants P. W. Murphy and Luigi Marre as sureties. Graves filed an annual account of his administration May 28, 1898, which was duly settled by the court, and subsequent thereto received and paid out certain moneys for the estate, and died insolvent July 15, 1900, without rendering any account thereof, or any further account of his administration of the estate. After his death the respondent herein was appointed as his successor in the administration of the estate, and brought the present action against the defendants, as sureties upon the aforesaid undertakings, for an accounting, and to recover the amount of money belonging to the estate which should have been in the hands of Graves at the time of his death. The court found that Graves had received of money belonging to the estate the sum of $3,011, no part of which had been paid out or accounted for by him, and rendered judgment against the defendants therefor. From this judgment the defendant McAllister has appealed, bringing the appeal here upon the judgment roll, without any bill of exceptions.

The appellant is not a party to the bond filed after the death of J. T. Murphy in 1898, and, as the court found that he did not sign or execute the bond of $20,000, filed in August, 1895, which is set forth in the complaint, his liability rests solely upon the bond filed upon the issuance of letters of administration in 1894. He contends that he is not liable upon this bond, for the reason that the bond in 1895 was taken as a substitute for this one, that for that reason there can be no liability against the parties thereto, and upon the further ground that the release of Greenberg as co-surety upon the original bond operated also to release him from all liability thereon.

The claim that the bond of 1895 was a "substitute" for the original bond of 1894 rests upon a recital in the order of the court accepting it that "it has been introduced as a substitute for the former bond," and upon the clause in the bond, "This bond to have force and effect from January 20, 1894." We have not been cited to any statutory provision authorizing the court to accept a subsequent bond of an administrator as a substitute for one previously executed, or with the effect of releasing the parties to the prior bond from all liability thereon; and in the present case the court did not direct that the bond should be a substitute for the original bond, but merely ordered "that said new bond be accepted." If, however, the bond, by reason of the alteration thereon, was void at the time this order was made, the basis for the order had no existence, and with it the order itself fell. The bond of 1895 is itself prospective in its terms and, in the absence of any words to the contrary, is to be regarded as cumulative. This consideration of its character is not impaired by the clause above quoted from the bond, but these words are more consistent with an intention on the part of the sureties to hold themselves bound for any delinquencies on the part of the administrator subsequent to the date of his appointment. The claim of the appellant is, moreover, refuted by the finding of the superior court that the allegation of the complaint that this bond was filed "as additional security" for the faithful discharge by the administrator of his trust is true.

The proposition in the appellants' brief that inasmuch as, under section 1403, Code Civ. Proc., the court is authorized to release a surety upon an administrator's bond only upon his own application therefor, and that its order in the present case releasing Greenberg, made upon the application of the heirs at law of the deceased, had the effect to release the appellant from all liability upon the bond, cannot be maintained. Section 1543 of the Civil Code declares, "A release of one of two or more joint debtors does not extinguish the obligation of any of the others." The provisions of this section are universal, and include all releases, whether resulting from operation of law, or by virtue of a statutory provision, or by the direct act of the party with whom or for whose benefit the obligation was entered into.

We are not required upon the present appeal to determine whether this order of the court had the effect to release Greenberg. If the order was without authority of the court to make it, it was nugatory. If it was within its jurisdiction, the liability of the appellant was not affected by it. Under section 1397, Code Civ. Proc., the heirs at law were authorized to ask for further security; and under section 1402, Code Civ. Proc., it was the duty of the court, whenever it came to its knowledge that the bond was insufficient, to require the administrator to file additional security. The court was therefore authorized to require an additional bond, and whether, after the representation as to his insolvency, such bond was given by the administrator voluntarily, or after an order requiring him to file it, does not affect the rights and liabilities of the appellant upon the original bond.

The judgment should be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

146 Cal. 164

SMITH v. SOUTHERN PAC. R. CO. (L. A. 1,307.)*

(Supreme Court of California. Feb. 1, 1905.)

RAILROADS—CONSTRUCTION ALONG STREET—DAMAGES TO ABUTTING OWNER.

Damages special and peculiar to an abutting owner, authorizing recovery by him, may be caused by the construction of a railroad in a highway on his side of the street, and close to his property, though the rails are flush with the surface of the street, and the construction works no change of grade.

[Ed. Note.—For cases in point, see vol. 18, Cent Dig. Eminent Domain, § 310.]

Department 2. Appeal from Superior Court, Santa Barbara County; William S. Day, Judge.

Action by W. F. Smith against the Southern Pacific Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Canfield & Starbuck, for appellant. Richards & Carrier, for respondent.

McFARLAND, J. This is an action to recover damages alleged to have been caused to certain land and premises of plaintiff by the construction and maintenance by defendant of a steam railroad along the public road or street upon which plaintiff's land abuts. The jury returned a verdict for plaintiff in the sum of $350, and a judgment was rendered accordingly. Defendant appeals from the judgment, and brings up the evidence and rulings of the court in a bill of exceptions.

The main facts are these: Wallace avenue is a public highway in Santa Barbara county. It runs through the town of Summerland, and that part of it which lies within the town constitutes the principal street of said town. Plaintiff owns lots in the town abutting on said highway or street, and having a frontage thereon of 100 feet. The street lies on the south side of plaintiff's lots. About June, 1891, defendant constructed, and since then has maintained, along said street, a railroad track, upon which it operates a steam railroad; having been granted the right of way therefor by the board of supervisors. A part of this railroad runs along the entire frontage of plaintiff's lots, upon which he has a dwelling house and other buildings. The lots are on a level with the street, and the construction of the railroad does not change the grade of the street. The rails are flush with the surface of the street. The track in front of plaintiff's lots is constructed entirely on the north half of the street—the side next plaintiff's lots. It runs diagonally along the street at an angle to the front line of plaintiff's lots, and is nearer that line on the southwest corner of his lots than on the southeast corner. At the southwest corner the ends of the ties of the railroad are 10 feet from plaintiff's line, and on the northeast corner between 12 and 13 feet. The street is 60 feet wide. One of defendant's witnesses said: "I don't think it would be possible for a man crossing with a team up to Mr. Smith's place to hitch in front of his two western lots. Opposite the eastern lots he might, but it might not be a desirable place to hitch, though." The amount of damage found by the jury was fully sustained by the evidence, provided such damage was not damnum absque injuria. There are some other facts in the case which are commented on by counsel, but, in our opinion, they are not important.

The general principle applicable to a case like the one at bar is that, when a railroad is constructed and maintained along a highway in front of a man's land, the latter may recover damages of the railroad company for such destruction or impairment of his rights and easements in the public highway caused by the railroad as constitute damage peculiar to himself, and independent of such damage as he sustains in common with the public, but cannot recover damages for those general inconveniences which he is subjected to in common with the public. In the case at bar the contention of appellant for a reversal seems to rest on the proposition that because the rails of the track were flush with the surface of the ground, and the construction of the railroad track did not cause any change of grade, or compel respondent to go either up or down in getting from his land to the street, therefore, as a matter of law, respondent could not have suffered from its construction any damage peculiar to himself, and different from that felt or sustained by the public. But we do not think that this proposition is maintainable. We cannot say that, as a matter of law, the construction of the railroad so near the line of respondent's lots as to cause him inconvenience and obstacles spoken of by the witnesses, above mentioned, as well as other obstacles to the enjoyment of said lots that could readily be suggested, does not cause damage peculiar to respondent, and different from that suffered generally by the public. It is not a sufficient answer to say that it was necessary for appellant to build its track gradually across the street, and therefore to put part of it close to respondent's line. Whatever appellant's necessities were in the premises, if what it actually did caused special and peculiar damage to respondent, it is liable for such damage.

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*Rehearing denied March 2, 1905.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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146 Cal. 160

JONES v. HODGES et al. (L. A. 1,318.)

(Supreme Court of California. Feb. 1, 1905.)

ADVERSE POSSESSION—"SUBSTANTIAL INCLOSURE"—EVIDENCE—SUFFICIENCY.

1. In an action to quiet title, in which defendant claimed by adverse possession, evidence *held* to support a finding that the fence maintained by defendant during her occupancy was a "substantial inclosure," within Code Civ. Proc. § 323.

2. Breaches in an inclosure do not destroy its continuity, so as to prevent the acquisition of title by prescription, unless such breaches are permitted to remain for such length of time as to show that the occupant did not intend to continue the exclusive appropriation of the premises.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 101.]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by John T. Jones against Cora S. Hodges and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Chas. Lantz, for appellant. Walter L. King and Chas. L. Batcheller, for respondents.

LORIGAN, J. This action was brought against a number of defendants to quiet title to several lots in block 3 of the Malabar tract in South Pasadena, Los Angeles county. It was tried as to defendant Hodges, and relative to lot 31 of said block, and from a judgment in her favor, and an order denying his motion for a new trial, plaintiff appeals.

Defendant asserted title to the premises by adverse possession, based upon a claim that she had the lot protected by a substantial inclosure, and had paid all the taxes assessed upon it, for a much longer period than the statute required. The lower court found in her favor upon this plea, and whether this finding is sustained by the evidence presents the only point on appeal.

Defendant's predecessor, Mrs. Taylor, having in March, 1894, obtained a conveyance of this lot from one who claimed title to it under a tax deed, which is conceded to have been void, shortly thereafter built a fence around the premises. In March, 1897, defendant purchased the lot from Mrs. Taylor, and in June, 1898, built a small dwelling house thereon, and placed wire netting on the fence all around it. This action was commenced in April, 1901, some seven years after the original fence was constructed. It is insisted by appellant that the evidence was insufficient to show that defendant's predecessor, Mrs. Taylor, paid the taxes assessed upon the property for the years 1894 to 1897, both inclusive, or that the fence surrounding the lot, at the time of its construction and up to the time when defendant built the house on the lot and stretched the wire netting around the fence, was or remained a "substantial inclosure," within the meaning of section 323 of the Code of Civil Procedure. There seems to be no dispute as to the payment of taxes, or the substantiality of the fence, subsequent to these latter dates.

We think the evidence sufficiently shows the payment of taxes for the years in question by Mrs. Taylor, who then claimed the lot. While the evidence might have been more specific and definite on this point, we are not prepared to say it was not sufficient to support the finding of the court, particularly when there was no question in the case that the taxes for any of these years had not been paid, or that they were paid by any one other than Mrs. Taylor.

Now, as to whether the fence, as erected, was and remained a substantial inclosure. The evidence is indefinite as to its height, and conflicting as to the size of its posts, and the distance they were set apart. But there was evidence to warrant the court in finding that this fence was from four to five feet high, consisting of posts four by four inches in size, set five or eight feet apart, and had two rails, one by three inches, set, one near the top and the other near the bottom. It is insisted by appellant that in its original construction this fence did not constitute a substantial inclosure; that it was not sufficient to turn cattle, which is the usual test to be applied in determining whether an inclosure is substantial or not. But it cannot be said, as matter of law, that this fence was insufficient for that purpose. Whether it was or not was a question for the trial court to determine from all the evidence in the case. It is quite apparent from the record that, upon the trial, the evidence as to this fence was addressed almost exclusively towards proving the condition in which it stood during the three years subsequent to its construction; it being contended by appellant that it had become broken down and dilapidated, and suffered to remain in that condition for long intervals during that period. Very little evidence was introduced as to its stock-restraining sufficiency as originally constructed, but what little there was was in support of its effectiveness for that purpose, it being in evidence that it would turn a cow or horse unless "they would run into it in madness." There was no evidence on the part of the appellant that, as originally constructed, this fence was insufficient for that purpose; the evidence of his witnesses on that point was addressed to times when rails were temporarily off the fence, and not to its original construction.

It is claimed that in Polack v. McGrath, 32 Cal. 17-22, this court held that a fence similar to the one shown to have been erected by defendant's predecessor was not a substantial inclosure. But it appears that on the trial of that case in the lower court it was proved as a fact (which was not mentioned in that opinion) that the fence there referred to was not sufficient to turn cattle. See Polack v. McGrath, 38 Cal. 668.

As to the condition of the fence during these years in question: As we have said, the evidence in the case was mainly addressed to this point. It is quite conflicting, principally as to the extent to which the fence was out of repair, and as to the dates during which it was in such condition. In fact, as far as the evidence produced by appellant is concerned, it is very indefinite upon this latter point. It is conceded in this case that, when the small dwelling house was being built, the fence was down to permit of hauling in lumber, and the evidence as to it being out of repair can as well be applied to that period as to any prior time. There is, however, no doubt that at times during the years in question some of the rails were knocked off the fence; but the evidence satisfactorily shows that defendant and her predecessor were mindful at all times of keeping the fence in repair, and these breaches were repaired within a reasonable time after they occurred. It is true that, while the rails were off, cattle could have entered the premises, but this fact of itself would not be sufficient to break the continuity of defendant's possession. Breaches in an inclosure do not destroy its continuity, unless they are permitted to remain for such a length of time as to show that the defendant did not intend to continue the exclusive appropriation of the premises which its original construction indicated.

We are of the opinion that the evidence justified the findings of the lower court which are attacked, and the judgment and order are therefore affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(146 Cal. 212)

JOHNSTON et al. v. CALLAHAN. (Sac. 1,122.)

(Supreme Court of California. Feb. 6, 1905.)

JUDGMENTS — DEFAULTS — NOTICE — RELIEF —APPEAL—MATTERS REVIEWABLE.

1. Under Code Civ. Proc. § 634, providing that findings of fact may be waived by failing to appear at the trial, and section 670, providing that the judgment roll, if the complaint is not answered, consists of the summons, with proof of service, the complaint, with a memorandum of default, and a copy of the judgment, an appeal from a default judgment must be determined on the pleadings and judgment alone, in the absence of a bill of exceptions or statement.

2. A rule of the superior court, relied upon in appellant's brief, cannot be considered, when not incorporated in the record.

3. A default judgment, reciting that it appeared to the court by satisfactory evidence that defendant was duly notified, more than five days before the trial, that the cause was set for trial on a day specified, showed a compliance with Code Civ. Proc. § 594, requiring proof of five days' notice of trial of issues of fact to entitle the party to proceed with his case in the absence of the adverse party.

4. Relief from a judgment taken through mistake, inadvertence, or excusable neglect should be obtained by application to the lower court, under Code Civ. Proc. § 473, and not by an appeal on the judgment roll, when every presumption is resolved in favor of the regularity of the proceedings, unless some defect is disclosed in the record.

Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by James A. Johnston and another against D. T. Callahan. From a judgment for plaintiffs, defendant appeals. Affirmed.

Arthur H. Barendt, for appellant. Tabor & Tabor, for respondents.

VAN DYKE, J. This is an appeal from the judgment of the superior court of Placer county. The action was for the recovery of $380.80 for goods sold and delivered, and work, labor, and services. It appears that the case was heard and judgment rendered in the absence of the defendant or his counsel, and in his appeal defendant's counsel says: "With a rush that was well-nigh indecent, and against the urgent protests of counsel for the defendant, the case was hurried to trial in the lower court, and judgment was entered against defendant. From this judgment, defendant appeals, and claims that it should be set aside: (1) Because no notice of motion to set for hearing was given, and there is no record of any such notice in the papers of the case on file in the superior court of Placer county. (2) Because no notice of the time fixed for hearing was given defendant and appellant, and there is no record of such notice in the papers in the case on file in the superior court of Placer county. (3) Because, on the assumption that an informal communication in a letter to the defendant's counsel may have been sufficient to put him on his guard, the notice therein conveyed was nevertheless too short. The defenses here offered may be technical, but are justifiable on the ground that they are the only resort against the injustice of what is commonly known as a 'snap judgment' taken by default."

There is no bill of exceptions or statement brought up with the judgment, and the appeal must be determined by what is disclosed in the judgment roll alone—that is, the pleadings and the judgment—as in this case a failure to appear on the part of defendant was a waiver of findings on his part. Code Civ. Proc. §§ 634, 670.

The complaint in the action was filed November 3, 1901, and the answer thereto April 21, 1902, and the trial was had June 2, 1902. In the judgment it is recited that: "It appearing to the court by competent and satisfactory evidence that the defendant was duly notified, more than five days prior to the 2d day of June, 1902, that the above-entitled cause was set for trial for Monday, June 2, 1902, at the hour of 10 o'clock, and that all the allegations of the plaintiffs' complaint on file herein are true, and that the denials contained in the answer of defendant are untrue, it is ordered and adjudged," etc.

Appellant in the brief of his counsel copies what purports to be a rule of the superior court of Placer county in reference to giving notice to an adverse party of the trial of a cause, containing the following: "A party having a cause set for trial in the absence of the adverse party must see that the latter has reasonable notice of the time fixed." That rule of court, however, is no part of the record in this case, and cannot, therefore, be considered.

As already shown, the judgment recites that satisfactory evidence was before the court that defendant was notified, more than five days prior to the trial of the cause, that the same was set for trial on the day mentioned; and that is a compliance with the provisions of the Code on that subject. Code Civ. Proc. § 594.

If the judgment were taken against the defendant, either through his mistake, inadvertence, surprise, or excusable neglect, he was furnished ample means for relief in the court below. Code Civ. Proc. § 473. It is worse than useless, however, to appeal from the judgment upon the judgment roll alone, unless some defect is disclosed in the record, as every presumption and intendment is resolved in favor of the regularity of the proceeding in the court below.

The judgment must be affirmed, and it is so ordered.

We concur: SHAW, J.; ANGELLOTTI, J.

146 Cal. 214

DE MARTINI v. ALLEGRETTI et al. (DE MARTINI et al., Interveners). (Sac. 1,345.)*

(Supreme Court of California. Feb. 6, 1905.)

DEPOSITARIES — APPLICATION OF FUNDS — DIRECTIONS—TESTAMENTARY INSTRUMENTS—VALIDITY.

Deceased deposited a fund with defendants for investment in their names, and thereafter wrote them a letter stating that he had deposited the amount in question with them, to care for and invest until his death, and gave directions for the payment of such fund by defendants to certain designated persons, etc., after his death. There was no limit as to the amount deceased could draw from the fund during his life. *Held*, that the direction to pay to others had no effect before decedent's death, and, not having been executed in accordance with the statute of wills, was invalid as a testamentary disposition of the fund thereafter.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, §§ 26, 36; vol. 49, Cent. Dig. Wills, §§ 209, 220.]

Department 2. Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Walter De Martini, as special administrator of the estate of Geralomo De Martini, deceased, against G. Allegretti and others. Giovanni De Martini and others intervened. From a judgment in favor of plaintiff, Anna Basso, as administratrix of the estate of Luigi De Martini, deceased, and others, appeal. Affirmed.

Jos. F. Cavagnaro and Budd & Thompson, for appellants. Solinsky & Wehe, C. K. Bonestell, John O'Gara, Walter J. De Martini, and Nicol & Orr, for respondents. W. J. De Martini and John O'Gara, for interveners.

McFARLAND, J. This is an action by the administrator of the estate of Geralomo De Martini, deceased, to recover of the defendants G. Allegretti and G. B. De Martini certain money alleged to be the property of said estate in the hands of said defendants. Those two defendants, in their answer, admit the possession of the money and that they received it from the deceased, and aver their desire and readiness to pay it to whomsoever it belongs; but they say that certain other defendants named in the complaint assert ownership of said money, and they ask the court to determine to whom it should be paid. Other defendants claim to be entitled to the money by virtue of a certain written instrument hereinafter set forth, executed by the deceased on the 20th day of October, 1896, and bearing that date. There were also certain additional defendants and interveners in the case, who are heirs at law of the deceased, and who joined with plaintiff in claiming what is sought by the complaint. The court found that the money involved is the money of the estate, and rendered judgment accordingly for plaintiff. The said defendants who claim under said instrument of October 20, 1896, and who filed a cross-complaint, appeal from the judgment and from an order denying their motion for a new trial.

The material facts in the case are these. In May, 1895, the deceased had about $5,000 deposited in some of the savings banks of Stockton, which was not bringing much interest, and on the 23d of that month he drew the money from the banks and gave it to the defendants G. Allegretti and G. B. De Martini for the purpose of having them invest it for him so that it might produce a better income. They took the money and very successfully invested it for him in mortgages, taking the mortgages in their own names. They gave him from time to time whatever of the money he wanted. While this condition of affairs existed, the deceased, on October 20, 1896, made and delivered to them the written instrument under which appellants claim and which is as follows:

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*Rehearing denied March 8, 1905.

"Stockton, Cal., October 20, 1896.

"Messrs. G. Allegretti and G. B. De Martini (or the Survivor of Yourselves), Stockton, Cal.:

"Having placed in your hands the sum of five thousand two hundred ($5,200.00) dollars, gold coin, to keep, care for, and invest for me in your names until the date of my death, I now hereby direct you as to the disposal of said sum of money in the event of my death. At the time of my death, or as soon thereafter as possible, pay the expenses of my last sickness and all the expenses of the burial of my body. Retain for yourself a reasonable amount for your services and expenses in the care and investment of said sum of money. After which is done, pay to Luigi De Martini, my brother, the sum of one thousand ($1,000.00) dollars, gold coin; to Maria De Martini, wife of Fillipi De Martini, the sum of one hundred ($100.00) dollars, U. S. gold coin; and Guistina De Martini, daughter of Fillipi De Martini, the sum of fifty ($50) dollars U. S. gold coin; and the remainder of said sum of money, pay to Giovanni De Martini (son of Guiseppi De Martini), Davidie De Martini (son of Guiseppi De Martini), and Giovanni De Martini (son of Paule De Martini), share and share alike, in U. S. gold coin. In the event of the death of Maria De Martini or Guistina De Martini before my death, the sum directed to be paid to her shall be paid to the survivor of them. And in the event of the death of either or any of the said Luigi, Giovanni, Davidie, and Giovanni De Martini before my death the sum or sums hereby directed to be paid to him or them shall be paid to the survivors of said last-named beneficiaries, share and share alike; that is, divided equally amongst them. In the event of the death of G. Allegretti or G. B. De Martini, then I direct that the survivor of them shall carry out my desires and wishes aforesaid.

"Your friend,

his
"[Signed] Geralomo X De Martini.
mark.

"Witness to mark of Geralomo De Martini: E. L. Wilhoit. Geo. E. Wilhoit."

After the giving of this instrument the same condition of affairs continued until the death of the deceased, which occurred on the 19th day of February, 1902. They continued to give him whatever of the money he wanted, and had given him at the time of his death nearly $1,000. The deceased lived up in the mountain region, and the defendant Allegretti, on the witness stand, said: "Geralomo used to come down himself, and we paid money to him; and sometimes he wrote from the mountains, and we sent it up. The payments were made as set forth in our answer. Q. Was there at any time any limit placed upon the amount he should draw? A. There was no limit at all. He can draw it all." He testified further as follows: "Q. For whose use and benefit were you investing and keeping that money? A. Mr. De Martini. Q. Which De Martini? A. Geralomo De Martini." He also testified that the deceased made the instrument of October 20th to get rid of the necessity of probate proceedings. The foregoing was substantially all the evidence in the case. There was no question as to the correctness of the account rendered by said two defendants, or as to the amount of money left in their hands.

The appellants contend that by the said instrument of October 20, 1896, an interest in the money vested in appellants in præsenti, although the enjoyment was postponed until after the death of the deceased; while respondents contend that the instrument was not intended to pass, and did not pass, any present interest from the deceased to the appellants, but was only an attempt to make a disposition of the property to take effect after his death, which he could only have done by a properly executed will. Counsel on each side have argued the case with ability and learning, and have quoted and commented upon many leading authorities relating to the question; but we do not think that it would serve any useful purpose to review those authorities here. Each case cited depended upon its particular facts, and there is not much variance in the authorities as to the general principles of law applicable. It is sufficient for us to say what, in our opinion, is the legal effect of the particular facts in the case at bar with respect to the question here involved; and we think that the contention of respondent and the conclusion reached by the court below as to this question are right. The "surrounding circumstances" shown by the evidence certainly give no aid to appellants' contention; and, looking alone at the instrument in question, there is nothing to be seen in it which gives to appellants any present vested interest or estate in the property in contest. It merely gives direction to Allegretti and G. B. De Martini that, in the event of the death of the deceased, they shall then give whatever of his money they may still have in their hands to the appellants. Nothing is given them before the event of his death. This direction had no effect before his death, and it could not have effect after that event; for a disposition of property to take effect after death can be made only by an instrument executed in accordance with the statute of wills. The instrument, from beginning to end, is, on its face, clearly and entirely testamentary in character.

Appellants plead the statute of limitations. The action was commenced within two months after the death of the deceased, and we are unable to see any ground whatever for claiming that the action was barred, as to appellants, by any provision of the statute of limitations.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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146 Cal. 231

LAMBERT v. SOUTHERN PAC. R. CO.

(L. A. 1,294.)*

(Supreme Court of California. Feb. 7, 1905.)

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—DISCOVERED PERIL.

1. In an action against a railroad for injuries from a collision at a crossing, evidence *held* to show plaintiff guilty of contributory negligence as a matter of law.

2. Where plaintiff, who was injured at a railroad crossing, actually knew of the approach of the train when he was 450 feet from the crossing, failure of the engineer to sound the whistle or ring the bell had no causal connection with the ensuing collision.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1081, 1094, 1146, 1189.]

3. Where those in charge of a locomotive saw plaintiff's team slowly approaching a crossing 150 feet away, they were not chargeable with negligence in failing to check the train, but were entitled to presume plaintiff would stop.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1014–1016.]

Department 2. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Henry Lambert against the Southern Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Canfield & Starbuck, for appellant. B. F. Thomas, for respondent.

HENSHAW, J. This action was for damages. Plaintiff alleged that as he, with his wagon and two horses, was traveling on the public highway, at a point upon this highway in the town of Summerland where it crosses the defendant's railroad, the defendant negligently, carelessly, and wrongfully ran a locomotive onto plaintiff's horses and wagon, and the plaintiff, killing the horses, breaking the wagon, and injuring plaintiff himself. The defense pleaded both a general denial and contributory negligence. At the close of plaintiff's evidence, and again at the close of all the evidence, defendant moved for the dismissal of the action, or for a judgment of nonsuit, which motions were denied. From the judgment which was rendered upon the verdict of the jury in favor of plaintiff, defendant appeals, and with its appeal presents a bill of exceptions.

The evidence is insufficient to sustain the verdict and judgment, and defendant's motion should have been granted. As might be expected, the strongest testimony for the plaintiff is that given by himself, and from this it appears that at the time of the trial he was a farmer 67 years old, so deaf that he could not hear ordinary conversation, and his testimony was given by question and answer in writing. He had resided about a mile and a half from the town of Summerland for about 30 years. He had driven horses all his life, and at one time was a stage driver. One of his horses he had driven over this road daily for about 14 years. The other horse he had had a few months, and had driven him over the road in a buggy, but not very often. Neither had ever been frightened at the cars, and both had been near the cars. From the town of Summerland the railroad track and the main county road approach each other as one goes eastward at an acute angle, until, at a distance of about 700 feet from the post office, the highway crosses the railroad. The obstructions to the view of one traveling upon the highway are insignificant, the depot itself being the greatest of them, and one driving toward the crossing can, looking westward, easily see the track for from one-quarter to one-half a mile. To the left of the highway, and upon the side away from the track, at a point about opposite the crossing, is a road, and to the east of this road, and still opposite the crossing, the grade is such as easily to have permitted one to drive upon it, and thus avoid crossing the track. Upon the day of the accident plaintiff had stopped at the post office to secure his mail. He left the post office and started slowly toward the railroad. While driving along he was "glancing at the headlines of his newspaper * * * for a little way—for about 25 or 30 yards perhaps." When he had thus driven about 50 or 60 yards, "all of a sudden my horses became frightened and started off. I thought it was the cars, and I tried to hold them, which I was unable to do. When I had gone about 100 yards, I looked to see where the cars were. I saw them over my right shoulder. I saw the engine; didn't see the string of cars; just saw the engine. I was within about 30 or 35 yards of the crossing. I pulled on the horses with all the strength I had, but I couldn't hold them. They were soon on the track. There was no place where I could turn off—oil derricks to one side. When the engine come near to them, my horses started off on a trot. They continued to trot until the collision with the engine. The horses became frightened about 150 yards from the crossing as near as I could tell. I didn't hear no whistle or no bell. When I saw the engine, the bell was hanging still. I think I could have heard the bell if it had rung or the whistle if it had been sounded within 80 rods of the crossing. I have heard the whistle and heard the bell lots of times when I have been riding through Summerland before the accident. I could have heard the whistle or bell anywheres between the depot and the crossing." It appears from numerous eyewitnesses to the accident that the horses were "just trotting along" at a rate of from 4 to 6 miles per hour, while the speed of the train was about 20 miles an hour.

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*Rehearing denied March 9, 1905.

From plaintiff's own testimony, then, it appears that he became aware of the approach of the train when he was some 150 yards distant from the crossing, and that his horses proceeded to trot toward the crossing, and that he could not stop them. It further appears that he thus had 450 feet of distance to travel, with places and opportunity to have turned to the left, and thus to have avoided the accident. The only reason he could assign for not doing so is the presence of oil derricks; but it is made clearly to appear, as has been said, that there was a traveled street into which he could have turned, and that the condition of the land to the left of the highway was such that he could easily and with safety have driven his horses upon it. Besides the testimony of the plaintiff, there were three eyewitnesses to the accident called by him—Mr. Dewlaney, Mr. Hickey, and Mrs. Gibson. Mr. Dewlaney saw the plaintiff first when the latter was going east and was about 500 feet west of the crossing. Plaintiff's horses were "trotting along," and it did not occur to Mr. Dewlaney that there was any likelihood of the accident until the plaintiff had gone about 350 feet further, and was within 150 feet of the crossing; that knowing that the engine was approaching, and knowing that the plaintiff was deaf, and not having seen him look around, Mr. Dewlaney stood up, saying: "There is a man who is likely to get run into." He then watched the plaintiff from that time until the collision. The plaintiff did not change the speed at which his horses were still trotting along, "a slow gait of about five or six miles an hour," and there was nothing to indicate to Mr. Dewlaney that there was any likelihood of an accident beside the two facts that he knew the plaintiff was deaf and did not see him look around up to the time when the collision took place. When quite near the track the horses apparently became frightened, but, if the plaintiff had looked around, he would have seen the train, and would have had time to stop after Mr. Dewlaney had stood up and said the plaintiff was likely to get run into. Mr. Hickey, who was with Mr. Dewlaney, stood up and looked when Mr. Dewlaney made the remark that "there is a man who was likely to get run into," and saw the plaintiff when the latter was at a distance of about 150 feet from the crossing. He was driving along the road, at the rate of 5 or 6 miles an hour, and his horses were trotting. The train was making a good deal of noise, but Mr. Hickey, as well as Mr. Dewlaney, knew that the plaintiff was deaf, and plaintiff appeared to Mr. Hickey not to know that the train was approaching. Mrs. Gibson was picking flowers with her grandchild when she heard the rumble of the train. She looked up and was startled to see the plaintiff and the engine close together, just passing east of her. The collision took place almost immediately. Although she did not estimate the rate of speed of the plaintiff's horses, and could not say whether she could have seen any attempt on his part to stop them after he had passed by, she observed, as the plaintiff passed her, that the horses were "trotting along at an ordinary rate"—not running away, but "just trotting along as horses will," and that "they did not show any signs of fright or increase their speed materially as the engine came near." Nor did she see the plaintiff make any attempt to stop them. There was nothing to prevent the plaintiff from seeing a quarter of a mile westerly up the track, or from seeing the engine, which was so close when Mrs. Gibson looked up that she saw at once that the accident was inevitable, if he did not "cross the track before the engine could catch him." If, therefore, we are to accept plaintiff's testimony alone, then it appears that for 450 feet before reaching the crossing he knew that the train was approaching, and that he did not turn his horses, which were trotting at a speed of only 5 or 6 miles an hour, aside to a place of safety, as he could easily have done. If we are, however, to take the testimony of his own witnesses, then, himself a very deaf man, he deliberately drove his team upon the crossing, without looking to see whether or not a train was approaching, at a slow pace, in broad daylight, when the track was visible to him for more than a quarter of a mile. That such conduct constitutes contributory negligence, as a matter of law, is settled beyond peradventure. Flemming v. W. P. R. R. Co., 49 Cal. 253; Glascock v. C. P. R. R. Co., 73 Cal. 137, 14 Pac. 518; Hager v. S. P. Co., 98 Cal. 309, 33 Pac. 119; Herbert v. S. P. Co., 121 Cal. 227, 53 Pac. 651; Green v. S. P. Co., 132 Cal. 254, 64 Pac. 255.

There is much testimony in the case to the effect that the bell was rung and the whistle blown; but, putting that aside and assuming that such was not the fact, yet as the only purpose was to give warning, and as plaintiff by his own testimony knew of the approach of the train when he was 450 feet from the crossing, the negligence of the defendant—if such there was—in failing to sound the bell or whistle, has no causal connection with the accident itself. Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 Pac. 480. So, too, as to the failure of the engineer to stop the train. The fireman testifies that he first saw the plaintiff when the plaintiff was about 150 feet and the engine about three times that distance from the crossing; that plaintiff was driving along at an ordinary rate of speed, about 4 miles an hour. The horses were trotting, and did not show any signs of fright, and the fireman had no idea that plaintiff was going to try and cross the track until the plaintiff was about 10 feet from the main track. As soon as he realized that plaintiff was endeavoring to cross the track, the fireman called to the engineer, and every effort was made to avoid the collision. Under this state of the evidence, there can, of course, be no effort to invoke the doctrine termed the "last chance doctrine," to the effect that in cases of contributory negligence he who has the last clear opportunity to avoid inflicting an injury is responsible, if in the exercise of ordinary care he fails to do so; for there was nothing in the approach of the plaintiff, according to the testimony of the fireman and of plaintiff's witnesses, to call for the stopping of the train. The fireman did not know that the plaintiff was deaf, and was not bound to assume that the driver of a team so approaching a crossing in broad daylight, with an unobstructed view—the team merely trotting along—would not check his horses in a place of safety.

For these reasons the judgment appealed from is reversed.

We concur: LORIGAN, J.; McFARLAND, J.

146 Cal. 196

In re McDOUGALD'S ESTATE. (Sac. 1,290.)*

(Supreme Court of California. Feb. 4, 1905.)

ESTATES — ADMINISTRATION — MORTGAGES — CLASSIFICATION BEFORE FORECLOSURE—PAROL AGREEMENTS — VALIDITY — CONSIDERATION—ADMINISTRATORS—CREDITS — TAXES — DIVIDENDS.

1. Where an administratrix held a claim secured by mortgage against the estate, and failed to list her mortgage interest, which exceeded the value of the property mortgaged, for taxation, but permitted the land to be taxed as though no mortgage existed thereon, she was not entitled to a credit for taxes paid by her as administratrix on the real estate described in the mortgage.

2. Where a mortgage provided for 10 per cent. interest, a parol agreement by which the mortgagee agreed to accept 7 per cent. if the mortgagor would pay the taxes on the property, including the interest of both mortgagor and mortgagee, was valid so far as executed, under Civ. Code, § 1698, providing that a contract in writing may be altered by a written contract, or by an executed oral agreement.

3. Where a mortgagor died leaving an insolvent estate, together with a debt secured by mortgage providing for 10 per cent. interest, such interest was reduced to 7 per cent. by Code Civ. Proc. § 1494, providing that if the estate be insolvent no greater rate of interest shall be allowed on any claim after the first publication of notice to creditors than is allowed on judgments obtained in the superior court, so that a parol agreement by the mortgagor to pay taxes on the interest of both the mortgagor and mortgagee in the property mortgaged, in consideration of the mortgagee's agreement to reduce the rate of interest to 7 per cent., was unenforceable as against the mortgagor's estate for want of consideration.

4. Code Civ. Proc. § 1648, provides that if there is any claim not due, or any contingent or disputed claim against a decedent's estate, the amount thereof, or such part as the holder would be entitled to if the claim were due, established, or absolute, must be paid into court and there remain to be paid over to the party when he becomes entitled thereto, or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. *Held*, that a matured mortgage indebtedness against an estate before foreclosure was not a contingent claim within such section, and that the court was not authorized thereunder to take testimony to ascertain the probable deficiency which would arise on foreclosure.

5. Code Civ. Proc. § 1644, provides that the preference given in section 1643 to a mortgage against a decedent's estate extends only to the "proceeds" of the property mortgaged, and that, if such proceeds are insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate. *Held*, that the word "proceeds" as so used did not include the rents of the property mortgaged accruing before sale, where the rents, issues, or profits of the property were not included in the mortgage.

6. Code Civ. Proc. § 1643, divides debts of a decedent's estate into classes, the fourth describing mortgages against deceased in the order of their date, and the fifth all other demands against the estate. Section 1644 provides that the preference to a mortgage only extends to the proceeds of the property mortgaged, and, if such proceeds are insufficient to pay the mortgage, the part remaining unsatisfied must be classified with other demands against the estate; and section 1645 declares that, if the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claims, and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid. *Held* that, where there had been no sale of property mortgaged by a decedent, the holder of the mortgage was entitled to have the claim thereunder classed as a claim of the fifth class, and to be allowed a dividend estimated on the full amount, without any deduction for the probable proceeds of a future sale of the mortgaged property.

Department 1. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Judicial accounting of Carrie B. McDougald, as administratrix of the estate of her deceased husband. From an order settling her second account as administratrix, and from an order providing for the payment of a claim held by her, secured by mortgage against the estate, she appeals. Modified.

Budd & Thompson, for appellant. Buck & Middlecoff, Minor & Washington, J. B. Webster, and C. H. Fairall, for respondent.

SHAW, J. This case presents two appeals by Carrie B. McDougald from the order settling her second account as administratrix of the estate, one taken by her as administratrix, the other as the holder of a claim secured by mortgage. The entire assets of the estate consist of the real estate covered by the mortgage held by Carrie B. McDougald, $6,822.95 received by her after her appointment as rentals of said real estate, and $500 received on a life insurance policy.

1. The principal point urged by the administratrix in her representative capacity is the action of the court in rejecting the item

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*Rehearing denied March 6, 1905.

of taxes. In her account she claimed credit for $2,129.67 paid as taxes on the real estate described in her mortgage. The court rejected this item, and charged the amount as a part of the balance on hand out of which dividends were to be paid. We think this action of the court was correct. It appears that she did not list her mortgage interest for assessment, but allowed the land to be taxed in the same manner as if there was no mortgage thereon. As holder of the mortgage interest, it was her duty to list it for taxation, and the taxes consequently levied on that interest would be her individual debt, and not the debt of the estate. The debt being greater than the value of the land, there could have been no excess on which the estate would have been taxed. The mortgage debt would therefore have covered it all. She cannot be allowed to do indirectly what she could not do directly, especially when, in her trust capacity as administratrix, she was held to the utmost good faith in dealing with the estate. Equity will regard that done which ought to have been done, and the matter must be adjusted by requiring her to bear the burden of the taxes which she should have paid, as fully as she would have borne it had she listed her mortgage interest for taxation, as she ought.

In this connection, she offered to prove a parol agreement between the deceased and Parker, the original mortgagee, at the time of the execution of the mortgage, to the effect that, if the deceased would each year pay the taxes on the entire estate in the property, including the interest of both mortgagor and mortgagee, the mortgagee would remit 3 per cent. on the 10 per cent. interest provided in the note, and would accept a payment of 7 per cent. as a full payment of the interest on the debt; that this arrangement was carried out during the lifetime of the deceased; that when she procured the mortgage to be assigned to her she immediately transferred it to the Stockton Savings Bank as collateral security for a debt she personally owed to the bank; and that thereafter she, as administratrix, and said bank had continued to act under the same arrangement in regard to taxes and interest. This was objected to on the ground that it was an oral agreement purporting to change the terms of the note and mortgage, and the objection was sustained. Doubtless, as an executory agreement to bind the parties in the future, and so far as it was unperformed, it was invalid. But it would have been valid if it had been in writing (Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423), and, so far as it had been performed, we see no reason why it was not valid as an executed parol agreement. Civ. Code, § 1698. The validity of such agreements arises from the fact that, apart from the loan of the money, there is a lawful and valuable consideration for the promise of the mortgagee to rebate the interest. The advancing of the necessary money for the benefit of the mortgagee, and the services of the mortgagor in attending at the office of the tax collector, making the payment, and procuring the receipt therefor, all of which, in the absence of such agreement, the mortgagee must do and the mortgagor is under no obligation to perform, constitute a sufficient consideration for the agreement to rebate the interest, and make the written executory agreement, or the executed oral agreement, lawful. In substance, it is but a part payment of the interest. But although the objection made may not have been well taken, the evidence was properly excluded for other reasons. The note on its face bore 10 per cent. interest. The estate being insolvent, as the court found, the holder of the mortgage claim could not charge or receive more than 7 per cent. interest thereon. Code Civ. Proc. § 1494. The reduction of the rate of interest from 10 per cent. to 7 per cent. was therefore already accomplished in this case by the law, and the estate received, and could receive, no benefit whatever from the arrangement. There being no reciprocal benefits, the administratrix as mortgagee cannot be allowed to profit personally by the arrangement. There was no error in this ruling.

2. Objection is made to the action of the court in refusing to allow the credit for $2,943.72, credited as interest on the mortgage debt held by her. This item was disallowed, and was charged to her as administratrix as a part of the balance to be distributed as dividends. The court held that the rents of the mortgaged property were not a part of the "proceeds" of the property, as that term is used in section 1644, Code Civ. Proc., but were general assets of the estate, and that the mortgage debt of the administratrix was not entitled to a preference over the general debts in the distribution of such rents. It further held that the mortgage claim could not be classed with the unsecured claims, so as to be entitled to a dividend out of the general assets estimated upon its full amount, but that as to that claim the dividends should be estimated only upon the excess of the claim over the value of the mortgaged property. Accordingly, testimony was taken, the value of the land determined, the excess of the claim was found to be $7,491.76, and upon this sum the court allowed a "contingent" dividend of $412.32, to be paid to her only in the event that she should thereafter become entitled thereto. We presume that by this the court meant that this sum should be paid to her only in the event that, upon a foreclosure sale, there should be a deficiency judgment for the amount stated as the excess of the debt over the value of the property mortgaged.

We find no statutory authority for the action of the court in endeavoring to ascertain the probable deficiency, and directing that a contingent dividend thereon be retained until the actual deficiency should be determined. It was evidently based on the following part of section 1648, Code Civ. Proc.: "If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require." The claim on the mortgage debt was due, and the amount was not disputed. If we concede that it was contingent to the extent that the amount of the "proceeds" of the property mortgaged was not ascertained, and could not be determined until there was a sale thereof, and hence that the balance that would remain after the application of such proceeds thereon was uncertain and indeterminable, still there is nothing in the statute that warrants the taking of testimony by the court to ascertain the probable deficiency, or the determination by the court of the probable deficiency in any manner. The section quoted contemplates that an amount shall be paid into court, for the benefit of such contingent claim, equal to the amount that would be payable thereon if the whole of it were established as absolute. This would require a contingent dividend on the whole claim. We do not think this is the sort of a contingent claim referred to in that section.

Section 1643, Code Civ. Proc., divides the debts of the estate into five classes, to be paid in the order there given. We are here concerned only with the fourth and fifth classes. The fourth class is described as "judgments rendered against the deceased in his lifetime, and mortgages in the order of their date," and the fifth class as "all other demands against the estate." Section 1644 provides that: "The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property is insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate." Section 1645 declares that: "If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claims; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid." The word "proceeds" as here used does not include the rents of the property accruing before the sale, at least where the rents, issues, or profits of the property are not included in the mortgage. The court, therefore, properly held that the rents were general assets of the estate, on which the mortgage was not a lien and in which it was entitled to no preference. The preference given to mortgage debts by section 1643 is by section 1644 clearly limited to the proceeds arising from the property mortgaged, either upon a foreclosure sale, or a sale by the administrator under section 1569.

We think, however, that in calculating the dividend to be paid out of the general assets, where there has been no sale of the property mortgaged, the mortgage debt must be classed as a claim of the fifth class, and allowed a dividend estimated upon the full amount of the claim, without any deduction for the probable proceeds of a future sale. As the preference of the mortgage debt is limited to the proceeds of the property, it follows that, where there are no proceeds in question, there can be no preference, and the mortgage debt, in such circumstances, ranks as an unsecured claim, and stands in the fifth class as to the general assets. The second clause of section 1644 manifestly can have no application whatever until there has been a sale. It does not have the effect of a declaration that prior to a sale the mortgage debt cannot participate in any dividend of the general assets. The effect of the three sections, properly construed, is that with respect to the proceeds of the mortgaged property the mortgage debt shall have the preference and be first paid, and that, where there are no proceeds before the court upon which such preference can operate, the claim has no preference at all, and must be classed, with other demands against the estate, as a debt of the fifth class. Otherwise it would either be unclassified entirely, or, being still classed as one of the fourth class, it would be entitled to preference by virtue of section 1645. It must belong to one or the other of these classes, and the most reasonable interpretation of the Code is to give it rank, as to general assets, as a claim of the fifth class, and entitled to share to its full amount in the dividend.

The conclusion is that the court erred in establishing a dividend only upon the supposed deficiency, and in allowing it as a contingent dividend. It was entitled to an absolute dividend to the extent of its proportion, estimated upon the whole amount of the claim, in the same manner as the other debts.

The order is affirmed as to all parts thereof, except the order declaring and allowing a dividend upon the money adjudged to be on hand. The part of the order declaring the dividend on the claims is reversed, and the cause remanded with directions to the court below to estimate and order payment of a dividend upon the mortgage debt, or any part thereof then remaining unpaid, as a claim of the fifth class.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

146 Cal. 191

In re McDOUGALD'S ESTATE. (Sac. 1,286.)*

(Supreme Court of California. Feb. 4, 1905.)

ADMINISTRATORS — SECURED CLAIMS — PRESENTATION—DESCRIPTION OF MORTGAGE—ALLOWANCE — INTERMEDIATE ACCOUNT — RES JUDICATA.

1. Under Code Civ. Proc. § 1497, providing that, if a claim against an estate is founded on a bond, bill, note, or any other instrument, a copy of the instrument must accompany the claim, where a note secured by mortgage given by deceased was assigned to the administratrix, the filing of a copy of the note with the claim was sufficient without a copy of the assignment.

2. Where a claim secured by mortgage covering all the mortgagor's real estate, filed against the mortgagor's estate, stated that the note was secured by a mortgage on real estate of the deceased, described in the inventory on file, to which reference was made for further particulars, and the date of the execution and acknowledgment of the mortgage was given, with the volume and page of the record, to which reference was also made, the claim sufficiently described the mortgage within Code Civ. Proc. § 1497, requiring that it should be sufficient to describe the mortgage or lien and refer to the date, volume, and page of its record.

3. Where a secured claim due the administratrix was indorsed by the judge of the superior court, "Allowed and approved the 14th day of March, 1899, for $23,652.30 and interest," the words "allowed and approved" must be construed to refer to the claim on which they were indorsed, and constituted a sufficient allowance of the claim as a secured claim.

4. Code Civ. Proc. § 1628, provides that within 30 days after the time for presenting claims every administrator shall render a full account of his administration, exhibiting all debts presented and allowed during the period embraced in the account. Sections 1635 and 1636 provide that, when an account is presented for settlement after due notice, any creditor or person interested may contest the same, and may object to any item not passed upon on the settlement of any previous account; and section 1637 declares that the settlement of an account and the allowance thereof by the court is conclusive against all persons in any way interested in the estate. *Held*, that where an account of an administratrix containing an allowance to her of a secured claim against the estate was approved after notice, without objection, such allowance could not be attacked by creditors on the settlement of the administratrix's final account, on the ground that the claim had been purchased by the administratrix in violation of Code Civ. Proc. § 1617.

Department 1. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Judicial accounting of Carrie B. McDougald, as administratrix of the estate of her husband. From an order allowing a claim of the administratrix against the estate, Louise E. Boggs, as executrix, a creditor of the deceased, appeals. Affirmed.

See 77 Pac. 443.

Louttit & Louttit and Buck & Middlecoff, for appellant. Budd & Thompson, for respondents.

SHAW, J. This is an appeal by Louise E. Boggs, as executrix of a creditor of deceased, from that part of the order settling the final account of Carrie B. McDougald, as administratrix of the estate, declaring that said administratrix holds a valid claim against the estate, secured by mortgage, and is entitled to a contingent dividend, out of the moneys on hand, upon the excess of the claim over the value of the mortgaged property.

The deceased died on November 17, 1898, and his widow, Carrie B. McDougald, was appointed and qualified as administratrix of his estate on December 10, 1898. The real estate was appraised at $24,000. It was mortgaged to R. B. Parker upon a mortgage executed in 1890 to secure a note of $22,000, due five years after date, upon which the principal and a considerable amount of interest remained unpaid at his death. When Mrs. McDougald qualified as administratrix the mortgage debt was about to become outlawed, and the holder of the mortgage threatened a foreclosure suit. There was no money belonging to the estate, and no means apparent from which money could be obtained. In order to prevent a foreclosure and save the property to the estate, she purchased and obtained an assignment of the mortgage and of the debt thereby secured, paying the price out of her own moneys. It is not claimed that she obtained any discount. At that time the debt had not been presented or allowed as a claim against the estate. After the assignment to her she presented it as a secured claim, and it was allowed by the judge of the superior court by indorsing thereon and signing the following statement: "Allowed and approved the 14th day of March, 1899, for $23,652.30 and interest." Thereafter she presented for settlement her first account current as administratrix of the estate, including therein a "list of claims presented and allowed," in which her claim was described as follows: "Claimant Carrie B. McDougald; amount $23,652.30 and int., date of allowance March 14, 1899." After due notice and hearing, the court made an order allowing, approving, and settling this account as rendered.

It is objected that this claim was never properly presented, because a copy of the assignment to Carrie B. McDougald is not set out therein. Section 1497, Code Civ. Proc., provides that, if a claim is founded on a "bond, bill, note, or any other instrument," a copy of the instrument must accompany the claim. A copy of the note given by the deceased and secured by the mortgage was attached to the claim. This is all that was necessary to comply with the above provision of the Code. The claim was not founded on the assignment, but on the debt of the deceased as evidenced by the note.

The same section provides that, if a claim is secured by a recorded mortgage, "it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and the page of its record." The objection is made that this claim did not properly describe the mortgage, but we think it is untenable. It was stated in the claim that the note was secured by a mortgage upon the real property of the deceased, described in the inventory on file, to which reference was made for further particulars. The date of its execution and acknowledgment was given, with the volume and page of the record where it was recorded, to which reference was also made. The mortgage covered all the real property belonging to the deceased at the time of his death, and included all the real property described in the inventory. We think this was a sufficient description of the mortgage to comply with the statute. There could be no mistake as to the particular mortgage intended to be relied upon, and the only purpose of the required description is to identify the mortgage.

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*Rehearing denied March 6, 1905.

It is also claimed that the allowance, in the form in which it was made, was equivalent to a rejection of the claim as a secured claim. The language of the indorsement does not properly bear this construction. It was allowed for the full amount stated on the face of the claim, and therefore there can be no implication that there was a rejection of any part of the claim as to the amount. The allowance did not contain any limitation or reservation whatever. The words "allowed and approved" must be taken to refer to the claim on which they were indorsed, and, as it purported on its face to be a secured claim, it must be deemed to have been allowed as a secured claim.

The principal objection to the claim is that it was purchased by the administratrix after her appointment and qualification; that this was a violation of section 1617 of the Code of Civil Procedure, declaring that "no administrator or executor shall purchase any claim against the estate he represents"; and that a sound public policy demands that she shall not be allowed to enforce the claim thus procured. It is probable that the court has some discretion with regard to questions of public policy, and there is a serious question whether such policy should be enforced with respect to a purchase of the character here presented. Its effect was to preserve to the estate for the time being the only property it possessed, with the result that the estate received the rentals which constitute the fund over which the present contest is waged. If she had not purchased the mortgage debt, but had allowed the prior holder to foreclose the mortgage, there would be no money on hand over which to maintain the contest. It does not seem just to allow the general creditors to dispute the lawfulness of a purchase which procured for them the fund in which they claim to participate, and which, if the purchase had not been made, would never have existed. But we do not find it necessary to decide this question, for we are of the opinion that the general creditors are concluded by the allowance of the claim and the subsequent order of the court settling the first account. Within 30 days after the expiration of the time for presenting claims, every executor or administrator must render a full account and report of his administration, and every account must exhibit all debts which have been presented and allowed during the period embraced in the account. Code Civ. Proc. § 1628. When an account is presented for settlement after due notice, as in this case, any creditor or person interested may contest the same, and may object to any item of charge or credit, or to any claim allowed and not passed upon on the settlement of any previous account, and may thereupon have his objection settled and determined. Code Civ. Proc. §§ 1635, 1636. The settlement of an account and the allowance thereof by the court are conclusive against all persons in any way interested in the estate. Code Civ. Proc. § 1637. One whose claim has been rejected, and who is prosecuting a suit upon it against the estate, is a person interested who may make such a contest, and who is concluded by the settlement of a previous account. The first account of the administratrix set forth her claim as one of the allowed claims against the estate. This was sufficient to notify all persons interested that the validity of this claim would be determined and established by the settlement of the account as rendered. No objection or contest was made; the account was settled, allowed, and approved as rendered, and thereupon this claim, with the others mentioned in the list, passed into the class of claims "passed upon on the settlement of a former account" (section 1636), and was conclusively established against all persons in any way interested, and its validity was not thereafter subject to attack upon the hearing of any subsequent account. A judgment or order of a court having jurisdiction is conclusive of all matters involved which might have been disputed at the hearing, although no objection was in fact made. This rule applies to the settling of accounts, the same as to any other proceeding. Estate of Grant, 131 Cal. 426, 63 Pac. 731; Estate of Bell, 142 Cal. 102, 75 Pac. 679.

There is nothing in the point that the description of the claim, as set forth in the account, did not refer to the mortgage security, nor disclose on its face the fact that the claim had been purchased by the administratrix after her appointment and qualification. The statement in the list of claims set forth in the account described the claim with such certainty that there could be no mistake concerning its identity. The claim itself was on file at the time, and it stated all the particulars as to the mortgage lien, the property covered thereby, and the precise date of the assignment. Any one interested could therefore easily obtain all necessary information upon these points from the papers on file. The statement in the account was sufficient to point out the particular claim of the administratrix as one of the allowed claims. This is all that was necessary. It is not the purpose of the law regulating the administering of estates to require in the statement of matters contained in an account as much nicety or precision or as great detail as is required in pleadings in civil actions. The settlement of the account is to be considered as an adjudication of the validity of all claims exhibited therein with sufficient certainty to identify them with accuracy, including all the incidents thereto, shown in the statement of the claim as filed, which are necessary to establish their rank. It is not necessary that the statement of claims contained in the account should aver that the claim belonged to any particular class, or that it should state the facts which show the class to which it belonged. Its class is to be determined from the nature of the claim as presented and allowed.

We find no error in the record of which the appellant can complain. Carrie B. McDougald has taken appeals from the same order, both in her representative capacity and as a creditor. The decision of the present appeal will be without prejudice to the appeals taken by Mrs. McDougald.

The parts of the order appealed from by Louise E. Boggs, executrix, are affirmed, so far as her appeal is concerned.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

(146 Cal. 203)

LOS ROBLES WATER CO. v. STONEMAN et al. (L. A. 1,319.)*

(Supreme Court of California. Feb. 4, 1905.)

WATERS — DIVERSION — INJUNCTION — PARTY PLAINTIFF—STATUTE—COVENANTS—CONSTRUCTION.

1. Code Civ. Proc. § 367, providing that an action shall be prosecuted in the name of the real party in interest, does not prevent a water company, incorporated to furnish a limited amount of water flowing from a certain tract of land for its stockholders only under a contract with the owner of the land (who had covenanted with the stockholders as her grantees to cause a given quantity of water to be conveyed to the several grantees' lands), from maintaining in its own name a suit to restrain a diversion of the water by subsequent owners of the land from which the water was to be furnished, in view of section 369, providing that a person with whom or in whose name a contract is made for the benefit of another may sue without joining with him the persons for whose benefit the action is prosecuted, and Civ. Code, § 809, providing that the owner of an estate in a dominant tenement or the occupant of such tenement may maintain an action for the enforcement of an easement attached thereto.

2. Under the direct provisions of Civ. Code, § 806, the extent of a servitude is determined by the terms of the grant; and hence, under an express covenant that a certain quantity of water should flow perpetually from the grantor's lands to the grantees' lands, and that the covenant should bind the grantor's heirs, successors in interest, and assigns of the water-bearing lands, no question arises as to whether the covenant runs with the land and binds subsequent owners of the water-bearing lands.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the Los Robles Water Company against Adele Stoneman and another. From a judgment for defendants, plaintiff appeals. Reversed.

Stephens & Stephens, for appellant. Lynn Helm, for respondents.

COOPER, C. This action was brought to restrain defendants from taking water from certain pipes, for a mandatory injunction compelling them to deliver water, and for damages. The demurrer of defendants to the amended complaint was sustained, and judgment entered in their favor. Plaintiff prosecutes this appeal, for the purpose of reviewing the ruling on the demurrer.

The facts alleged must, for the purposes of this decision, be deemed to be true. They are in substance as follows: In the year 1891, Mrs. Mary O. H. Stoneman was the owner of two tracts of land in Los Angeles county—the first being the Los Robles Rancho, consisting of 165 acres; the second being the Los Robles Park tract. The first tract was farming or orchard land, and the second tract was higher and water-bearing land. While she was so the owner she concluded to subdivide and sell the first tract, and, to aid her in so doing, to grant certain appurtenant water rights with each subdivision sold, the water to be supplied from the second tract, upon which there were more than 16½ miner's inches of water rising in and flowing thereon, which could be conducted to the first tract by means of pipes. She accordingly subdivided the first tract into lots of about 10 acres each, and sold 140 acres during the year 1891 to different purchasers, to each of whom she granted, as appurtenant to the lot conveyed, a constant flow of water equal to one inch, miner's measurement, to each ten acres, and in like proportion for larger or smaller tracks, to be taken from the said water rising in the second tract. Deeds were made by the grantor to the respective purchasers, conveying the land and water appurtenant thereto, and, after a description of the subdivision conveyed, the deeds each provided that the grantor, on or before the 1st day of February, 1892, would convey to the purchasers one acre of land for reservoir purposes; that a reservoir should be constructed upon the acre of land by the grantees; that the water for the grantees should be delivered into the one reservoir when completed. The deed, in each case, further provided that if a majority of the consumers of water should elect to incorporate for the purpose of managing and controlling the storage and distribution of the waters of said reservoir, and should so notify the consumers of water, all such consumers and grantees should be held to have agreed to incorporate for the purposes of managing and controlling the distribution of said 16½ inches of water, and should convey to the corporation their several water rights and receive certificates of stock therefor. The deeds so made by Mrs. Stoneman each contained the following covenant: "The party of the first part, for herself, her heirs, successors in interest, and assigns, further agrees to cause said * * * water to flow perpetually to said party of the second part into said reservoir to be constructed as aforesaid, his heirs and assigns, forever. * * * And the party of the first part covenants that sixteen and one-half (16½) miner's inches of water shall be forever conducted to the said reservoir from its immediate sources—either springs, tunnels or other excavations—in and by substantial pipes in all respects sufficient for such purpose, to be forever maintained throughout in good, serviceable condition by the party of the first part, her successors in interest, heirs, and assigns, and that the water shall be forever preserved pure and free from any and all contamination, which obligation shall forever apply, and bind her heirs, successors in interest, and assigns of said water-bearing land."

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*Rehearing denied March 6, 1905.

After the conveyance was made, the parties to whom the lots and appurtenant water rights were conveyed consented to, and did, incorporate; the plaintiff being the corporation so formed. After the incorporation of plaintiff, the parties who had purchased the several tracts of land, and Mrs. Stoneman, their grantor, signed, executed, acknowledged, and delivered to plaintiff a conveyance which contained a general recital of the facts, and recited the conveyance of the one acre to plaintiff for a reservoir site, and further recited that "whereas, they (the grantors) have severally acquired interests in waters, to wit, 16 569-1000 inches, each inch equivalent to a continuous flow of one-fifteenth of a cubic foot per second, rising above said reservoir on the elevated lands now or formerly of Mrs. Mary O. H. Stoneman on the Los Robles Rancho, * * * which said waters are appurtenant to those lands described in said above-mentioned maps as lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18." Then, after other recitals, the conveyance states that the grantors "severally hereby grant, bargain, sell, and convey unto the party of the second part, each, all of their several interests in and to said waters and in and to all rights of way and main distributing pipe lines used and held in connection with said reservoir site and said waters, with power upon the party of the second part: * * * To manage and control the waterworks and pipes in connection with said reservoir, and for the distribution of said waters. Said waters to be taken, held, and owned by the party of the second part in trust for the several owners of said lots of land, the parties of the first part, and for distribution among them in proportion to their several interests in said waters. To distribute said waters to the several owners of said lands and their grantees."

Thereupon the plaintiff issued shares of stock to the several purchasers in proportion to the amount of water owned by each appurtenant to his land, who have ever since owned and claimed the said stock, and recognized the title of plaintiff to the water and rights conveyed to it by said deed. The plaintiff thereupon went into possession, and continuously thereafter, until interrupted by defendants, for a period of more than five years, continued in the peaceable possession of said waters and property, claiming the same adversely to all the world, and distributing the same to its said stockholders as per their agreements and rights. At the time of the conveyance to plaintiff, Mrs. Stoneman still owned 25 acres of orchard land of the first tract and had shares of stock issued to her on the basis of 2½ inches of water.

The plaintiff was really created and came into being, for the purposes and as part of the scheme of Mrs. Stoneman, in connection with the sale of the lots to the several purchasers. It was the agent or instrument to whom the reservoir site was conveyed, and through whom all the parties, including Mrs. Stoneman, were to receive the water after Mrs. Stoneman had delivered it to the reservoir. On May 19, 1897, Mrs. Stoneman conveyed the second tract, or water-bearing lands, and the 25 acres of the first tract, or orchard lands, to defendant Purcell. In May, 1898, defendant Purcell conveyed the second tract to Adele Stoneman, both deeds being made without consideration. The 25 acres of the first tract, so conveyed by Mrs. Stoneman to Purcell, has received its share of water and has been irrigated by plaintiff under the general plan and system.

Prior to the execution of the deed to plaintiff Mrs. Stoneman had constructed a pipe line from the second tract down to the reservoir, and caused said 16½ inches of water to be delivered to plaintiff in its said reservoir, as she had covenanted to do. All this had been done, and the several conveyances made to the purchasers of the lots in the first tract, before the conveyances were made to defendants, and they took with full knowledge of the rights of all parties to said waters. Upon the execution of the conveyance to defendants, they entered into possession of the second tract of land, and of the pipe line leading therefrom, and diverted from the pipe line into which the waters had been delivered to plaintiff about two inches of the 16½ inches of water, and ever since have diverted, and claim the right to take and divert for their own use, about two inches of said waters, which under the deeds and contract should flow into said pipe and into plaintiff's reservoir. Although requested, defendants refused and continue to refuse to turn the said two inches of water into the pipe line, or to permit plaintiff to do so, and they will, unless restrained, continue to divert said water from said pipe line and from said reservoir to the great injury of plaintiff. The court below held that plaintiff was not the real party in interest, and that it had no beneficial interest in the subject-matter of the action.

Defendants' counsel argues, in support of the ruling, that the plaintiff by the conveyance to it did not acquire "any interest in said waters sufficient to enable it to bring an action for their diversion or any interference therewith." We may assume, for the purposes of this discussion, that the defendants, taking without consideration, and with full knowledge of the rights of all parties, are in no better position than Mrs. Stoneman would be if she had not made the conveyance to defendants and had diverted the water as these defendants have done. After receiving the money of the parties to whom she conveyed lots, in consideration of her agreement to deliver 16½ inches of water to plaintiff for them, and after inducing them to incorporate and expend their money in building a reservoir and a system of pipes for the distribution of the water, and after conveying the water to plaintiff, she will not be allowed to divert the water, and say that the plaintiff has not sufficient legal title to maintain the action. She joined in the conveyance of the legal title to plaintiff. She will not now be allowed to say that plaintiff has no interest in receiving what was legally conveyed to it. Plaintiff is, as all corporations are, the artificial person, representing the shareholders. It acts for the shareholders, and its property is the property of those who hold the certificates of stock. It cannot live in houses, wear clothes, ride in carriages, or eat the fruit produced on the lands; but it can, under our laws, sue and be sued and protect the property rightfully conveyed to it. The purchasers of the lots from Mrs. Stoneman agreed among themselves and with her to create plaintiff. They did this so as to have a common reservoir and a common system of pipes, instead of having many reservoirs and many pipe lines. Mrs. Stoneman joined in the conveyance, and conveyed the reservoir site as an inducement to the parties to purchase her land. It is true that the water made appurtenant to each lot or parcel of land is still appurtenant to such lot or parcel, and that the owner of the lot or parcel would be the one injured by a diversion of the water or any part of the water to which such lot is entitled. But for this reason it will not be held that each separate owner of the 18 lots must bring a separate action. It might, in such case, be very difficult to show just how much water was diverted from, and how much injury was done to, each owner of the lot. It is not difficult to hold that plaintiff is entitled to the two inches of water that defendants' grantor conveyed to it. If we should hold that Mrs. Stoneman or her successors must deliver the amount of water she agreed to deliver to the artificial person to whom she agreed to deliver it, the parties entitled to it can determine their several rights, without allowing defendants to cause vexation and delay because the plaintiff does not claim the water for itself. It is the duty of a party making a lawful contract to live up to it. It is not the business of such party to raise the question as to the person or persons to be benefited by the result of the contract being performed. If the plaintiffs were an independent artificial person, having no relation with the parties by and through whom it was created, and held no property belonging to any of the parties to the transaction leading up to its incorporation, the question would be quite different. But it was created for the very purpose of carrying out the agreements of the parties. In such case a court of equity will reach out beyond the form and shadow, and grasp the substance. It will endeavor to aid the parties in carrying out their contract, and in enforcing their respective rights under them, rather than to lend its assistance to defeat such contracts by imaginary obstacles. In this case a judgment in favor of plaintiff would protect the defendants from further suits by the owners of the lots as to the same matter. This is all that defendants are entitled to, or that they have a right to expect. The statute provides that an action shall be prosecuted in the name of the real party in interest. Code Civ. Proc. § 367. It also provides that a person with whom, or in whose name, a contract is made for the benefit of another, may sue without joining with him the persons for whose benefit the action is prosecuted. Code Civ. Proc. § 369. The contract in this case was made by Mrs. Stoneman with plaintiff, for the benefit of the parties to whom Mrs. Stoneman conveyed the several lots. It provided that plaintiff should "distribute said water to the several owners of said lands and their grantees."

In speaking of the meaning and object of the Code in requiring that an action shall be prosecuted in the name of the real party in interest, this court said, in Giselman v. Starr, 106 Cal. 657, 40 Pac. 10: "It is to save the defendant against whom a judgment may be obtained from further harassment or vexation at the hands of other claimants to the same demand. It is to prevent a claimant from making a simulated transfer, and thus defeating any just counterclaim or set-off which defendant would have to the demand if pressed by the real owner. But where the plaintiff shows such a title as that a judgment upon it, satisfied by defendant, will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defense he could make against the real owner, then there is an end of the defendant's concern, and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest." It is evident that by the above test the judgment in this case will protect defendants, or bar them, as the case may be. The several parties to whom the water was conveyed joined in the agreements, and required that the water be delivered to the plaintiff in the reservoir, "to be taken, held and owned" by the plaintiff for the several owners of the lots. Nor was the conveyance to plaintiff void as an express trust in real estate. The conveyance states that the waters are to be held and owned in trust for the several owners of the lots, but this would be true if it had not been so stated in the deed. The corporation, as matter of law, would hold the water and all other property in trust for its stockholders. The stock, which carries the right to the use of the water, is transferable, and the land is alienable. The property is not tied up and withheld from the channels of trade, and hence the kind of conveyance here is not among the evils prohibited by the provision of the Code upon express trusts as to real estate. The water, when delivered into the plaintiff's reservoir from the lands of the grantor, may be regarded as personal property. We know of no law prohibiting the plaintiff from holding the title to such property in trust for the purposes of distribution. In fact, the statement that the property is held in trust is in substance but a statement as to the relations between the plaintiff and its stockholders.

It is not necessary, in this case, to decide the question as to whether or not the covenants run with the land and are binding upon the present owners. Mrs. Stoneman, while she owned the water-bearing lands, conveyed the 16½ inches of water as an incumbrance or charge upon the land. She expressly covenanted that the water should flow perpetually, and that the covenant in each case should "bind her heirs, successors in interest, and assigns of said water-bearing lands." The extent of a servitude is determined by the terms of a grant or the nature of the enjoyment by which it is acquired. Civ. Code, § 806. The owner of an estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto. Civ. Code, § 809. If the covenant had been to furnish the water to a third party, or to do something independent of the grantor and grantee, and not connected with the thing transferred, then it would be different; but, in this case, to say that the covenant was for the benefit of the reservoir, or for the benefit of a third party, would be to ignore the plain, common-sense, practical view of the covenant and contract made by the parties.

We advise that the judgment be reversed, with directions to the court below to overrule the demurrer.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to overrule the demurrer: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

146 Cal. 225

NOBLE v. GARDEN et al. (Sac. 1,304.)*

(Supreme Court of California. Feb. 7, 1905.)

GIFTS CAUSA MORTIS—STATUTE—WILLS.

1. Where assignments of certificates of stock in a building and loan association were filled out by direction of the owner with the intention to make a gift thereof to the assignees, and the secretary of the association was given possession of the certificates by the owner, and told to hold them until the owner's impending death, and then deliver them to the assignees, the transaction was not a gift causa mortis, under Civ. Code, art. 3, § 1146 et seq., providing that a verbal gift is not valid unless there is an actual or symbolical delivery of the thing to the donee, if capable of delivery.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, §§ 122–132, 134.]

2. The transaction was not a testamentary disposition of the property under the Code defining the several kinds of wills that may be made.

Commissioners' Decision. Department 1. Appeal from Superior Court, San Joaquin County; Frank K. Smith, Judge.

Action by Arthur M. Noble, as administrator of the estate of Deborah H. Lee, deceased, against Clara D. L. Garden and others. Judgment for defendants, and plaintiff appeals. Reversed.

Plummer & Dunlap (Woods & Levinsky and Sheldon G. Kellogg, of counsel), for appellant. Nicol & Orr and Budd & Thompson, for respondents.

COOPER, C. This action was brought to obtain a decree that 29 shares of the capital stock of the San Joaquin Valley Building & Loan Association is the property of the estate of Deborah H. Lee, deceased. Findings were filed, upon which judgment was entered for defendants. This appeal is from the judgment on the judgment roll and a bill of exceptions.

The question is as to whether or not the title to the property in controversy passed by a gift causa mortis during the last illness of deceased. The facts are substantially as follows: In October, 1892, deceased was ill, suffering from a paralytic stroke, and under the care of a nurse and physician. She sent for Arthur M. Noble, told him that she had about $15,000 in money, and wanted his advice as to what was best "for her to do so as to produce her some income, and still have control of it while she lived." Noble advised her to take stock in the San Joaquin Valley Building & Loan Association, a corporation, of which he was secretary; that the stock would pay dividends, and that she could draw the principal, or any part of it, at any time she pleased. She said to Noble, "Suppose I am sick a long time, and want to use more money, how can I get the money?" Noble explained to her that the money would be represented by the different certificates in different denominations, and that she could surrender any certificate at any time and get the money. She replied: "I want to be sure that this does not go out of my control. I have bills to pay and expenses to meet, and I want money available for that purpose." Noble told her that it would be under the conditions desired by her; that the by-laws of the association provide that the money represented by the certificates can be withdrawn at any time, but that she would lose the interest since the last dividend was paid, in case she desired the money before a dividend became due. Deceased told Noble to issue the certificates in her name, and they were so issued; 19 in all. She also gave Noble a list of persons to whom she wanted the certificates assigned. Noble prepared the certificates and assignments as requested, and delivered them to deceased, who kept them a few days, and again sent for Noble, and gave him the certificates, with the remark: "I want you to take these certificates, and keep them in your safe, and when anything happens to me, if I should pass away, whatever is left from these certificates, deliver them to the people to whom they have been assigned." Among the certificates were Nos. 467, 468, and 481, being those in controversy; 481 being for 25 shares of the capital stock, and 467 and 468 for 10 shares each. On the back of certificate 481 was the following writing: "For valuable consideration I do hereby transfer and set over unto Clara D. L. Garden 25 shares of the stock of the San Joaquin Valley Building and Loan Association standing in my name as per the books of the corporation. Certificate No. 481, issued October 17, 1902. Witness my hand this 17th day of October, 1902"—the same being duly signed by deceased, and witnessed. The certificate also contained the clause: "No transfer shall be valid unless the passbook of the shareholder transferring is also surrendered, and the association is not bound except for the value of the shares as shown by the passbook, of even number with the certificate." The assignments of Nos. 467 and 468 were in the same form, except one of these was assigned to Helen L. Garden and the other to David L. Garden. The passbook was delivered to Noble, and thereafter remained in his possession. In the early part of February, 1903, Noble took all the certificates, and went to see deceased, who was still bedridden, and rapidly failing. He then, at her request, paid her the accrued dividends on the entire stock, $159, and she surrendered and had canceled two of the certificates, one for $100 and the other for $1,000, and received the money therefor. She handed the remaining certificates back to Noble, and asked him to keep them safely for her and in case of her death to deliver them to the persons to whom they were respectively assigned. On March 12, 1903, deceased died, without having revoked said assignments, or any of them. The certificates were then in the safe in the possession of Noble, who afterwards delivered them to the parties named in the respective assignments.

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*Rehearing denied March 9, 1905.

Gifts donatio mortis causa had their origin in the civil law, and were adopted with slight modifications into the common law. Ward v. Turner, 2 Ves. Sr. 431. Justinian defines a donatio mortis causa as "that which is made to meet the case of death, as where anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but, if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given." It was much doubted by the early jurists whether such disposition of property should be considered as a gift or as a legacy. In some respects it is similar to a legacy. A legacy is always given in view of the possible death of the donor, and so must a gift causa mortis be given; but in the former case the donor need not be sick and in present peril of death, while in case of the latter it must be given in anticipation of a speedy death from a present sickness or impending peril. In either case the absolute title to the property does not become vested in the donee, and in either case the gift or legacy may be revoked at any time before the death of the donor. Thornton on Gifts, § 20, and cases cited. It is there said: "But in a gift causa mortis a written instrument is not necessary. It may be, and usually is, made by parol; and the possession of the thing given must be absolutely delivered to the donee before the death of the donor and the donee. * * * The most characteristic mark of distinction between a legacy and such a gift is the change of possession. From the nature of the donatio, it is apparent that the infallible test which must distinguish it from a testamentary gift is delivery, a change of dominion in præsenti. Without this there is really nothing to distinguish it from an ordinary testamentary bequest." In the early case of Ward v. Turner, supra, it was held that an actual delivery is indispensable to vest the property, if the subject-matter is capable of delivery. The Lord Chancellor traces the rule in its early stages, and concludes: "Therefore, from the authority of Swinburne and all these cases the consequence is that by the civil law, as received and allowed in England, tradition or delivery is necessary to make a good donation mortis causa." In Keniston v. Sceva, 54 N. H. 36, the court said: "The essential requisites of a valid gift causa mortis are well known and perfectly understood. They have in no respect changed since they were established and declared by the civil law, except in this particular: that under the civil law delivery of the property was not absolutely essential to the validity of the gift—an element which, in our law, cannot be dispensed with. Sanders' Justinian, 228, 229; 1 Williams on Executors and Administrators, pt. 2, B 2, c. 2, § 4, p. 544; 1 Story's Equity Jur. § 607a; Smith v. Kittridge, 21 Vt. 244." In Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, the question is elaborately discussed, and the authorities collected. The Supreme Court of the United States there said: "If the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will. * * * But there must be delivery of possession. The contract must have been executed. The thing given must be put into the hands of the donee, or placed within his power by delivery of the means of obtaining it. * * * Without delivery the transaction is not valid as an executed gift; and without consideration it is not valid as a contract to be executed. The decision in Wight v. Wight was founded on a supposed distinction between a gift inter vivos and a donatio mortis causa. But there appears to be no such distinction. A delivery of possession is indispensable in either case. * * * A delivery which does not confer upon the donee the present right to reduce the fund into possession, by enforcing the obligation according to its terms, will not suffice. A delivery in terms which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift." This court has laid down the same rule in the late case of Pullen v. Placer County Bank, 138 Cal. 170, 71 Pac. 83, 94 Am. St. Rep. 19, where it is said: "A gift vests the donee with the absolute property in the thing given, and it is no longer subject to the control of the donor. If, on the other hand, the thing given remains under the control of the donor, or (except in case of a gift causa mortis) is subject to his revocation, his gift is not complete. There is no difference, however, in this particular between a gift inter vivos and a gift causa mortis. In either case it is not complete unless there is an actual or symbolic delivery to the donee of the thing to be given." Our Code, in article 3 (Civ. Code, § 1146 et seq.), provides certain rules as to gifts inter vivos and causa mortis, and that "a verbal gift is not valid unless the means of obtaining possession and control of the thing given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee." See, further, Anderson's Dic. of the Law, tit. "Donatio Mortis Causa"; Thornton on Gifts, § 21 et seq.; Harris v. Clark, 3 N. Y. 93, 51 Am. Dec. 352; Bedell v. Carll, 33 N. Y. 585; Ruiz v. Dow, 113 Cal. 497, 45 Pac. 867; Calkins v. Equitable B. & L. Ass'n, 126 Cal. 534, 59 Pac. 30.

We do not think there was any delivery of the certificates of shares of stock made in the lifetime of the deceased. She retained control and dominion of them, and expressly stated to Noble that she wanted to be sure that the property did not go out of her control. He told her it should not. As her agent he kept the certificates, and brought them to her when she had two of them canceled, and received $1,100 for them. She expressed to Noble her intention when she said: "If I should pass away, whatever is left from these certificates deliver them to the people to whom they have been assigned." The title certainly did not vest in the parties to whom the assignments were made, because it was expressly stated that it should remain in deceased. If the title remained in deceased, the transaction shows only an intention to make a gift. By the terms, understanding, and intention of deceased, the gift was not to take effect until her death. In such case the disposal is testamentary, and not a gift. Hart v. Ketchum, 121 Cal. 429, 53 Pac. 931. However much we may desire to carry out the intentions of deceased, we cannot do so in this case, because the effect would be to hold valid an oral testamentary disposition of her property. The Code has provided the kinds of wills that may be made and the essential requisite of each kind. The oral directions to Noble by deceased did not constitute any one of the kinds of wills authorized by the Codes.

It follows that the judgment should be reversed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment is reversed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

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146 Cal. 237

GAY v. GAY. (L. A. 1,596.)

(Supreme Court of California. Feb. 7, 1905.)

DIVORCE — ALIMONY PENDING APPEAL — GOOD FAITH AND MERIT OF APPEAL—DETERMINATION — MOTIONS — RES JUDICATA—ALLOWANCE TO WIFE FOR EXPENSES ALREADY INCURRED.

1. The court has power to require a husband to pay alimony to the wife pending her appeal from a judgment granting him a divorce.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 625, 641.]

2. The granting of alimony pending a wife's appeal from a judgment granting the husband a divorce is within the discretion of the trial court,

and its action will not be interfered with unless clearly abused.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 770.]

3. The question whether a wife's appeal from a judgment granting the husband a divorce is meritorious, so as to justify the allowance of alimony pending the appeal, is to be determined from the entire showing made on the hearing, so that the court may consider the wife's affidavit and the bill of exceptions served on the motion for a new trial.

4. Where, on motion by a wife for alimony pending her appeal from a judgment granting a divorce to her husband, she filed an affidavit stating that the appeal was taken in good faith and on the advice of counsel that she had good grounds for appeal, and also filed notice of intention to move for a new trial, and served a bill of exceptions for use on this motion, there was a sufficient showing that the appeal was in good faith and meritorious to justify the trial court in granting the wife alimony pending the appeal.

5. On appeal from an order granting a wife alimony pending appeal from a judgment granting her husband a divorce, the Supreme Court will, in determining whether the appeal was taken in good faith, take judicial notice of mandamus proceedings before it by appellant to compel the trial judge to settle a bill of exceptions.

6. Where, after a judgment of divorce in favor of the husband, the wife's motion for alimony pending an appeal which she alleged she intended to take was denied, this order was not res judicata preventing the granting of the motion on its renewal after an appeal had been perfected.

7. In an action for divorce an allowance may be granted the wife for the payment of expenses already incurred by her, if such an allowance is necessary to enable her to further prosecute or defend her case.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 616.]

8. On suit by a wife for divorce she was granted $250 per month as alimony pendente lite, and on judgment granting the husband a divorce on his cross-complaint this order was revoked. On application by the wife for alimony pending appeal, the court granted her $100 per month, the order also reciting that, as she had received no alimony for three months, the payments should date from three months before the order and the husband immediately pay her $300. *Held*, that it was a reasonable inference from the order that the allowance of $300 was made in order to enable the wife to further carry on her case.

In Bank. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Lucile D. Gay against John H. Gay, in which defendant was granted a divorce on his cross-complaint. From an order granting plaintiff alimony pending her appeal from the judgment, defendant appeals. Affirmed.

L. L. Boone and Oscar A. Trippet, for appellant. Valentine & Newby and Victor E. Shaw, for respondent.

LORIGAN, J. This is an appeal from an order, made after judgment rendered in favor of defendant, requiring him to pay plaintiff certain amounts of money for her maintenance pending her appeal in the action to this court. The action was commenced by plaintiff to obtain a divorce on the ground of extreme cruelty. Defendant answered denying the allegations of the complaint, and filed a cross-complaint asking that he be granted a divorce from plaintiff upon similar grounds. Pending the trial of the cause the court made an order requiring defendant to pay plaintiff $250 per month for her maintenance, and, the cause having been subsequently tried, judgment was entered denying plaintiff's application for a divorce, and an interlocutory judgment was rendered in favor of the defendant, declaring him entitled to a divorce upon his cross-complaint, and in such interlocutory judgment, among other things, it was decreed that the order theretofore made requiring defendant to pay alimony of $250 per month to plaintiff be vacated and set aside. This judgment was entered October 29, 1903. On January 8, 1904, plaintiff applied to the lower court for an order requiring defendant to pay for her maintenance pending an appeal in the action, which she represented she intended to take, but which had not actually been taken. This motion was denied, without prejudice to its renewal. Thereafter plaintiff filed and served her notice of appeal from the judgment, together with an undertaking on appeal, and on January 16, 1904, renewed her application for an order for maintenance pending the appeal. Upon the hearing, in addition to other evidence presented upon the motion, was the affidavit of plaintiff, which, aside from showing her indigent circumstances, stated (which was not denied) that she had on the 3d of December, 1903, filed a notice of intention to move for a new trial in said action; that within the time allowed by law and the extension granted by the court, and on January 11, 1904, she had served her bill of exceptions and filed affidavits to be used on motion for a new trial, but that said bill of exceptions had not then been settled, and said motion for a new trial had not been then heard; that she had appealed from the judgment and interlocutory decree in good faith, and intended to prosecute the same with diligence in this court; and that she was advised by her attorneys that she had good and sufficient grounds for such appeal. Thereafter the court made an order directing the defendant to pay plaintiff for her maintenance, pending the appeal, $100 on February 15, 1904, and $100 a month on the 15th of each succeeding month until further order of the court, and then further recited and provided that, "it appearing to the court that plaintiff has received no alimony from the defendant since the 15th day of October, 1903, under the order of this court dated December 11, 1902, or otherwise, it is ordered that said payments of $100 a month shall date from the 15th day of November, 1903, and the said defendant is ordered to pay to the said plaintiff for her support and maintenance the sum of $300 on or before the 1st day of February, 1904, being the amounts due under the terms of this order for the period from November 15, 1903, to February, 1904." This order was made January 29, 1904, and this appeal is taken from the whole thereof.

The right of the court, pending an appeal, to require the husband to pay the wife such an amount as may be necessary for her support during that period, is beyond question. Bohnert v. Bohnert, 91 Cal. 431, 27 Pac. 732, and cases cited therein. Whether alimony pending such appeal shall be granted is a matter resting in the sound discretion of the court, and its action relative to an application therefor will not be disturbed by this court, save when it appears that such discretion has been clearly abused. We find nothing in the record which would warrant us in disturbing the order upon any of the grounds suggested by appellant, the most pertinent of which will be referred to.

It is insisted that the record does not disclose that the appeal from the judgment was taken in good faith, or that it has any merit. We think it does. Counsel is mistaken in his view that this question of good faith, or merit, is to be determined solely from an inspection of the judgment roll. It is to be determined from the showing made upon the hearing in the lower court, and upon which the order was based. The affidavit of respondent states that her appeal was taken in good faith, and upon the advice of her attorney that she had good grounds for appeal from the judgment. Her appeal from the judgment is not necessarily to be heard upon the judgment roll alone. Her affidavit shows that she had filed a notice of intention to move for a new trial, and in support of it had prepared and served a bill of exceptions and filed affidavits. Upon the appeal from the judgment she will be entitled to use the bill of exceptions settled for use on the motion for a new trial, if she so desires. Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Vinson v. Los Angeles Pacific Railroad Company, 141 Cal. 153, 74 Pac. 757. The lower court had a right to take all these matters into consideration in determining the question of good faith and merit. The respondent was not required to demonstrate that her appeal will be successful; she was only required to show to the satisfaction of the lower court that the appeal was taken in the belief, and upon the advice of her attorneys, that she had good grounds to expect a reversal upon all the record which she would be entitled to present to this court upon such appeal. The fact that the judge of the lower court before whom the case was tried, and who was therefore fully advised of all the proceedings therein, awarded her alimony, is some evidence that he believed there was merit in her appeal, and that it was being taken in good faith. If he believed otherwise, he would have denied the motion. In Bohnert v. Bohnert, supra, there was not as strong a showing, either as to good faith or a meritorious appeal, as appears in the case at bar, and yet in that case it was held that the record disclosed nothing to justify this court in disturbing the discretion in awarding alimony, pending the appeal, exercised by the trial court in that case, and, in our judgment, there is less warrant for doing so in the case at bar.

And, in passing, it may be said that this court will take judicial notice of proceedings had before us in this case which show that respondent has endeavored, in the apparent good faith with which the lower court found she was actuated in taking her appeal, to have her bill of exceptions settled to be used for all purposes for which it would be available to her, even to the extent of applying for and obtaining a writ of mandate from this court compelling the judge of the lower court who tried the case, and before whom the matter of settling the bill was pending, and who had refused to do so, to proceed to settle it. Gay v. Torrance, 143 Cal. 14, 76 Pac. 717. And other proceedings in this court bearing generally upon the same subject: Gay v. Torrance, 143 Cal. 169, 76 Pac. 973; Gay v. Torrance (Cal.) 78 Pac. 540.

It is contended, that the court was precluded from making the order appealed from because of the order of January 8, 1904, denying the application for alimony previously made; that the matter was res adjudicata. The doctrine of res adjudicata has no application to motions in a pending action, nor is it of moment that in denying the former application the court did so without prejudice to a renewal of the motion "in case a motion for a new trial is made and denied by this court." The court did not thereby preclude itself from entertaining a motion, subsequently made, before the disposition of the motion for a new trial, if it thought proper to do so. A renewal of the motion, supported by no additional evidence, might have afforded sufficient reason for the refusal of the court to again entertain it. But where a motion is renewed, based upon new evidence, it is within the discretion of the court to entertain it. When the application, which was denied on January 8, 1904, was made, no appeal from the judgment had been perfected by plaintiff. The subsequent motion, upon which the order in question is based, was made after such appeal was perfected, and the bill of exceptions on motion for a new trial served and the affidavits filed. This latter motion was made under a new state of facts, which in the judgment of the court warranted it in again entertaining the motion, and it had the discretion to do so. Johnson v. Brown, 115 Cal. 697, 47 Pac. 686.

It is further insisted by appellant that the court erred in making an allowance of $300 to respondent; that such an allowance was in the nature of a reimbursement for the cost of her past support; and that, under the provisions of section 137 of the Civil Code, the court was only authorized to make an allowance for future support. We are cited to Loveren v. Loveren, 100 Cal. 494, 35

Pac. 87, as supporting this view. The appeal in that case, however, involved the validity of an order of the lower court directing the defendant, on motion for that purpose, to repay plaintiff certain costs and expenses of the action, which she had incurred and paid. The order was reversed by this court, but the reversal was based upon the fact that the expenses for which she sought reimbursement had been actually paid with means derived from her separate estate or upon her own credit. But, in disposing of the matter, the court further said: "Such an allowance can only be granted as to expenses necessary to be incurred in the future prosecution or defense of the action, and cannot be made for the payment of past expenses, except where such payment is necessary to be made in order to enable the wife to further prosecute or defend her case."

If, then, it be conceded that, by parity of reasoning, the rule laid down in Loveren v. Loveren with reference to reimbursement for costs and expenses of the wife in an action of divorce should apply to an application by the wife for support and maintenance, still, in the case cited, the rule that payments for past expenses shall not be allowed is not absolute, but is subject to the qualification that such an order may be made whenever it appears that such payment is necessary to enable the wife to further prosecute or defend her case. And the same qualification to the rule should apply to applications by the wife for support. If it should appear to the court that it was necessary, in order to insure the support of the wife upon the amount to be paid to her periodically in the future, that existing wants or expenses incurred by her should be provided for, the court, within the qualification announced above, would have the right to do so.

And we think it is a fair and reasonable inference to be deduced from the terms of the order in question that the court deemed it necessary to make provision for the payment immediately (within three days after the order) of a lump sum of $300, in order that the respondent might be placed in a situation so that in the future she would be enabled to live upon the allowance provided to be paid her. This application was made in the same court and before the same judge who had tried the main cause, and who was familiar with all the facts and circumstances relative to the parties, and he, no doubt, took into consideration the fact that the court had previously judicially decided that $250 per month was a reasonable amount to be paid respondent for her support; that this order had been expressly vacated in the judgment; that in the interim between the entry of the judgment and the making of the present order the respondent was in indigent circumstances, and depending upon the charity of her relatives; that, necessarily, being without means, she must have been restricted in supplying herself with many things suitable to her condition in life—apparel and such incidentals as were necessary to her comfortable support—or that, if these things were supplied, they must have been obtained upon credit asked and extended on the faith of a subsequent allowance to be made by the court to meet them; that under this state of circumstances it would be only proper for the court to make an immediate allowance in gross, adequate to meet present actual wants arising therefrom, or to wipe out her indebtedness and restore her credit, or for both purposes. By doing this, in the first instance, the court realized that it would relieve her from embarrassment through existing wants or present indebtedness, obviate the necessity of devoting any part of the future allowance to pay such indebtedness, and so enable her to live in the future upon the allowances provided for that purpose, and, in addition to this, to provide her with means for her support from the date of the order (January 29th) to February 15th, when payment of her future monthly allowance was, by its terms, then to commence. While it is true that the terms of the order recite that respondent had received no alimony since October (which was a payment under the old order up to November 15, 1903), and that payment of $100 per month should date from November 15th, we are satisfied that this was but a recital of a reason, and the specification of a monthly amount which the court deemed should be taken as the basis for making the substantive part of the order awarding a gross amount to provide for her present wants and necessities, in order to insure her proper support in the future from the payment of the future allowances. When we take into consideration that the defendant is the owner of property of the value of $400,000, and in receipt of a monthly income of $550, the allowance to respondent of $100 per month is quite reasonable, and was doubtless placed at that figure because the court, having provided for her relief from present embarrassment by the award of $300, considered that, so relieved, she would in the future be able to support herself on her moderate monthly allowance.

Some point is made upon the rulings of the court relative to the admission and rejection of evidence upon the hearing of the motion, which we think untenable and requiring no discussion.

We find nothing in the record which would warrant a reversal of the order, and it is therefore affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.; SHAW, J.

146 Cal. 219

MIDDLETON v. ARASTRAVILLE MIN. CO. et al. (Sac. 1,093.)

(Supreme Court of California. Feb. 7, 1905.)

CORPORATIONS — MORTGAGE — VALIDITY—STATUTES—CONSTRUCTION — RATIFICATION — EVIDENCE—SUFFICIENCY — MECHANICS' LIENS—PRIORITIES.

1. Under Civ. Code, § 305, providing that corporate powers must be exercised by a board of directors "to be elected" from among the holders of the stock of the corporation, a mortgage executed by a corporation's president and secretary, in pursuance of a resolution of its board of directors who were named in the articles of incorporation as its board of directors for the first year is valid.

2. The "stock and transfer book," which, under Civ. Code, § 378, is required to be kept by corporations, is the criterion, under section 312, for determining the amount of stock held by any person, and for which he is entitled to cast a vote for any purpose at a stockholders' meeting; and hence the statement by the secretary, in his record of a stockholders' meeting, of the amount of stock held by a stockholder, made under section 377, requiring a record to be kept by corporations of every act done or ordered to be done, and of who were present and who absent at any meeting, must yield to the evidence derived from the "stock and transfer book."

3. The testimony of a stockholder as to the number of shares held by him at the time of an annual meeting of stockholders of a corporation, though subject to be overcome by the production of the stockbook required by Civ. Code, § 378, to be kept by corporations, must, in the absence of evidence therefrom, prevail over the unsupported recital of the secretary of the corporation in his minutes of the meeting made under section 377, requiring a record to be kept by corporations of every act done or ordered to be done, and who were present and who absent at any meeting.

4. In a mortgage foreclosure suit against a corporation, evidence examined, and *held* sufficient to show ratification by the stockholders of the mortgage on which the foreclosure was based.

5. The stockholders of a corporation do not hold a fiduciary relation to each other by which one is precluded from voting at a stockholders' meeting on a question in which he has an individual interest adverse to any of the other stockholders.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 763.]

6. Under St. 1897, p. 96, c. 92, providing for attaching the certificate of the secretary to mortgages on the property of a corporation, the evidence of a ratification by the stockholders is not required to be attached to a mortgage of a corporation to give it validity, the ratification being complete on the adoption of a resolution therefor.

7. Where a mortgagee of a mining corporation's property was the general manager of the corporation while certain persons performed labor on the mining ground, and such labor was performed with the knowledge of such mortgagee, or even at his request, the lien of his mortgage, which was a matter of public record long prior to the time when the services were rendered, was not postponed to the liens acquired by virtue of such labor.

Commissioner's Decision. Department 1. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Jonathan Middleton against the Arastraville Mining Company and others. From a judgment for plaintiff, defendants other than the mining company appeal. Affirmed.

J. B. Curtin, J. P. O'Brien, and Chas. E. Dedrick, for appellants. F. W. Street, for respondent.

HARRISON, C. Action for the foreclosure of a mortgage upon certain mining property, executed to the plaintiff by the defendant corporation. The other defendants claim an interest in the property by virtue of certain mechanics' liens for labor performed upon the mining ground subsequent to the execution and recordation of the mortgage. The corporation suffered default, and judgment was rendered in favor of the plaintiff for the satisfaction of his claim, and for the satisfaction of the claims of the defendants out of the surplus. The latter have appealed from that portion of the judgment which postpones their liens to that of the plaintiff, and urge in support of their appeal that there was no valid execution of the plaintiff's mortgage; that its execution was not ratified by the holders of two-thirds of the capital stock of the corporation; and that the plaintiff is estopped from claiming a priority for his lien over their liens.

These propositions involve a consideration of the following facts: After the Secretary of State had issued his certificate that the articles of incorporation had been duly filed, the incorporators therein named adopted a code of by-laws, and on April 7, 1897, the persons named in the articles as directors for the first year organized as a board, and elected a president and secretary, and thereafter, on the same day, passed a resolution authorizing the president and secretary to enter into an agreement with the plaintiff herein for the purchase of certain mining property, including that described in the mortgage, upon certain specified terms. On April 12th the plaintiff herein executed to the corporation a conveyance of the said property, and as a part of the consideration therefor the president and secretary executed to him certain promissory notes of the corporation. May 25, 1897, the board of directors authorized an execution to him of a mortgage upon its mining property to secure the said promissory notes, and on the next day the mortgage described in the complaint herein was executed. The annual meeting of the stockholders was held July 20, 1897, and at that meeting a resolution was adopted approving and confirming the act of the directors in purchasing the said property and executing the said promissory notes and mortgage. During the years 1899 and 1900 the plaintiff was the manager of the defendant corporation, and the appellant Tonkins was the superintendent of its mining properties, and during that period the appellants other than Tonkins performed labor upon the said mining ground, with the knowledge and consent of the plaintiff, and afterwards filed in the recorder's office notices of their claim of mechanics' liens therefor. The appellant Tonkins, as said superintendent, performed labor and expended money on said mine for the corporation, and in September, 1900, in an action therefor against it, caused an attachment to be levied upon the property, and, subsequent to the commencement of the present action, obtained judgment against the corporation for the amount of his claim.

1. The objection to the sufficiency of the execution of the mortgage must be overruled. It was executed by the president and secretary of the corporation in pursuance of a resolution of the board of directors expressly authorizing them to execute it. The contention of the appellant that as, under section 305, Civ. Code, the corporate powers of the corporation are to be exercised by a board of directors "elected" from the stockholders, and as the directors in office at the time the mortgage was executed were merely the persons who had been named as such in the articles of incorporation, and had not been "elected," they could not confer any valid authority to execute the mortgage, would set at naught many of the provisions of the Code. By section 292, Civ. Code, upon the issuance by the Secretary of State of his certificate that proper articles of incorporation have been duly filed, the corporation is brought into existence with all the corporate rights and powers that are given by statute. The corporation can exercise these powers only through its board of directors, but it is not to be supposed that the Legislature intended that it should be an inert and lifeless body during the interim between its coming into existence and the time of holding its first annual meeting. The provision of section 290, Civ. Code, that the articles of incorporation must set forth the number of directors and the names and residences of those who are appointed for the first year, taken in connection with the provision of section 302, Civ. Code, that the directors are to be elected annually, and, in the absence of any by-law in reference thereto, that such election must be held on the first Tuesday in June, necessarily implies that in the interim between the organization of the corporation and the first election of directors the corporate powers and authority of the corporation may be exercised by the directors named in the articles of incorporation.

2. The objection that the mortgage was not ratified by the stockholders in the manner required by law is based upon the record made by the secretary of the proceedings had at the annual meeting in reference to such ratification. In this record he stated that there were present at the meeting the holders of 25,062 shares of the capital stock of the corporation, and that the resolution for ratifying the act of the directors was unanimously adopted. In this record it is also stated that the secretary announced to the meeting that 44,065 shares of the capital stock of the corporation had been issued, and it is urged by the appellants that it is thereby shown that the resolution did not receive the approval of the holders of two-thirds of the outstanding stock. The plaintiff, however, against the objection of the defendants, was allowed by the court to introduce other evidence, some of which was taken from the stockbook and stock journal kept by the corporation, and some of which was his own testimony, against the secretary's record of the annual meeting, both as to the amount of the outstanding stock and the amount represented at the meeting. From this evidence it appeared that only 41,365 shares had been issued, and that there were present at the meeting the holders of 31,775 shares; that is, 6,713 more shares than was stated in the record kept by the secretary. In the records of the meeting the secretary had stated that the plaintiff was present, and represented 11,515 shares. The plaintiff, however, testified at the trial that at that time he owned and held 18,828 shares of the capital stock that had been issued to him. It thus appears that by the unanimous vote of those present at the annual meeting the holders of more than two-thirds of the outstanding stock ratified the act of the directors. The court did not err in receiving this evidence. There is no principle of law or provision of statute under which the records of a private corporation kept by its secretary are to be regarded as conclusive evidence of the facts therein stated. See Thompson on Corp. §§ 7739, 7740. The record which section 377, Civ. Code, requires to be kept by the corporation of "every act done or ordered to be done" and of "who were present and who absent" at any meeting may be regarded as prima facie evidence thereof as between the members or stockholders of the corporation, but the secretary's record of the statement of a fact made to the meeting by himself or by any other, which is derived from some outside source, is not even prima facie evidence of that fact. The "stock and transfer book," which, under section 378, Civ. Code, the corporation is required to keep, is the source from which is to be ascertained the amount of outstanding stock, as well as the names of the several stockholders and the amount held by each, and is the criterion under section 312, Civ. Code, for determining the amount of stock held by any person, and for which he is entitled to cast a vote for any purpose at a stockholders' meeting. The statement by the secretary in his record of a stockholders' meeting of the amount of stock held by a stockholder must yield to the evidence derived from this book. The testimony of the plaintiff as to the number of shares held by him at the time of the annual meeting was a matter peculiarly within his knowledge,

and, though subject to be overcome by the production of the stockbook, must, in the absence of evidence therefrom, prevail over the unsupported recital of the secretary in his minutes of that meeting. The court therefore did not err in holding that the evidence was sufficient to establish the ratification by the stockholders of the mortgage executed to the plaintiff.

The suggestion in the appellants' brief that by reason of his interest the plaintiff is disqualified from voting in favor of ratifying the act of the directors is without merit. The stockholders of a corporation do not hold a fiduciary relation to each other by which one is precluded from voting at a stockholders' meeting upon any question in which he has an individual interest adverse to any of the other stockholders.

3. The resolution adopted by the stockholders at their annual meeting was a sufficient ratification of this mortgage. The original purchase of the mining ground had been made under the express authorization of the entire body of stockholders at that time; and at the annual meeting the fact of its purchase was announced, and that in settlement therefor six promissory notes of the corporation for $1,000 each, secured by a lien upon the company's property, had been given to the grantor towards the payment of the purchase price. The stockholders were thus informed that the directors had created a lien upon the mining ground of the corporation, and also of the extent of that lien, and their action in unanimously approving and confirming this act of the directors, without seeking to be informed of the character of the lien, had the effect to ratify the creation of any lien placed upon the mining ground by the directors which would be a reasonable form of security for the promissory notes. The statute (St. 1897, p. 96, c. 92) does not require the evidence of this ratification to be attached to the mortgage. The ratification became complete upon the adoption of the resolution by the stockholders. The provision in the statute for attaching to the mortgage the secretary's certificate of its adoption is for the convenience of proof, and the prima facie character of such certificate as evidence yields to the production of the original record of its adoption.

4. The fact that the plaintiff was the general manager of the corporation during the time that the appellants performed their labor upon the mining ground, and that such labor was performed with his knowledge, or even at his request, did not have the effect to postpone the lien of his mortgage to the liens which they acquired by virtue of such labor. His mortgage had been executed and was a matter of public record long prior to the time when the others rendered their services, and they are held to have entered upon that service with notice that whatever rights they might acquire by reason thereof would be subject to the prior lien of his mortgage.

The judgment and order should be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

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GRANNIS v. SUPERIOR COURT OF CITY & COUNTY OF SAN FRANCISCO et al. (S. F. 4,078.)

(Supreme Court of California. Feb. 8, 1905.)

DIVORCE—FINAL DECREE—TIME OF ENTRY—NECESSITY OF INTERLOCUTORY DECREE—JUDGMENTS—MODIFICATION OF AMENDMENT—POWER OF COURT.

1. After proceedings to vacate or modify a judgment on motion for new trial, or on appeal, or under Code Civ. Proc. § 473, authorizing relief from judgments taken through mistake, inadvertence, surprise, etc., are ended, and the time therefor has expired, the superior court has no power to vacate or modify its judgments in a matter of substance, on account of judicial error in the decision, although such error is patent on the face of the record, but its power thereafter is limited to the correction of mere clerical misprisions on the record, or to the excision of such parts of the record as are void for want of jurisdiction or power.

2. As a general rule, a judgment rendered by a court which has jurisdiction of the subject-matter and of the parties, however erroneous, is not void.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 24.]

3. The provisions of the Code must be construed with a view to effect its objects, and when the language used is not entirely clear the court may, in aid of interpretation, consider the spirit, intention, and purpose of a law, and may look into contemporaneous and prior legislation on the same subject, and the external and historical facts and conditions which led to the enactment of the provisions under review.

4. St. 1897, p. 34, c. 36, amending Civ. Code, § 61, provided that a marriage contracted by a divorced person during the life of the former spouse and within one year after divorce should be void. The Supreme Court decided that marriages contracted without the state under the conditions specified in the section were valid. The Legislature in 1903 (St. 1903, pp. 75, 76, 176, cc. 67, 158) again amended section 61, and added two new sections, numbered 131 and 132, to the Civil Code. Section 61 as last amended provides that in no case can a marriage of either of the parties contracted during the life of the other and within one year after the entry of an interlocutory decree of divorce be valid. Section 131 requires the court, if it determines that a divorce ought to be granted, to enter an interlocutory judgment, from which an appeal may be taken within six months. Section 132 provides that after a year from the entry of the interlocutory judgment the court may enter final judgment, unless appeal has been taken from the interlocutory judgment, or motion for new trial made, in which case final judgment shall not be entered until such motion or appeal has been disposed of. *Held*, that the purpose of this legislation was to prevent collusive di-

vorces and hasty remarriages, and complications arising from such remarriages prior to the final disposition of the cause on motion for a new trial or appeal, and to effect this purpose a final judgment entered prior to the expiration of a year from the date of the interlocutory judgment, or without any interlocutory judgment, would be absolutely void, regardless of any considerations of waiver, consent, or acquiescence of the parties.

5. The right to divorce is statutory and subject to regulation by the Legislature, which may impose restrictions or delays in regard to the time for beginning the action, or the method and order of procedure after the same is begun; and hence the legislation of 1903 (St. 1903, pp. 75, 76, c. 67), adding to the Civil Code sections 131, 132, prohibiting the granting of absolute divorces until the expiration of a year from the entry of an interlocutory decree, is constitutional.

6. Where a judgment was, in so far as it purported to grant an immediate divorce, void as being entered without any interlocutory judgment, as required by Civ. Code, §§ 131, 132, it was within the power of the superior court at any time, on motion of either party, or of its own motion, to vacate so much of the decree as awarded an absolute divorce, leaving the remainder of it, determining that the party was entitled to a divorce, unmodified and unaffected.

In Bank.

Petition by James G. Grannis for a writ of prohibition against the superior court in and for the city and county of San Francisco and Hon. John Hunt, judge thereof. Denied. See 77 Pac. 647.

Galpin & Bolton, for petitioner. A. P. Van Duzer, for respondents.

SHAW, J. This is a proceeding in prohibition to prevent the superior court of San Francisco from acting upon a motion pending before it to modify a judgment.

On June 25, 1903, an action for divorce, in which Amelia B. Grannis was plaintiff and James G. Grannis was defendant, was regularly tried by the superior court, and on July 1, 1903, said court rendered and entered its judgment in said action purporting to grant an absolute and immediate divorce to the plaintiff. The decree as entered was signed by the judge, and the decree proper was preceded by a recital that it appeared to the court "that all the allegations contained in the plaintiff's complaint are true," except certain facts not material. There were other recitals which were equivalent to special findings as to the amount of the community property and as to the children, which are immaterial to the consideration of the present case. The portion of the entry constituting the judgment of divorce was as follows: "It is now, therefore, ordered, adjudged, and decreed as follows, to wit: That the marriage between the plaintiff, Amelia B. Grannis, and the defendant, James G. Grannis, be dissolved, and the same is hereby dissolved, and said parties are, and each of them is, freed and absolutely released from the bonds of matrimony existing between them, and all the obligations thereof." Other provisions of the decree disposed of the property and the custody of the children.

Proceedings on appeal and motion for new trial having terminated without effect, the plaintiff on August 31, 1904, more than a year after the judgment, served on the defendant notice of a motion to set aside the portion of the decree above quoted, on the ground that it was void, it being, in form and effect, a final judgment of divorce instead of the interlocutory judgment prescribed by the act of 1903. In pursuance of this notice, plaintiff, on September 2, 1904, presented the motion to the court, and the court, against the defendant's objections, declared its intention to determine said motion, and to make an order, to quote its own language, "that so much of said decree as awards to the said plaintiff an absolute decree is hereby vacated and set aside; but said decree, in so far as it may determine that the plaintiff is entitled to a divorce, shall be in no way modified or affected by this order." The object of the present proceeding is to prevent the superior court from making the order, or from further proceeding in pursuance of the motion.

The contention of the petitioner is that the judgment entered by the court on July 1, 1903, was, both in form and effect, a judgment of absolute divorce, and that, as proceedings for new trial and on appeal have ended, and more than six months had elapsed at the time proceedings on the motion were begun, the superior court has no power to modify or vacate it.

After proceedings to vacate or modify a judgment on motion for new trial, or on appeal, or under section 473, Code Civ. Proc., are ended, and the time therefor has expired, the superior court has no power or authority to vacate or modify its judgment, in a matter of substance, on account of judicial error in the decision, no matter how apparent such error may be on the face of the record. Its power thereafter is limited to the correction of mere clerical misprisions on the record, or to the excision of such parts of the record as appear to be, or can be shown to be, void for lack of jurisdiction or power. Egan v. Egan, 90 Cal. 15, 20, 27 Pac. 22; Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899; Norton v. A. T. & S. F. R. R. Co., 97 Cal. 390, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198. The modification proposed to be made herein is not the correction of a clerical error, but goes to the substance and effect of the judgment.

Under these circumstances the superior court has no power to make the order in question unless the judgment proposed to be so modified is absolutely void as a final judgment. When the judgment was rendered the court had jurisdiction of the subject-matter in general and of the parties. The general rule is that, under such circumstances, a judgment, however erroneous, is not void. It must be conceded that the court cannot make this order unless, by the legislation of 1903 (St. 1903, pp. 75, 76, 176, cc. 67, 158), amending section 61 of the Civil Code and adding thereto sections 131 and 132, the court is divested of power to enter a final judgment granting a divorce until it has first entered an interlocutory judgment declaring a party entitled to a divorce, and an interval of one year has passed thereafter before such final judgment.

The provisions of the Code must be construed with a view to effect its objects (Civ. Code, § 4), and when the language used is not entirely clear the court may, to determine the meaning, and in aid of the interpretation, consider the spirit, intention, and purpose of a law, and to ascertain such object and purpose may look into contemporaneous and prior legislation on the same subject, and the external and historical facts and condition which led to its enactment. 26 Am. & Eng. Ency. of Law, 601, 602, 603, 623–4, 632.

The institution of marriage is an important feature of civilization, and its preservation is essential to the maintenance of organized society. As was said in Deyoe v. Sup. Court, 140 Cal. 482, 74 Pac. 30, 98 Am. St. Rep. 73: "In every civilized country marriage is recognized as the most important relation in life, and one in which the state is vitally interested. * * * The well-recognized public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage parties to live together, and to prevent separation and illicit unions." Owing to the strength of human passions and the weakness of human nature, the regulation and preservation of the institution of marriage, and the prevention of the abuse of the right of divorce, have always been one of the most difficult problems of government. It has been considered essential to the promotion of happiness and the good order of society to provide that for certain offenses against marital rights the innocent party could, under fixed restrictions, have the marriage dissolved by judicial decree. But it has been found that this right is often abused; that by collusion and fraud, by fabricated testimony, or by the exaggeration of trifling offenses, divorces are obtained which should not have been granted; that when the procedure is easy and speedy slight causes are magnified and made the pretext for hasty divorces, and that too frequently actions for divorce are not prompted by the necessity of relief from marriage bonds which, by the fault of the other party, have become the cause of misery and suffering, but are inspired by a desire to become free from the old obligations in order to make a new alliance. It has also been found that in some cases difficult complications occur arising from divorced persons contracting a subsequent marriage before the judgment of divorce became final by the expiration of the time within which an appeal could be taken. To prevent or mitigate these evils, it has always been the legislative policy to make many restrictions in the procedure in divorce cases which are not applicable in ordinary actions.

In continuation of this policy the Legislature in 1897 amended section 61 of the Civil Code so as to provide that a marriage contracted by a divorced person during the life of the former spouse, and within one year after the time of the judgment of divorce, should be illegal and void. St. 1897, p. 34, c. 36. Immediately it was contended that this law was of no effect beyond the confines of the state, and that marriages solemnized during the year after the divorce, within another state or territory, which were valid by the laws of such state or territory, must be recognized as valid in this state. Numerous attempts thus to evade the law were made, and much difference of opinion existed as to the legality of such marriages, until finally, in August, 1902, it was decided by this court that such marriages were valid in this state, and the question was thus settled. Estate of Wood, 137 Cal. 130, 69 Pac. 900. Thereupon the act of 1897 became practically a dead letter. All who wished to enter into another marriage within the year easily accomplished their purpose and evaded the law by a short journey beyond the borders of the state.

At its next ensuing session the Legislature passed the acts making a second amendment to section 61, and adding the new sections, as above mentioned. By the last amendment to section 61 it was provided, with respect to a second marriage to a different person during the life of a former spouse, that "in no case can a marriage of either of the parties during the life of the other be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for a divorce." The new sections 131 and 132 are as follows:

"Sec. 131. In actions for divorce the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce, and from such interlocutory judgment an appeal may be taken within six months after its entry, in the same manner and with like effect as if the judgment were final.

"Sec. 132. When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete the disposition of the action, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed. The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either."

The manifest purpose of these several amendments was to avoid the effect of the decision in Estate of Wood, supra, by going a step further than the law of 1897. That law simply prohibited a remarriage within one year, and made such marriage illegal and void if made within this state, but it did not affect the procedure in an action for a divorce, nor the validity or effect of a judgment therein. The law of 1903 acts upon the proceeding and upon the judgment, and secures the same period of delay as the former act, by providing for a delay in the entry of final judgment dissolving the marriage for at least one year after the trial and interlocutory judgment in the action. It thus presents the same obstacle to speedy divorces, the same opportunity for reflection and reconciliation, and the same check to collusion and fraud, and in the meantime it effectually prevents a subsequent marriage with another person by the simple provision that the former marriage, during the interval, shall remain undissolved. The ultimate object, of course, was to reach and mitigate the same evils to which the act of 1897 was directed.

For a time after this act took effect there was some difference of opinion among the judges of the superior courts with respect to its validity, several of them holding it unconstitutional, and granting what purported to be immediate final judgments of divorce in disregard of its provisions. The question was settled in favor of the validity of the law by this court in Deyoe v. Sup. Court, supra. In the meantime, however, a number of so-called final judgments had been entered, among them the one here involved.

It is obvious that the entire purpose of this legislation will be practically defeated if the law receives a construction which will enable the courts at the request, or with the consent, express or implied, of the parties, or either of them, to give final judgment immediately upon the trial, and without a previous interlocutory judgment. In order to reach this conclusion the law must be held to be merely directory in this respect, and the disregard of it a mere error not affecting its validity except upon appeal or in some form of direct attack. The departure from the prescribed order of proceeding, with the consent or acquiescence of the parties, must be considered as an irregularity which is waived, and the giving of an immediate final judgment held an error which, whether expressly waived or not, can be effectively cured, and the judgment placed beyond attack, by the mere failure to appeal. Persons seeking or submitting to a divorce for the purpose of entering into another marriage, or in collusion for any improper purpose, will request, consent to, or acquiesce in an immediate final judgment, many cases will occur in which it will seem a harmless deviation from the strict course of procedure, the matter will seem unimportant, and the desire or request of the parties or the seeming necessities of exceptional cases will prevail, and final judgments will be immediately given. It will soon become customary. The evil-disposed persons against whom alone the law is directed will be the ones who will avail themselves of this opportunity to evade its true intent and purpose.

In view of these considerations we think that, if it is reasonably possible, the terms of the act should receive a construction calculated to make its object and purpose secure, and which will make it impossible for either party to contract another lawful marriage within a year from the time of the trial and interlocutory judgment. The language is clearly susceptible of this construction, and the object and purpose to be accomplished make it necessary to reject any other construction. It declares that "if it [the court] determines that the divorce ought to be granted an interlocutory judgment must be entered" (section 131); and further, that "when one year has expired after the entry of such interlocutory judgment the court * * * may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons;" and that if an appeal is taken from the interlocutory judgment, or a motion for a new trial is made, "final judgment shall not be entered until such appeal or motion has been finally disposed of" (section 132); and by section 61 a subsequent marriage is made void if contracted within the year after the interlocutory judgment. These provisions, interpreted in the light of the previous legislation and decisions and the purpose to be accomplished by the law, are clearly to be understood as a limitation on the power of the court in the matter, and as intended to forbid the entry of a final judgment until after the prescribed period. The law can only be made effectual for the accomplishment of its object by holding that any final judgment purporting to grant the divorce is absolutely void if thus prematurely entered.

This conclusion receives additional support from a consideration of the nature of a proceeding for a divorce and of the recognized public policy on the subject. The parties to such an action have not the right to control procedure as in other actions. The court is not bound by admissions in the pleadings, nor by the stipulations of the parties, nor is its inquiry as to the facts limited by the pleadings. 7 Ency. of L. & Pr., 88, 121. Nor can a divorce be granted solely upon the testimony or admissions of the parties. Civ. Code, § 130; 9 Am. & Eng. Ency. of L. 845. The state is interested in the matter. In Deyoe v. Sup. Court it is said: "While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same unless good cause for its dissolution exists, is an interested party. It has been said by eminent writers upon the subject that such an action is really a triangular proceeding in which the husband and wife and the state are parties." Page 482 of 140 Cal., page 28 of 74 Pac. (98 Am. St. Rep. 73). See, also, McBlain v. McBlain, 77 Cal. 507, 20 Pac. 6; Warner v. Warner, 100 Cal. 11, 34 Pac. 523; Hatton v. Hatton, 136 Cal. 356, 68 Pac. 1016; Newman v. Freitas, 129 Cal. 292, 61 Pac. 907, 50 L. R. A. 548; 1 Nelson Div. §§ 1, 7, pp. 2, 17. The rule in actions affecting property, that the parties interested may control the disposition of the interests involved, and that the judgment of the court will be made to conform to such dispositions, when ascertained, has no application to divorce cases. Hence it follows that in such cases there can be no effectual waiver by the parties of any restriction established by law for the benefit of the public, or for the protection of the interest which the state has in the preservation and permanence of the marriage relation. The provision forbidding the granting of a divorce solely upon the admission, stipulation, or testimony of the parties goes to the sufficiency of the proof, which is not ordinarily disclosed upon the record. A disregard of this provision cannot be made to appear of record except upon appeal, and for this reason it cannot be made the subject of inquiry upon any collateral attack. But on appeal, where such disregard appears, it is always held to be an act beyond the power of the court to do, or of the parties to sanction, and absolutely void. The restriction now under consideration is of such a nature that a disregard of it must always be apparent upon the face of the record, and consequently the lack of power in the court will appear in every case upon an inspection of the record alone.

The rule invoked by the petitioner, taken in connection with the construction we have given to the act, would put the premature entry of final judgment of divorces in the class of errors which can always be reached on collateral attack. Tallman v. McCarty, 11 Wis. 406, cited and relied on by petitioner, states it as favorably to him as any case that can be found. The law of Wisconsin provided that in partition suits there should be an interlocutory judgment declaring the interests of the parties, that commissioners to make partition were then to be appointed, and upon the confirmation of their report the court was authorized to render a final judgment of partition. Commissioners were appointed and final judgment rendered in accordance with their report, but there had been no interlocutory judgment. On collateral attack in that case the court held the judgment valid, and said: "No order which a court is empowered *under any circumstances*, in the course of a proceeding over which it had jurisdiction, to make, can be treated as a nullity merely because it was made improvidently, or in a manner not warranted by law or the previous state of the case. The only question in such a case is, had the court or tribunal the power, *under any circumstances*, to make the order or perform the act? If this be answered in the affirmative, then its decision upon those circumstances becomes final and conclusive, until reversed by a direct proceeding for that purpose." (The italics are our own.) It is to be observed that no question of public policy was there involved, and that the public had no particular interest in the decision of the case, nor was there anything in the statute governing the procedure in that case which could be construed as a restriction upon the ordinary powers of the court. In a partition suit the parties could agree as to their respective interests, could waive an interlocutory judgment and consent to the immediate appointment of commissioners, or even to an immediate final judgment, without any preliminary proceedings at all, without in any respect contravening public policy, or transgressing restrictions made to protect the interests of society. The law in question in this case, as we have construed it, was intended as a limitation upon the power of the court with respect to the subject-matter, so that the court shall not be competent to grant a final divorce at any time during the year succeeding the interlocutory judgment, and so as to require that the interlocutory judgment be first entered. The parties could not waive these proceedings, nor invest power in the court by their consent or acquiescence. The purpose of the statute is to provide that in any event and under all circumstances there shall be an interval of one year after the party is declared to be entitled to a divorce before it can become absolute. The question above stated cannot here be affirmatively answered. There can be no state of facts which will give the court power to enter final judgment immediately. Hence, upon the face of the record and as a matter of law, the final judgment in question is, as a final judgment, without actual or possible authority, and is therefore necessarily void.

The cases holding judgments valid on collateral attack, although they may be necessarily founded upon an erroneous view of the law, are none of them cases in which the law which the court mistook was the law which vested the jurisdiction or power over the subject-matter in the court. So far as they are cases involving jurisdiction of this class at all they are confined to instances where the jurisdiction over the subject-matter is by law made to depend on the preliminary determination of a question of fact. In that event a determination of the court rendering the judgment that the facts which give the jurisdiction exist is conclusive in all collateral inquiries. Farmers' & M. Bank v. Board, 97 Cal. 328, 32 Pac. 312; In re Grove St., 61 Cal. 438; Cahill v. Superior Court (Cal.) 78 Pac. 467. But where the question upon which the jurisdiction depends is one of law purely, the jurisdiction over the subject-matter is always open to collateral inquiry. In re Grove St., supra; Arroyo D. & W. Co. v. Superior Court, 92 Cal. 52, 28 Pac. 54, 27 Am. St. Rep. 91; Cahill v. Court, supra. Mr. Freeman says: "When a tribunal has not jurisdiction over the subject-matter, no averment can supply the defect; no amount of proof can alter the case. As power over the subject-matter is given by law, nothing but an additional grant from the legislative authority can extend that power over a class of cases formerly excepted." 1 Freeman on Judgments, § 120. And also: "If a court grants relief which under no circumstances it has any authority to grant, its judgment is to that extent void." Id. § 120c.

It is contended that the law, if thus construed, would be unconstitutional. The Constitution, it is said, confers upon the superior court full jurisdiction of actions for divorce, and the effect of this law would be to arrest the exercise of this jurisdiction, and suspend further action for one year; and if it can do this for one year it must have power to suspend its action indefinitely, or absolutely, and for an unlimited time, and if such power exists the Legislature may thus practically destroy or divest the jurisdiction given by the Constitution. If it were necessary to the validity of this act to hold that the Legislature has power to suspend absolutely the functions of the superior court, the argument might have weight. We do not consider it necessary. It is sufficient to hold that the Legislature has power to make reasonable regulations as to the proceedings by which the jurisdiction in such cases is exercised, and to prescribe the terms and conditions on which a divorce may be granted, and that in view of the subject-matter of the act and the object in view a provision for the postponement of final judgment for one year, and a suspension of the power of the court to enter such judgment in the meantime, is not an unreasonable regulation of the procedure, and is within the legislative power to prescribe, as a condition necessary to the existence of the right to a divorce. The right to a divorce is subject to the legislative will and exists only by legislative grant. The change in the method made by this law affects only the procedure and the right of the parties to an immediate divorce, and does not take jurisdiction from the court. The right to a divorce not being inherent or constitutional, but statutory, the Legislature could repeal the law, and thus effectually prevent the granting of any divorces, or it could suspend the right for any number of years after the beginning of the action, without affecting the jurisdiction of the court. The Legislature has complete control of the subject, and may impose whatever restrictions or delays it pleases, either in regard to the time for beginning the action, or the method and order of procedure after the action is begun. The grant of jurisdiction means only that such limited rights of divorce as the Legislature provides are cognizable in the superior court under such system of procedure and subject to such restrictions as may from time to time be established.

The judgment in question, being wholly void as a final judgment granting an immediate divorce, it was within the power of the superior court, at any time, on motion of either party, or of its own motion, to declare it null, in so far as it purported to be of such effect. People v. Davis, 143 Cal. 675, 77 Pac. 651; People v. Temple, 103 Cal. 453, 37 Pac. 414.

It is urged that "the greater contains the less" (Civ. Code, § 3536), and hence that, as the judgment in question necessarily determines that the plaintiff is entitled to a divorce, it is therefore valid to that extent as an interlocutory judgment under the statute, and that the court should not vacate it, but should regard it as valid to that extent, and, the year having expired, should now enter a final judgment. Cases are cited to the effect that a judgment for too much, or in excess of the power of the court, is not wholly void, but is void only in so far as it is beyond the jurisdiction. Anderson v. Parker, 6 Cal. 201; Ex parte Rosenheim, 83 Cal. 388, 23 Pac. 372; People v. Brown, 113 Cal. 35, 45 Pac. 181. For the purposes of this decision this may be conceded. There are strong reasons in support of the proposition. If the order proposed to be entered by the superior court in pursuance of the motion was as far reaching as the motion, and purported to set aside the judgment for all purposes, it would be necessary to decide the question. It does not go so far. It purports only to vacate "so much of the decree as awards to the said plaintiff an absolute divorce," and expressly declares that, "in so far as it may determine that the plaintiff is entitled to a divorce," the judgment is neither to be modified nor affected by the order. The proposed order is therefore strictly within the power of the superior court, and the writ of prohibition should not be issued.

The petition is denied.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

146 Cal. 257

CLAUDIUS v. MELVIN, Judge. (S. F. 4,073.)

(Supreme Court of California. Feb. 8, 1905.)

DIVORCE—INTERLOCUTORY AND FINAL DECREES—VALIDITY—"YEAR"—NUNC PRO TUNC ENTRY—COMPUTATION OF TIME—STATUTE—REFUSAL OF FINAL DECREE—MANDAMUS.

1. Where an interlocutory decree of divorce is ordered entered nunc pro tunc, the year which must elapse before final judgment can be given begins to run from the time of the actual entry of the interlocutory judgment.

2. A decree declaring that "it appears that all the allegations of the complaint are sustained; that the matter so alleged and proved in behalf of plaintiff is sufficient in law to entitle the plaintiff to the relief as prayed for in the complaint"—sufficiently declares "that the party in whose favor the court decides is entitled to a divorce," within Civ. Code, § 131, providing that if the court decides that a divorce ought to be granted it shall enter such an interlocutory decree.

3. Where a decree of divorce embraced both an interlocutory and final judgment, and they were simultaneously entered, but the part purporting to grant an immediate divorce was void because at that time the year from the entry of the interlocutory judgment had not expired, the validity of the interlocutory judgment was not affected thereby.

4. Where a valid interlocutory decree of divorce had been entered, and the time had passed for its vacation on appeal, by motion for new trial or otherwise, an order of the trial court purporting to set aside such interlocutory decree was without jurisdiction, and therefore void.

5. After a valid interlocutory decree of divorce has been entered a year, the trial court may be compelled by mandamus to make and cause to be entered a final decree on refusal of an application therefor.

In Bank. Original proceeding by P. Claudius against Henry A. Melvin, judge of the superior court of Alameda county, for writ of mandamus. Granted.

Asa V. Mendenhall and A. E. Bolton, amicus curiæ, for petitioner. T. W. Harris and A. P. Van Duzer, for respondent.

SHAW, J. This is an original proceeding in this court to obtain a writ of mandate to compel the defendant, as judge of the superior court, to make and cause to be entered a final judgment of divorce in an action in the superior court of Alameda county wherein P. Claudius is plaintiff and Gesine Claudius is defendant.

The case is submitted to us upon a demurrer to the petition. The facts are as follows: The action for divorce was commenced on August 14, 1903. The defendant was duly served with summons, and on August 27, 1903, her default was duly entered for failure to appear or answer. The matter was then referred to a referee for the taking of testimony, and on September 4, 1903, the court, upon the referee's report, made what is styled a final decree granting the divorce. The petition for mandate does not allege that this decree was entered, but as both parties in their briefs say it was entered at the time it was made, and argue the case on that hypothesis, we will consider the petition as amended in this particular. Thereafter, on September 15, 1904, on motion of plaintiff, the court made an order purporting to set aside said final decree on the ground that it was void, and further ordered that an interlocutory decree, declaring the plaintiff entitled to the divorce prayed for, be entered nunc pro tunc as of date September 4, 1903, and the same was entered accordingly. On September 21, 1904, plaintiff applied for a final decree, which was refused by the court on the ground that the formal interlocutory decree, though entered nunc pro tunc as of September 4, 1903, was not in fact entered until September 15, 1904; that one year had not passed since the date of actual entry, and that it was the time of the actual entry of the interlocutory decree, and not the theoretical entry thereof, which fixed the time after which the final decree could be entered. It is this final decree which the plaintiff seeks to procure by the mandate.

We think the defendant is correct in the position that the year which must elapse before final judgment can be given begins to run from the time of the actual entry of the interlocutory judgment, and not from any theoretical nunc pro tunc date of entry.

We are of the opinion, however, that plaintiff for other reasons is entitled to the mandate. In the case of Grannis v. Superior Court, 79 Pac. 891 (decided this day), we held that a final decree, entered immediately after the trial or hearing, is absolutely void in so far as it purports to be final. It was not necessary in that case to determine whether or not a decree which purported to be a final judgment and was void as such could, nevertheless, stand as a valid interlocutory decree, if in form it was sufficient therefor. In this case the question is squarely presented.

The decree entered on September 4, 1903, declared that "it appears that all the allegations of the complaint are sustained by competent testimony; that said matter, so alleged and proved in behalf of plaintiff, is sufficient in law to entitle said plaintiff to the relief as prayed for in said complaint." Thereupon followed the usual form of judgment of divorce. Section 131, Civ. Code, provides that if the court decides that the divorce ought to be granted it shall enter an interlocutory judgment declaring "that the party in whose favor the court decides is entitled to a divorce." This the part of the decree above quoted substantially does. It was therefore sufficient in form for a valid interlocutory judgment. The entire decree embraced both an interlocutory and a final judgment and they were simultaneously entered. The part purporting to grant an immediate divorce was void because at that time the year from the entry of the interlocutory judgment had not expired. It is a well-settled proposition that a judgment may be in part valid and in part void. Unless the two portions are so inseparably connected that the one part cannot be declared void without vitiating the other, the rule is that the portion which is not in excess of jurisdiction may stand and the remainder be considered null. Where a part of a judgment is valid it may be to that extent enforced, although another provision of the same judgment may be in excess of the power of the court, and for that reason void. People v. Brown, 113 Cal. 36, 45 Pac. 181; Ex parte Rosenheim, 83 Cal. 392, 23 Pac. 372; Anderson v. Parker, 6 Cal. 201. The judgment entered on September 4, 1903, therefore constituted a valid interlocutory judgment declaring the plaintiff entitled to a divorce. As such it was subject to be vacated on appeal, or on motion for new trial, or by proceedings under section 473, Code Civ. Proc. The time for all these proceedings having expired, and no such proceeding to vacate it having been instituted, the court thereupon lost all power by any proceeding in the case to modify or vacate the judgment, in so far as it constituted an interlocutory judgment. All that the court could do at the time it made the order purporting to set aside the whole judgment was to vacate the part purporting to be a decree of immediate divorce. In People v. Davis, 143 Cal. 675, 77 Pac. 651, speaking of a valid judgment under similar circumstances, the court said: "Under such circumstances the judgment is entirely beyond the reach of the court that rendered it, except in a separate action, and any order of the court purporting to vacate it is beyond the jurisdiction of the court, and therefore void. Such an order occupies no better position than a judgment that is void upon its face, and, like such a judgment, is assailable wherever and whenever it may be produced, and whether the attack upon it be direct or collateral"—citing People v. Temple, 103 Cal. 447, 37 Pac. 414, and Moore v. Superior Court, 86 Cal. 495, 25 Pac. 22. It follows that the order of the court made on September 15, 1904, purporting to set aside the whole of the judgment of September 4, 1903, was itself wholly void in so far as it attempted to affect the part of said judgment declaring the plaintiff entitled to a divorce, and the interlocutory judgment remained unaffected.

The entry of an interlocutory decree nunc pro tunc was unnecessary, the order to enter it was without authority, and that part of the proceedings was entirely nugatory and may be disregarded. A year had elapsed between the time of the actual entry of the first judgment, which stands as a sufficient interlocutory judgment, and the application of the plaintiff for a final judgment. He was therefore at that time entitled to a judgment granting the divorce, and the defendant should have complied with his request to make and enter the same.

Let the writ issue as prayed for.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

146 Cal. 290

SOUTHERN PAC. R. CO. v. SAN FRANCISCO SAV. UNION et al. (L. A. 1,296.)

(Supreme Court of California. Feb. 16, 1905.)

EMINENT DOMAIN — CONDEMNATION PROCEEDINGS—VALUATION OF PROPERTY—SEPARATION OF EASEMENT AND FEE—MINERAL AND OIL LANDS—EVIDENCE—EXPERT TESTIMONY—MOTIONS TO STRIKE.

1. Where there is no substantial difference between the value of the fee and the value of the easement to be taken by condemnation proceedings, the value of the fee may be proven and assessed as damages; but where it can be shown as a fact that the fee, burdened with the easement, is of some substantial value to the owner, as where the underlying estate is valuable for the minerals it contains, this value is reserved to the owner, and must be taken into consideration in determining the damages to be awarded for the imposition of the easement upon the land.

2. A railroad acquires by condemnation proceedings the permanent and exclusive control of the surface of the land, but acquires no title to minerals or oils beneath the surface, and no right to appropriate them; but such right remains in the owner of the fee subject only to the obligation of supporting the railroad's easement.

[Ed. Note.—For cases in point see vol. 18, Cent. Dig. Eminent Domain, §§ 842, 847.]

3. Where an easement over oil land is condemned to be used as a right of way for a railroad, the railroad must pay the full value of the fee as oil land, if the reservation to the owner of the fee of oil rights is rendered of no value because of the railroad's appropriation of the surface; but the railroad may show, if possible, that a beneficial ownership in the oils underlying the right of way is reserved to the owner of the fee, and, if it makes such showing, the value of the beneficial ownership must be taken into consideration as something separate from the value of the easement, and the value of the easement alone be assessed as damages.

4. In proceedings to condemn a right of way over oil fields, an expert may testify as to matters which would influence him from the standpoint of a contemplating buyer in determining the market value of the land in an oil-bearing territory, the number of wells which could be economically placed on the amount of land taken, and ordinary losses therefrom, and the general relation of outlay to income; and such testimony is not objectionable as conjectural and speculative.

5. But further testimony of the witness that he would take into consideration what "he could pay for it and have sufficient margin for speculation during at least five years" is incompetent on the issue of market value.

6. A motion to strike out testimony was properly denied, where part of the testimony subject to the motion was proper, although another part was improper.

7. In proceedings to condemn a right of way over oil-bearing lands, it is permissible to show, on the issue of value, a progressive decrease in the productiveness of the field within which the land in question is situated.

Department 2. Appeal from Superior Court, Santa Barbara County; William S. Day, Judge.

Condemnation proceedings by the Southern Pacific Railroad Company against the San Francisco Savings Union and another. From an order denying a new trial, plaintiff appeals. Reversed.

Canfield & Starbuck, for appellant. Richards & Carrier, for respondents.

LORIGAN, J. This action was brought to condemn a right of way for a relocated railroad of plaintiff in the county of Santa Barbara. The strip sought to be condemned consisted of about two-thirds of an acre of land belonging to the defendant corporation. This strip lay along the southern boundary of a larger tract, several acres in extent, belonging to the same owner, and located within the exterior limits of the Summerland oil field, or district, in which the oil flows naturally from higher or shallower to lower or deeper wells. The defendant Becker has an interest in both pieces of property under a contract with the defendant corporation. The case was tried before a jury, and, all issues having been waived except as to the value of the property taken, the evidence in the case was limited solely to that question, and, being submitted to the jury, a verdict was rendered in favor of defendants. The plaintiff moved for a new trial, and from the order denying it appeals.

The main point on this appeal relates to the proper measure of value which should be applied in a suit to condemn land of the character involved here, namely oil land—whether an easement acquired over a strip of oil-bearing land, part of a larger tract of the same character owned by the same person, is equivalent to taking the fee, and must be paid for as of the value of the fee, or may it, when applied to such land, be an interest different in law from the fee, having a substantially different value, and to prove which the defendant should be permitted to introduce evidence? The lower court held, as a matter of law, that in condemning a right of way over this strip of land, part of a larger tract of oil-bearing land, there could be no difference in value between the easement and the fee, and, not only, over plaintiff's objections, permitted defendants to address their evidence solely to the value of the fee, but instructed the jury that defendants were entitled to have an award to that extent. It was insisted by the plaintiff upon the trial that it sought, and under the law was entitled to condemn, only an easement in the property, and endeavored, by cross-examination of defendants' witnesses and by witnesses produced upon its own part, to show that there was, in fact, a substantial difference in value between the fee in this land and the easement it sought to condemn for a right of way across it. The court refused to permit them to make this showing, and under all these rulings the question whether the court was correct as to the measure of value it applied, is presented.

While it is no doubt true that under the law of this state a railroad company is only entitled to acquire by condemnation proceedings an easement over the land, and that the fee thereof remains in the owner, yet in most condemnation cases by railroad companies this distinction, as far as it enters into a determination of the damages to be assessed for the right of way acquired thereby, has no practical application. Usually in such cases there is no substantial difference in value between the easement and the fee of which the law will take notice. Hence, in ordinary cases, where condemnation for a right of way for railroad purposes is sought, evidence is permitted to show, as the damages sustained, the full value of the land taken, upon the theory that the easement will be perpetual; that the right of way acquired, though technically an easement, will be permanent in its nature, and the possibility of abandonment by nonuser so remote and improbable as not to be taken into consideration; that the exercise of the right will require practically the exclusive use of the surface; and that any interest which might be reserved to the owner in the fee would only be a nominal one and of no value. Under such circumstances, as there can be no substantial determinative value in the fee apart from the easement, the law will not consider them separately, but will require the condemning corporation to pay the value of the fee as the measure of damages sustained. To illustrate: Where a right of way is condemned over agricultural land or over building lots, this is in effect to take the entire value of the land. In either case the underlying ground upon which the easement is imposed can be of no value to the owner. The sole value of such lands consists of the use to which the owner could devote the surface —to cultivation or building—and, when he is deprived of that use, the entire value of the land is taken from him, and hence, for all beneficial purposes to the owner, there can be no difference in value between the easement and the fee. They are substantially identical in value. And to illustrate further: If the whole of a tract of mineral land is to be condemned, whether such mineral has a fixed situs, such as gold, iron, or coal, or the land overlies minerals of a fugitive and wandering nature, such as petroleum oil or natural gas, which may be drawn from it, the same rule for determining the easement taken would apply. As these minerals can only be reached from the surface, when all the surface is taken from him, the owner is deprived of the entire value of his land. A reserved ownership in the minerals would be merely nominal, and of no advantage or benefit to him. So that, in all these cases which we have instanced, it would be idle to endeavor to distinguish, in assessing damages, between the value of the easement and the value of the fee, because, in the nature of things, there is no real difference between them. When the easement is taken, the fee is substantially taken, and for all practical purposes in measuring damages the value of the fee is the only available and proper standard.

But, while it is the rule that, where there is practically no substantial difference between the value of the fee and the value of the easement, the court may properly permit the value of the fee to be proven and assessed by the jury as the damages, yet in theory the distinction between the two remains, and in all cases, where it can be shown as a fact that the fee, burdened with the easement, is of some substantial value to the owner, this value is reserved to him, and must be taken into consideration in determining the damages to be awarded for the imposition of an easement upon the land. In condemning for a right of way, no more land and no greater interest in it can be taken by the railroad company than the public use requires, which is ordinarily the surface of the land. While it is true, as we have pointed out, that under some circumstances, in assessing damages, the value of the fee of the land taken is awarded, yet this is because in the nature of things there can be no difference in value between them. When, however, such a difference does exist, the rule is different, and the value of the easement taken, as distinguished from the value of the fee, is alone to be ascertained by the jury, and the owner compensated therefor. And this difference in value may, and usually does, exist to a greater or less degree in all cases where the underlying estate is valuable for the minerals it contains, and when but a portion of the owner's land which contains them is burdened with the easement. Whatever minerals lie beneath the right of way are reserved to the owner, and wherever such minerals are in situ underlying this right of way, while he may not enter upon it to take them (because the nature of the easement requires exclusive possession of the surface by the company), he can drift from tunnels sunk upon his adjoining land and do so, leaving, however, sufficient support for the easement imposed. Subject to this support, the right of the owner of the land, to take out all the minerals beneath the right of way, is absolute. Under the condemnation the railroad company acquires the permanent and exclusive control of the surface of the land, but it acquires nothing more. It acquires no title to the minerals beneath the surface, and, of course, no right to dig beneath the surface for the purpose of appropriating them, and, if it should undertake to do so, could be restrained at the instance of the owner of the underlying fee. While the title to the minerals underneath the right of way is reserved exclusively to the owner of the land across which it is condemned, there is no doubt that, by being restricted from entering upon it, it may be much more difficult and expensive for him to take them out, far more so than if he could operate directly over the land which has been appropriated under the easement; and it may be that much valuable mineral would have to be left to afford surface support, or, if this were taken out, a substituted surface support would have to be provided by the owner. But evidence of all these matters would be submitted to the court and jury, and would enter as substantial factors in determining the value of the easement. They would not affect his reserved right of ownership in the fee. While our attention has not been directed to any decision of this court adopting this as the rule in this state to be applied in assessing damages for the condemnation of a right of way over mineral lands, the authorities seem to be quite uniform upon the point in other jurisdictions, as far, at least, as lands containing mineral in situ are concerned, and the rule seems to be a reasonable and just one. Some of these authorities we cite: Robbins v. St. Paul S. & T. R. R. Co., 22 Minn. 287; Hollingsworth v. Des Moines & St. L. R. R. Co., 63 Iowa, 444, 19 N. W. 325; Tyler v. Town of Hudson, 147 Mass. 609, 18 N. E. 582; Blake v. Rich, 34 N. H. 289; Phifer v. Cox, 21 Ohio St. 255, 8 Am. Rep. 58; Penn Gas Co. v. Versailles Fuel Gas Co., 131 Pa. 532, 19 Atl. 933; North Pac. & M. R. Co. v. Forbis, 15 Mont. 459, 39 Pac. 571, 48 Am. St. Rep. 692.

But the particular question presented in this case, as to the proper measure of value which should be applied where an easement is sought over oil-bearing land, seems never to have been presented for determination to any court. At least our attention is called to no decision on the subject, and counsel upon both sides have been extremely thorough in the presentation and discussion of the subject. Counsel for appellant, reasoning from analogy, insists that the same rule should apply to oil lands as to other mineral lands, while counsel for respondents claim that there is no room for such application, and that there is such a radical and essential difference, both as to the character of the minerals and the nature of their ownership, as to make the rule inapplicable. But we do not think this difference in ownership, or the character of the minerals, of such a nature as to make it impossible that an owner of adjoining land can derive any benefit from a reservation in his favor of the petroleum oils in place, or which are liable to accumulate, by reason of the physical laws governing such fluids, under the land upon which the easement is imposed. Nor can it be said that it is impossible to show, in ascertaining the value of the easement acquired, that this reserved right has no determinative value separate from the easement. These oils lie in reservoirs, and, collectively, the owners of the superincumbent land have an exclusive ownership in them. The ownership of each, it is true, is only a qualified or partial ownership—a right to reduce the oil in the common reservoir to possession by sinking wells upon the particular tract of land owned by him overlying it. But, when so being exercised, the owner of the well is not limited to any particular territorial area beneath the surface from which he may draw the oil. He may not only draw from his own land, but he is entitled to draw from the reservoir generally, and he naturally does draw, and is of right entitled to draw, to his own well the oil underlying the lands of other surface owners. This, of course, is a right common to all surface owners, and, as the reservoir is not inexhaustible, there is a liability that in the process of pumping the oil beneath the lands of proprietors higher upon the strata will be naturally diminished, if not depleted, by being either drawn out, or by gravitation carried to lower and deeper wells. But, aside from this liability to loss from beneath particular lands, the ownership in the oil beneath that land may be said to be absolute in the owner of the surface; and if his right to take it out is not lost by virtue of being deprived of a part of his surface land, or his beneficial interest is only to some extent diminished, there is no reason why a corporation condemning a right of way across it, which takes only an easement, should pay for this reserved and available interest in the fee. That this reserved interest in the oil under the right of way was of a determinative value to the defendants, as owners of the adjoining land, was what the plaintiff sought to prove. Its contention was that, as such owners, it was possible for defendants to take out, by wells sunk along the border of the adjoining land, the oil in place beneath the strip composing its right of way, and by means of such wells to intercept the flow of oil from such adjoining land beneath the easement surface; and to the extent that this might be accomplished it offered to show that this right was of value, as something distinct and apart from the value of the easement, and we perceive no reason why it should not have been permitted to do so.

It is contended, however, by the respondents, that whatever ownership the defendants may have in the oil beneath the right of way could only be made available from the surface; that ownership of the surface carries with it the only right in the oil which is of any value, and that is the right to reduce to possession the oil beneath that surface; and that if, by putting down wells on the land adjoining, they can draw out the oil from beneath the right of way, they do not acquire such oil by virtue of any ownership they have in it as taken from the land subject to the easement, but they get it by virtue of their rights in the surface of the adjoining tract through which it is drawn. We cannot accord with this line of argument. We do not think it keeps in view a proper distinction between the qualified ownership of a surface owner of land in the general oil deposits contained in the reservoir, and the like ownership which attaches to the specific quantity which from time to time may be under the surface of a particular tract of land. While, collectively, all the owners of the superincumbent land have a common interest in the oil deposit, yet the right of an owner of the surface of a particular tract of such land to reduce the oil under it to possession can only be enforced when it comes under his land. If he can then reduce it to possession by drawing it from under all his land, notwithstanding his right to operate from a portion of the surface of such land for that purpose may be prevented by the imposition of an easement upon it, he retains the same right and to the same extent as he possessed it before the easement was imposed, and there necessarily would be a difference between the value of the reserved right and the value of the easement. It is true that usually the surface taken for a right of way would be the most advantageous point from which to draw the oil from beneath it; but, in the case instanced, it would not be essentially requisite. It might entail greater difficulty, and be attendant with less practical benefit and advantage for the owner of the adjoining land, who retains this beneficial ownership in the oil underlying the right of way, to operate, in acquiring its possession, from the adjoining land, than from the overlying surface; but these are matters which would have to be taken into consideration in estimating the value of the easement.

Nor is it true, as contended, that the appropriation of the surface of the oil-bearing land of itself necessarily destroys all right of defendants in the oil underneath it, by reason of such appropriation. As we have indicated above, this does not follow if, as a fact, by virtue of owning adjoining lands, a reserved ownership in the oils beneath the surface easement is of value. Not only this, but there are certain legal rights which, while enforceable by any owner of the surface of oil-bearing lands, are equally secured to the defendants in protection of their reserved rights to the oils underlying the easement, notwithstanding the surface control has been taken from them. By the condemnation proceedings, the plaintiff could not get any interest in the land itself, but only a right of way across it. It acquired no right to the underlying oils. If it should abstract them from under this right of way, the defendants could recover their value in an action for damages for their conversion, or could maintain an action in claim and delivery for their possession, to the same extent as against any other trespasser (Hail v. Reed, 15 B. Mon. [Ky.] 479; Hughes v. U. P. Lines, 119 N. Y. 426, 23 N. E. 1042); or, if the plaintiff should attempt to sink wells on the right of way, it could be restrained in equity at the instance of defendants, on the ground of a threatened irreparable injury. As is said in Bettman v. Harness, 42 W. Va. 437, 26 S. E. 272, 36 L. R. A. 566: "Such damages subtract from the very substance of the estate and tend to its ultimate destruction. * * * Petroleum oil in place is a part of the realty, and its unlawful removal a disherison equity will enjoin." The interest reserved to the owner in the fee owning adjoining land, upon condemnation of a right of way, is in all respects the same as if he had made a grant or a lease of a portion of the surface of his oil-bearing land, reserving to himself, as the owner of adjoining land, the right to all minerals beneath the granted or leased tract, but without right to enter upon its surface to sink wells. Such a right has been held to be a valuable one as to petroleum oil, notwithstanding its fugitive and wandering nature, and an attempted invasion of such right enjoined. Westmoreland & C. N. G. Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731. It is true that, in making a grant or lease with such a reservation in favor of his retained land, the grantor or lessor acts upon his own volition, and the value of the reservation depends upon his judgment, which may be influenced by the location of the different tracts and the area of granted and reserved lands and other considerations. But, although the proceeding in condemnation is in invitum, these same matters can be taken into consideration in determining whether the reservation which the law makes in these minerals is of substantial benefit to the owner of the adjoining land. If this reservation is of no benefit, then, as a matter of course, the condemning party must pay for the easement whatever the value of the fee is ascertained to be. If, however, there is a beneficial ownership in the oils underlying the right of way, as these are reserved to the owner of the fee, the value of this beneficial ownership must be taken into consideration as something separate and apart from the value of the easement, and the value of the easement alone assessed against the condemning party. As in condemnation proceedings only an easement is acquired, this is all that the law requires shall be paid for. We discover no reason why the rule pertaining to the determination of the value of an easement, which is adopted with reference to mineral lands, where the minerals are in situ, should not be applied to easements over oil-bearing lands. In principle there is no distinction, though as to oil lands the practical application of the rule may be more difficult. It no doubt will always be more difficult to prove whether a reserved right in oil is valuable or not, much more so than such a right in fixed minerals; but it cannot be said to be impossible to do it. It can hardly be that, in every case where a right of way is sought to be condemned over a strip of oil-bearing land, the valuable rights which were owned by the defendant when the condemnation proceedings were inaugurated, and which the condemning party does not acquire, are entirely lost to the defendant owning adjoining land by reason of the condemnation.

This disposes of the main point in the case, but appellant presents two other questions relative to rulings of the court. It insists that the trial court should have granted its motion to strike out the testimony of the witness Rusk, called on behalf of defendant, as to the market value of the property in question, on the ground that it appeared from his cross-examination that his testimony in that respect was merely conjectural and speculative. We do not think so. The witness fully qualified himself on direct examination to give an opinion on the subject. On cross-examination he testified as to the matters which would influence him from the standpoint of a contemplating buyer in determining the market value of land in an oil-bearing territory; the number of wells which could be economically placed on the amount of land taken, and ordinary losses therefrom; and the general relation of outlay to income. On cross-examination he entered into no details, nor gave any estimates. These were matters which, it appears to us, would naturally be taken into calculation in forming a public and general estimate of the value of land of this character, and which would influence the minds of sellers and buyers with relation to it, and to which the witness could properly testify. It is true the witness, in addition, testified that he would take into consideration what "he could pay for it and have sufficient margin for speculation during at least five years," which, of course, is not a factor in determining market value; and, if the motion to strike out had been addressed to this particular testimony, it would, doubtless, have been granted. It afforded, however, no warrant for striking out all the testimony of the witness, and the motion was properly denied.

It is further claimed that the lower court erred in refusing to allow appellant to prove a progressive decrease in the productiveness of the oil field within which the land in question is situated. Upon the argument here, counsel for respondents do not discuss the right of the appellant to make such proof, but defend the ruling of the court on the ground that the question, as addressed to the particular witness, was too indefinite and vague. This was probably true. Upon a new trial, however, objection on that ground may be obviated. As a matter of right the appellant was entitled to introduce evidence upon the subject. Such evidence is admissible as bearing upon the market value of the land in question, as oil-bearing land. As it is permissible to show that the land sought to be condemned is oil-bearing land, so it is permissible to show what kind of oil-bearing land it is, and to that end to show its degree of productiveness, whether increasing or decreasing.

The order denying the motion for a new trial is reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

146 Cal. 301

PEOPLE v. JAILLES. (Cr. 1,182.)

(Supreme Court of California. Feb. 18, 1905.)

RAPE—INFORMATION — DISTINCT OFFENSES — RESISTANCE — INSTRUCTIONS — WITNESSES — IMPEACHMENT—APPEAL—HARMLESS ERROR.

1. Pen. Code, § 261, defines rape as an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, (1) where the female is under the age of 16 years; (3) where the female resists, but her resistance is overcome by force or violence. Section 954 requires an indictment or information to charge but one offense, but permits the same offense to be set forth in different forms under different counts. *Held*, that an information for rape containing two counts, each charging a rape committed on the same day and upon the same female, but the first charging the accomplishment of the rape by force, and the second alleging merely an act of sexual intercourse with a female under the age of 16 years, is not subject to the objection of charging more than one offense, although it does not expressly state that the matters set forth are descriptive of the same offense.

2. An information for rape, alleging that defendant "on and upon * * * did violently and feloniously make an assault, and her * * * did violently and feloniously ravish and carnally know * * * she having resisted his said assault, and said resistance having been then and there overcome by force and violence" of defendant, sufficiently alleged resistance on the part of prosecutrix, overcome by force or violence, to the act of defendant in assaulting and ravishing her.

3. In rape, a charge omitting to state, as an essential to a conviction, that it was necessary to show that prosecutrix was not the wife of defendant, was not prejudicial, where in another portion of the charge the court correctly defined the offense as an act accomplished with a female not the wife of the perpetrator, etc., and there was no pretense or testimony on any side that prosecutrix was defendant's wife.

4. A witness for the defense was asked on cross-examination if he had not made a certain statement, at variance with his testimony, to a certain person. Having denied making such a statement, the person named was called in rebuttal, and testified without objection that said witness for the defense had made a statement under the conditions mentioned in the question asked of such witness. On cross-examination he testified that the statement was made in Spanish; that he understood Spanish, although he did not understand every word, and could not tell connectedly what was uttered, but his knowledge of the words used by defendant was derived from an interpreter. *Held*, that it was not error to refuse to strike out the rebuttal testimony on the ground that the same was hearsay, and to rule that the objection thereto went simply to the weight of the evidence.

5. The giving of a charge in a criminal case that the jury might consider the manner of a witness, his relation to the controversy, etc., is not ground for reversal.

6. The refusal to charge that "the presumption of innocence must go with you, in all your deliberations as jurors, in arriving at the verdict," was not prejudicial, where the court had already charged that defendant was presumed to be innocent until the contrary was proved,

and was entitled to an acquittal in case of a reasonable doubt of guilt, and there was no intimation in the charge that the presumption of innocence could be lost sight of at any time prior to arriving at a verdict.

7. A refusal to charge was not error where the substance of the request was given elsewhere.

Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Florencio Jailles was convicted of rape, and appeals. Affirmed.

E. E. Capps, G. H. C. Shaw, and Kelly & Shaw, for appellant. U. S. Webb, Atty. Gen., Cassius Carter, Dist. Atty., and W. R. Andrews, Dep. Dist. Atty., for the People.

ANGELLOTTI, J. Defendant was convicted of rape, and appeals from the judgment pronounced upon said conviction, and from an order denying his motion for a new trial.

1. The defendant interposed a demurrer to the information upon the ground that "the said information charges more than one offense." The demurrer was overruled, and this ruling of the trial court is complained of as erroneous. The information contained two counts, each charging a rape committed by defendant on May 10, 1903, upon one Maria Tampo; the first charging that a rape was accomplished by means of force and violence, and against the resistance of the female, and the second omitting all allegations as to force and violence and resistance, and simply alleging an act of sexual intercourse with the said female, she then and there being under the age of 16 years. Section 954 of the Penal Code provides, "The indictment or information must charge but one offense, but the same offense may be set forth in different forms under different counts, and, when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count." It has been said by this court that while, under our statute, the indictment or information may charge the same offense in different forms under different counts, "this must be done in such a way as to show clearly upon the face of the indictment or information that the matters and things set forth in the different counts are descriptive of one and the same offense." People v. Garcia, 58 Cal. 102. It must be conceded that it would be preferable for the pleader endeavoring to set forth one offense in different forms under different counts to expressly state in the information that the matters and things so set forth are descriptive of one and the same offense. Such a statement would obviate all question as to the intention of the pleader. We think, however, that, despite the absence of such a statement in the information before us, it is manifest that it was sought to charge but one offense, viz., one rape committed on Maria Tampo on May 10, 1903. The nature of the allegations in the two counts shows this very clearly. The only difference between the allegations of the two counts is that force, violence, and resistance are alleged in one, without allegation as to age, while in the other is the allegation as to age, without any allegation as to force, violence, and resistance. The allegations of each show the offense of rape, committed on the same person on the same day, and indicate that the district attorney was simply endeavoring to set forth the same transaction in different ways, so as to bring the case within either subdivision 1 or subdivision 3 of section 261, Pen. Code, as the evidence on the trial might show it to have been. All these allegations might undoubtedly have been joined in one count, for there is nothing inconsistent in them, or the second count might have been entirely omitted, for testimony showing the existence of the facts alleged therein would have been sufficient to sustain a conviction under the allegations of the first count. People v. Snyder, 75 Cal. 323, 17 Pac. 208; People v. Vann, 129 Cal. 118, 121, 61 Pac. 776. The decision of this court in People v. Thompson, 28 Cal. 214, is in point here, and sustains the information. The information in People v. Garcia, 58 Cal. 102, relied on by appellant, clearly charged two separate and distinct assaults. The court there said: "In brief, according to the information, the defendant committed two separate and distinct assaults upon Lenora Philis on the 28th of June, 1881, with intent to murder her—one with a large bar of iron while she was but three feet from him, and the other with a loaded rifle gun while she was but ten feet distant. Proof of the facts alleged in the second count would not have sustained the averments of the first, nor would proof of the facts alleged in the first count have sustained the averments of the second." The case is not in point here.

2. It is urged here for the first time—the objection not having been made by demurrer—that the first count of the information does not state a public offense, in that it does not clearly charge that the prosecutrix resisted the assault of defendant to the end. It is alleged in the information that the defendant "on and upon one Maria Tampo * * * did violently and feloniously make an assault, and her, the said Maria Tampo, did violently and feloniously ravish and carnally know * * * she having resisted his said assault, and said resistance having been then and there overcome by the force and violence of said" defendant. This sufficiently alleged resistance to the act of defendant, overcome by force or violence. It is suggested that it is alleged only that she resisted "the assault," and not that she resisted the ravishing. But the only assault alleged was that committed in the accomplishment of the act of ravishing. The allegation that she resisted the assault, and "that such resistance was overcome by the force and violence of said" defendant, neces-

sarily means that she resisted the whole thereof, to the very accomplishment of the act charged, and that the act was accomplished only by reason of the fact that her resistance was overcome by force and violence.

3. In charging the jury as to what was essential to a conviction under the first count of the information, the trial court omitted to state that it was necessary to show that the prosecutrix was not the wife of the defendant. In another portion of the charge the court correctly defined the offense as being an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under certain conditions. The omission noted above was not prejudicial. There was not the slightest pretense that the prosecutrix was the wife of the defendant. The defendant himself testified that he did not know her name, that he had no acquaintance with her, and that he never saw her before that night. Under the circumstances of this case, it could not be held to be prejudicial error for the court to assume in its instructions that she was not defendant's wife. See People v. Baldwin, 117 Cal. 244, 251, 49 Pac. 186.

4. The evidence very clearly establishes the fact that the prosecutrix was not the wife of defendant.

5. Adolpho Jailles, a witness for the defense, was asked on cross-examination if he had not made a certain statement, at variance with his testimony, to one Harry Hubbell and one Ambrosia Ruiz at a certain place and time, and denied having made such a statement. Hubbell was called in rebuttal, and testified, without objection, that at the time and place stated, and in the presence of said Ruiz, Jailles made said statement. On cross-examination he testified that Jailles made such statement in the Spanish language; that he understood Spanish; that he did not understand every word and sentence of Spanish; that he could not put a Spanish sentence "connectedly together," and could not tell "connectedly" what was uttered; and that his knowledge as to the exact words used by Jailles on that occasion was derived from what Ruiz, who acted as interpreter, then and there told him. The defendant thereupon moved to strike out the evidence of Hubbell as to Jailles' statement on the ground that the same was hearsay, and his motion was denied; the court saying that the objection went simply to the weight of the evidence before the jury. Taking into consideration all of the evidence of the witness upon this subject, we cannot say that the court erred in this ruling. It may be added that Ruiz, the interpreter, was subsequently sworn as a witness, and testified to the making of the statement by Jailles.

6. We find no prejudicial error in the matter of instructions to the jury. We have already discussed the question as to the effect of the omission of the court, in one portion of its charge, to state that it was necessary to show that the prosecutrix was not the wife of defendant. There was nothing in the instruction of the court as to "moral certainty" which could be construed to define that term as being simply that degree of certainty "which a person would feel justified to act upon in matters of importance to himself." The instruction as to the testimony of the defendant was the same instruction concerning which this court has over and over again said that a judgment will not be reversed because such instruction was given. No instruction was given that called the attention of the jury to any other particular witness or class of witnesses. The court simply informed the jury that, as to any witness, they might take into consideration his manner, relation to the controversy, etc. As has been often said, this is only stating to the jury facts already within their knowledge, as men of common sense. The refusal of the court to instruct that the "presumption of innocence must go with you in all your deliberations, as jurors, in arriving at your verdict" was not prejudicial. The court had already instructed "that a defendant in a criminal action is presumed to be innocent until the contrary is proved, and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." There was nowhere in the charge any intimation, as in cases relied upon by appellant, that this presumption of innocence could be lost sight of at any time prior to arriving at a verdict, and the jury could not have so understood, in view of the instructions given. The court refused to give a requested instruction to the effect that the prosecution was required to prove the defendant guilty beyond a reasonable doubt, and that the defendant is not required to prove his innocence. The reason assigned was that the instruction was given elsewhere, as it was, in substance. It was not necessary to repeat it in a different form.

7. The showing upon motion for a new trial on the ground of newly discovered evidence was not such that we can say that the trial court, in denying the motion, abused the discretion confided to it.

No prejudicial error appearing in the record, the judgment and order must be affirmed, and it is so ordered.

We concur: SHAW, J.; VAN DYKE, J.

146 Cal. 279

PROGRESSO S. S. CO. v. ST. PAUL FIRE & MARINE INS. CO. (S. F. 3,084.)*

(Supreme Court of California. Feb. 13, 1905.)

MARITIME INSURANCE—CONSTRUCTION OF POLICY—ACTUAL TOTAL LOSS.

1. In the construction of maritime insurance policies made payable at San Francisco, the law of California governs.

2. A finding that there was an actual total loss of steamers, within maritime policies issued

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*Rehearing denied March 15, 1905.

thereon just before they were to be towed to Alaska to be used for transportation on a river there, for the purpose of which transportation the owner held them, is warranted by evidence that they were so injured that they could not be repaired so as to be safely towed to Alaska.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; George H. Bahrs, Judge.

Action by the Progresso Steamship Company against the St. Paul Fire & Marine Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Page, McCutchen, Harding & Knight and Page, McCutchen & Eells, for appellant. A. H. Ricketts, for respondent.

SMITH, C. This is an appeal from a judgment for the plaintiff and from an order denying defendant a new trial. The suit was brought on two policies of insurance issued by defendant to the agents of the Yukon Transportation & Commercial Company, and made payable to plaintiff at San Francisco, insuring, in the sum of $2,500 each, two river steamboats known as the Staghound and the Gamecock, about to be towed from Portland, Or., to St. Michaels, Alaska. The interest of plaintiff was that of mortgagee. Each policy, besides the words of insurance, contained the memorandum, "Warranted free from all average and salvage." The two steamboats, when out about 36 hours from Astoria, met with such damage from the seas that the towing steamer was compelled to return with them in a badly damaged condition to Astoria. Shortly after their return the assured gave notice of abandonment to the defendant, which declined to accept it on the specific grounds that the damage was partial, and that its insurance was "warranted free of all average" and against "absolute total loss only." Of the two steamers the Staghound was most injured. The subsequent history of the steamboats does not seem to be material to the case, but, as some stress is laid upon it by the appellant, it may be as well to state that the two steamboats were libeled in the admiralty court for breach of contract of transportation and personal service, and ultimately sold by the marshal with their equipments, the Gamecock for $5,596 and the Staghound for $4,497; that the Gamecock was made into a towboat at an expense of $4,000, and put to use as such on the river; and that the Staghound was broken up, and her machinery removed into the hull of a new tugboat, and her hull converted into two barges.

One of the questions mainly discussed in the brief relates to the construction of the memorandum clause of the policy, "Warranted free from all average and salvage," as to which it is claimed by the appellant that this limits the right of recovery to the case of "actual total loss" only, and excludes "the right to abandon" for "constructive total loss." In discussing this question it is rightly assumed by the counsel that, as the contract provides for performance in San Francisco, the California law must govern. This will be found in sections 2704 and 2717, Civ. Code; the former defining "actual" and the latter "constructive" total loss. But it seems that on this question the court below accepted the theory of the appellant, and found, in effect, that there was an actual total loss of the vessel as defined in subdivisions 3 and 4 of section 2704 of the Civil Code; and, if this finding be supported by the evidence, the question discussed becomes immaterial. The question, therefore, to be considered is as to the sufficiency of the evidence to support this finding, and on this question we are of the opinion that the evidence was such as to justify the court in finding that the vessels could not be repaired so as to be towed to St. Michaels; and, indeed, with reference to the Gamecock, which was the least injured of the two, the witness Jones expressly so testifies. The court was therefore justified in finding that the owner of the vessels insured was deprived of their possession at the port of destination, and also in finding that they were rendered valueless to the owner for the purpose for which it held the same; that is to say for transporting freight and passengers on the Yukon river in Alaska. This conclusion renders it unnecessary to consider other questions discussed in the briefs.

We advise that the judgment and order be affirmed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed: VAN DYKE, J.; ANGELLOTTI, J.; SHAW, J.

146 Cal. 281

STIMSON et al. v. DUNHAM, CARRIGAN, HAYDEN CO. et al. (L. A. 1,445.)

(Supreme Court of California. Feb. 14, 1905.)

MECHANICS' LIENS—ENFORCEMENT—CLAIMS OF SUBCONTRACTORS—COSTS AND ATTORNEY'S FEES—INTERPLEADER—INTEREST.

1. Where owners were served with subcontractors' notices, which, under the provisions of Code Civ. Proc. § 1193, entitled them to withhold the whole amount due the principal contractor to pay the claims of the subcontractors, they were entitled to bring all interested parties into court so that their rights to the fund could be determined in one suit.

2. Under Code Civ. Proc. § 1193, authorizing the contractor to recover upon a lien only such amount as may be due him after deducting all claims of other parties for work done and materials furnished, a contractor to whom nothing is due after such deduction is not entitled to recover upon the lien filed by him.

3. Under Code Civ. Proc. § 1195, requiring the court in proceedings to enforce mechanics' liens to allow costs and attorney's fees, a contractor who does not establish his lien because

the fund due him is exhausted in the payment of subcontractors is not entitled to them.

4. Under Civ. Code, § 3287, authorizing the recovery of interest on liquidated damages, except during such time as the debtor is prevented by law from paying the debt, an owner, who, under Code Civ. Proc. § 1193, is prevented from paying the contractor because of the service of claims of subcontractors on him, is not liable for interest.

5. A contractor's demand for extras does not draw interest until the amount thereof is ascertained by judgment of the court.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Interest, § 35.]

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by William H. Stimson and others against the Dunham, Carrigan, Hayden Company, John N. Gardiner, and others. From the judgment rendered, and from an order denying a motion to annul the conclusions of law and to modify the judgment, defendant John N. Gardiner appeals. Affirmed.

Valentine & Newby, for appellant. John D. Pope, for respondents.

COOPER, C. Appeal from judgment and from an order denying appellant's motion to annul conclusions of law and to modify judgment.

The complaint alleges: That plaintiffs' testate, in September, 1900, entered into certain contracts with appellant, by the terms of which appellant was to furnish material and perform the labor in putting in certain pipes, pump, and fittings in the basement of the Stimson Block and Douglass Building in the city of Los Angeles for the sum of $1,968. That appellant in due time entered upon the performance of said contracts, and completed them on the ——— day of June, 1901. That the defendants (except appellant, the contractor), more than 40 in all, claim to have furnished portions of the material or labor in the performance of the contracts, and many of them have served written notices upon plaintiffs that appellant was indebted to them for materials or labor furnished or done in performance of said contracts of appellant, and have notified plaintiffs to withhold money sufficient to pay their demands; the total amount of money claimed in said notices exceeding the contract price of said improvements. That plaintiffs have no means of knowing whether the demands of said parties so furnishing labor and materials are just, or the respective amounts, but are desirous of making payment of the contract price and amount due to the materialmen, laborers, and parties entitled thereto, as the court may direct. That appellant claims that there is a sum due him for extra materials and labor furnished and done in the performance of the said contract, but plaintiffs do not know and cannot state whether there is anything due, or how much is due for extras, but that the amount due under the contracts and for extras is insufficient to pay all the claims for material furnished and labor done in the performance of said contracts. Plaintiffs pray that the court may determine and adjudge the amount in which they are indebted to appellant upon said contracts and for extras thereunder, and that, upon the amount being ascertained, they be permitted to pay such amount into court and be discharged; that defendants be required to set forth their respective claims for adjudication, so that the money due by plaintiff may be paid as the law may award; and that defendants, and each of them, be restrained from filing any liens upon plaintiffs' premises pending the hearing.

The materialmen and laborers appear to be satisfied with the decision, as they have not appealed. This opinion will therefore be confined to the question raised by the appellant, Gardiner. His demurrer to the complaint was properly overruled. Plaintiffs had made their contracts in compliance with the law, and desired to live up to them. They were willing to pay the amount due appellant for extras as soon as the matter could be judicially determined. They had been served with notices intercepting the payment of the entire amount due, but they could not, at their own risk, determine the amount or justness of the claim of each of some 40 laborers and materialmen. In such case they could not be held beyond the contract price and charged with additional costs and expenses created or incurred by appellant. Code Civ. Proc. § 1193; Rosenkranz v. Wagner, 62 Cal. 154; Turner v. Strenzel, 70 Cal. 30, 11 Pac. 389; Brill v. De Turk, 130 Cal. 244, 62 Pac. 462. Plaintiffs were required by the Code, after having been served with notices, to withhold sufficient moneys to pay all such claims and attorney's fees to each claimant to the extent of $100. Therefore plaintiffs, having the money on hand with which to pay all amounts due by them, and desiring to pay it to the proper parties, had the right to come into court and bring in all interested parties so that the one decree might settle all rights. Any party entitled to a lien would, no doubt, have had the right to insist that the amount for which plaintiffs were liable should have been paid into court, and upon plaintiffs' failure to do so would have been permitted to proceed with the enforcement of his lien in the regular course. The court would not, in a case like this, compel a lienholder to allow his lien to become barred without being secured by the deposit of the amount due by the owner or otherwise. In this case, however, the plaintiffs asked to be permitted to pay the amount into court as soon as it could be ascertained as to the sum due for extras. No question was raised in the court below as to the payment of the money into court, and no one was enjoined from filing a lien.

Appellant filed an answer and cross-complaint. He did not deny the allegation in the complaint that the amount due on the contracts and for extra work was insufficient to pay all the claims of the laborers and materialmen other than himself, but he alleged that the value of the extra materials and labor was the sum of $1,901.20. The court found the amount due on the contract price to be $1,968, and the amount due for extras $645.20 (neither of which findings are questioned); making the total amount due $2,613.20. It also found that there was due and owing by appellant to laborers $722.37, and to materialmen $2,654.61, the names and amounts being inserted in the decree (neither of which findings are questioned); making the total amount due from appellant and unpaid for labor and materials the sum of $3,376.98. This was in excess of the amount due by plaintiffs, and the decree provided that the laborers be paid in full, and the balance to the materialmen on a pro rata distribution of .6817+.

The court denied the demand of appellant for a foreclosure of his lien, for attorney's fees, for interest, and for costs. It is claimed that the court erred in all these respects. The appellant, as contractor, was entitled "to recover upon a lien filed by him only such amount as may be due him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished." Code Civ. Proc. § 1193. As there was nothing due him after making such deductions, he was not entitled to recover upon the lien filed by him. The Code provides that the court must allow, as part of the costs, the money paid for filing and recording the lien and reasonable attorney's fees, "to be allowed to each claimant whose lien is established." Code Civ. Proc. § 1195. As appellant did not establish a lien, he does not come within the provisions of the statute as to costs and attorney's fees. If, for the purposes of this case, it be conceded that appellant can raise the question, we hold that plaintiffs were not liable for interest. They were prevented by the express mandate of the statute from paying the amount for which they were liable, under the contracts, after the notices of the laborers and materialmen had been served upon them. Civ. Code, § 3287; Easterbrook v. Farquharson, 110 Cal. 316, 42 Pac. 811. And the demand for extras did not draw interest until the amount was ascertained by the judgment of the court. Macomber v. Bigelow, 126 Cal. 14, 58 Pac. 312, and cases cited.

It follows that the judgment and order should be affirmed.

We concur: SMITH, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

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146 Cal. 286

BIRD v. POTTER. (L. A. 1,591.)

(Supreme Court of California. Feb. 15, 1905.)

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY—TENDER — STATUTE—ADEQUATE CONSIDERATION—FINDING — SUFFICIENCY—APPEAL —QUESTIONS FOR REVIEW—SEARCH OF RECORD—RIGHTS OF COURT.

1. Under the direct provisions of Civ. Code, § 3388, a party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, where the party who has not signed it has performed or offers to perform it on his part, and the case is otherwise proper for specific performance.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 93.]

2. In an action for specific performance of a contract for the sale of a lot, a finding, supported by the evidence, that no agreement was made by plaintiff and defendant concerning the building of a house for plaintiff, and that there was no definite or certain promise made by plaintiff to the defendant, or to any one for him, concerning the building of the house, is conclusive on appeal.

3. Where alleged errors of law occurring at the trial are relied on, but the questions and rulings complained of are pointed out in no other way than by reference to folios, and an examination of such folios discloses the references to have been mistakenly made, the Supreme Court is not obliged to search the record to find the questions and rulings.

4. In an action to compel specific performance of a contract for the sale of a lot, it appeared that the contract recited the receipt from the plaintiff of $5 as part of the price of the lot. It also recited, "Full purchase price to be $450," and that the deposit was taken subject to the approval of the owner. The court found that at the time of the execution of the contract $450 was the reasonable value of the lot, and that the contract "was and now is" fair and just. It was admitted that plaintiff paid the defendant $5, and tendered him $445, which he declined. The judgment directed a deed to be executed and delivered to plaintiff on payment of $445, and interest thereon at the rate of 7 per cent. per annum from the date of the tender by plaintiff. *Held*, that a contention that no finding was made on the issue that defendant never received any adequate consideration for the alleged agreement was untenable.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Samuel M. Bird against Thomas McDaniels Potter. From a judgment for plaintiff, defendant appeals. Affirmed.

H. S. Rollins, for appellant. Geo. L. Keefer, for respondent.

COOPER, C. This action was brought to enforce specific performance of a written contract for the sale of real estate. The court filed findings, upon which judgment was entered for plaintiff. Defendant made a motion for a new trial, which was denied, and now prosecutes this appeal from the order denying his motion. He claims that the evidence is insufficient to justify the judgment and decision, and that certain errors of law occurred during the trial, to his prejudice.

The contract upon which the action depends is as follows:

"Los Angeles, Cal., May 16, 1902. Received of Samuel M. Bird five dollars as deposit and part of the purchase price of lot twenty-one, block 'D' of the Potter's Woodlawn Tract. Full purchase price to be $450.00. This deposit is taken subject to the approval of the owner. W. I. Hollingsworth & Co. Thomas McD. Potter."

The name of the owner, Thomas McD. Potter, was signed to the contract after it had been first signed by his agent, W. I. Hollingsworth & Co. The $5 was paid by plaintiff at the time the writing was given to him.

It is claimed by appellant that he never received an adequate consideration for the contract; that it was not binding upon plaintiff, because he did not agree to pay the $450 for the lot, and hence the contract, not being mutual, cannot be enforced in a court of equity. The claim is without merit. The contract is in writing, subscribed by the party to be charged, describes the land to be conveyed, and names the consideration for which defendant agreed to convey. Time is not made the essence of the contract. No demand was ever made by defendant for the balance of the purchase price, and the court finds that "on the 10th day of December, 1902, plaintiff offered to said defendant, Thomas McDaniels Potter, the sum of $445, in U. S. gold coin," and demanded of said defendant a deed for said lot, and that defendant refused to accept the said $445 or to give plaintiff a deed for said lot. This finding is supported by the evidence, and not questioned. If the amount named as the purchase price was not adequate, the defendant should have so determined in his own mind before he signed the contract, but, having signed it and stated the amount for which he would sell the lot, he must live up to it. Any other rule would make the contract worthless and mere waste paper. Defendant knew the meaning of it when he signed it, and the price for which he agreed to sell the lot. It is true that the contract was not mutual, as plaintiff did not agree to purchase, but the remedy became mutual upon the tender of the performance by plaintiff. It is not necessary to refer to the many decisions in support of the above principle, because it is the rule laid down in section 3388, Civ. Code, which reads: "A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance." In this case the plaintiff has offered to perform it on his part, and the case is certainly a proper one for enforcing specific performance. The rule is correctly stated in Hay v. Mason, 141 Cal. 723, 75 Pac. 300, where it is said: "If the option or offer to convey by defendant had been for a price named, although unilateral and signed by defendant only, it would have been binding upon him, if subsequently, and prior to its withdrawal by defendant, plaintiffs acted upon it and tendered the price to be paid. In such case the contract or offer, although not mutual when first signed by defendant, would have become so by the price being paid or tendered." That case was cited with approval, and the same rule recognized, in Nason v. Lingle, 143 Cal. 367, 77 Pac. 71.

Appellant also claims that there was an independent verbal agreement made at the time of the writing to the effect that defendant was to construct a house for plaintiff upon the lot, and that the house and lot were to be sold together. If it be conceded that such evidence of an oral contract was admissible, it is sufficient that the court found that no agreement was made by plaintiff and defendant "concerning the building of a house for plaintiff, and that there was no definite or certain promise made by plaintiff to said defendant, or to any one for him, concerning the building of said house." This finding is supported by the evidence. Other findings are questioned, and we have examined them, and find that, so far as material, they are supported by the evidence. The court found upon all the material issues.

The appellant, in his brief, under the heading "Errors of Law Occurring at the Trial and Excepted to by Defendant," says: "The errors here designated [folios 189–194] we will submit to the court for consideration upon the argument and citations heretofore made. The questions of the defendant to which objections were sustained were each, under the pleadings, competent, relevant, and material, which were the grounds of the objections made to them." The questions and rulings are in no other way pointed out, nor discussed. By turning to the transcript, we find four questions and rulings specified as error, with a reference to the folio and page where each can be found. We have looked at the folio and page referred to in each case, and do not find any one of the questions. We have not the time or the inclination to make an independent search of the record in order to find such questions and rulings. People v. McLean, 135 Cal. 309, 67 Pac. 770; People v. Cebulla, 137 Cal. 318, 70 Pac. 181.

Appellant claims "that no finding is made upon the issue that defendant never received any adequate consideration for the alleged agreement." The court found "that at that time, namely, the 16th day of May, 1902, the said sum of $450 was the reasonable value of said lot, and that the said contract was and now is fair and just." It is admitted that plaintiff paid defendant $5, and tendered him $445, which he declined. It is thus shown that defendant declined to receive "the adequate consideration" for which he agreed to sell the lot. The judgment protects defendant's rights, as it directs a deed to be executed and delivered to plaintiff upon payment "of said sum of four hundred and forty-five dollars, and interest thereon at the rate of seven per cent. per annum from the 10th day of December, 1902."

It follows that the order should be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

146 Cal. 277

NEVILLS v. SHORTRIDGE et al. (S. F. 2,196.)

(Supreme Court of California. Feb. 13, 1905.)

RES JUDICATA—DISMISSAL OF ACTION.

The dismissal of an action because prematurely commenced is no bar to another action.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1014.]

Commissioners' Decision. Department 1. Appeal from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by W. A. Nevills against Samuel M. Shortridge and another. From a judgment dismissing the action, but providing that it should not operate as a bar to a subsequent action, defendants appeal. Affirmed.

John E. Richards and Van R. Paterson, for appellants. Riordan & Lande and J. H. Campbell, for respondent.

COOPER, C. Appeal by defendants from judgment on the judgment roll without a bill of exceptions. The action was brought to recover a balance alleged to be due upon two promissory notes—one for $20,000, and one for $40,000—both dated November 30, 1896, and to foreclose a mortgage given to secure the said notes. The action was commenced November 30, 1898. The answers alleged, and the court found, that the action was prematurely commenced by reason of an agreement made by plaintiff on April 30, 1898, extending the time for the payment of said notes for one year from said last-named date in consideration of the conveyance of certain property by defendants to plaintiff of the aggregate value of $31,672.79, which was credited upon the indebtedness of defendants to plaintiff. The court accordingly gave judgment for defendants that the action be dismissed because prematurely brought, and that the defendants recover their costs. The judgment provided, "Such dismissal, however, not to be a bar to another action." Defendants complain of the judgment as to the quoted clause, and claim that the court had no power to determine the effect of its judgment in any subsequent proceeding between the parties.

It is evident that, if the judgment of dismissal was not a bar to another action, as a matter of law, the provision in the judgment, if conceded to be erroneous, was but a recital of the law as to the particular case, and was harmless. It is not contended by defendants that the effect of the judgment of dismissal was a bar to the beginning of another action. To hold that an action prematurely brought shall be dismissed, and that such dismissal will bar another action, brought when the obligation matures, would be to inflict a penalty of the entire loss to the plaintiff of his demand in all cases in which the court might decide on conflicting evidence that the action was brought prematurely, although the plaintiff was honestly mistaken. Such is not the law. A plea in abatement, without disputing the justness of plaintiff's claim, objects to the place, mode, or time of asserting it, and requires pro hac vice that the judgment be given for the defendant, leaving it open to renew the suit in another place or form, or at another time. It must not only point out the plaintiff's error, but must show him how it may be corrected, or in technical language it must give the plaintiff a better writ. 1 Chitty on Pleading (16th Am. Ed.) p. 462; Stephen on Pleading, p. 50; Pitts Son's Manufacturing Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156; Moore v. Sargent, 112 Ind. 485, 14 N. E. 466.

We advise that the judgment be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: ANGELLOTTI, J.; VAN DYKE, J.; SHAW, J.

JENNER v. MURPHY. (S. F. 4,054.) (Supreme Court of California. Dec. 5, 1904.) Department 2. Action by one Jenner against one Murphy.

PER CURIAM. The motion of respondent to dismiss the appeal from the judgment and the order denying the motion for new trial is hereby denied.

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146 Cal. 378

In re MOCK.

(Supreme Court of California. March 3, 1905.)

ATTORNEYS — ADMISSION TO PRACTICE — JURISDICTION OF COURT.

Code Civ. Proc. § 277, as amended by Act Feb. 15, 1905, provides that every person admitted to practice in the district court of appeal (a court created by Const. art. 6, as amended Nov. 8, 1904), "either upon examination or upon the production of a license from another state, * * * may practice as an attorney in all the courts of this state, including the Supreme Court." Section 279, as amended, provides that a person may be admitted or licensed to practice in all the courts of this state "by the district courts of appeal." *Held*, that though the Supreme Court may, as a matter of comity, permit an atttorney from another state to present argument in a pending cause in that court, it does not have power to admit an attorney to practice in all the courts of the state.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 1-3.]

Application of Samuel T. Mock to be admitted to practice as an attorney. Denied, without prejudice.

PER CURIAM. Samuel T. Mock, a citizen of the United States, has applied to this court to be admitted to practice as an attorney and counselor in all the courts of this state. He has, by the production of his license, issued by the Supreme Court of the state of Wisconsin, established the fact that he has been admitted to practice law in the highest court of a sister state, and has produced satisfactory evidence to the effect that he is in good standing at the bar of said sister state, and is a man of good moral character. He is therefore entitled to have his application granted if this court has the power to grant it.

The Legislature of this state, at its present session, has amended the section of the Code of Civil Procedure relative to the admission of attorneys from other states and countries to practice in all the courts of this state (section 279) so as to place such matter entirely in the jurisdiction of the district courts of appeal provided for by the recent amendment to the Constitution. By section 277 of the Code of Civil Procedure, as amended, it is provided that every person admitted to practice by a district court of appeal, "either upon examination or upon the production of a license from another state, * * * may practice as an attorney in all the courts of this state, including the Supreme Court." By section 279, as amended, it is provided that one may be admitted, on license, to practice in all the courts of this state "by any district court of appeal," and there is nothing in the law as it now exists that purports to authorize this court to make any such order of admission. It is undoubtedly true that this court has the power, as a matter of comity, to permit an attorney from any other state to present argument to this court in any pending cause; but we are of the opinion that it has not, under the law as it is now written, the power to make an order admitting one to practice in all the courts of this state, and that the applicant must make his application to a district court of appeal.

The application is therefore denied, without prejudice to the right of the applicant to apply to any district court of appeal.

146 Cal. 308

REBSTOCK v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 4,144.)*

(Supreme Court of California. Feb. 20, 1905.)

PRIMARY ELECTIONS—VOTERS—QUALIFICATIONS—STATUTES — CONSTITUTIONALITY — SECRECY OF ELECTIONS — OFFENSES — INDICTMENT—STATE'S EVIDENCE—EXEMPTION FROM PROSECUTION—DEFENSES—PROHIBITION.

1. Pen. Code, § 64, declares that no person otherwise competent shall be excused from testifying as to any of the offenses against the franchise on the ground that such testimony may criminate him, but that no prosecution can afterwards be had against such witness for any offense concerning which he testified for the prosecution; and Code Civ. Proc. § 1102, declares that prohibition lies only when the threatened proceedings "are without or in excess of the jurisdiction of the tribunal sought to be prohibited." *Held*, that where defendant was indicted for willfully and knowingly refusing to perform his duty as an election officer, as provided by Pen. Code, § 41, he was not entitled to a writ of prohibition to restrain prosecution of such indictment on the ground that he had appeared before the grand jury under subpœna issued by the district attorney, and testified concerning such offense as a state's witness; defendant being authorized by Pen. Code, § 1020, to present such matter as a complete defense to a plea of not guilty.

2. Refusal to dismiss an indictment on the ground that defendant, having testified as a state's witness before the grand jury, was not subject to prosecution for the offense, as provided by Pen. Code, § 64, cannot be reviewed on an application for a writ of prohibition to restrain further prosecution of the indictment; the error, if any, being reviewable on appeal from any judgment which might thereafter be pronounced.

3. Const. 1900, art. 2, § 2½, empowers the Legislature to determine the conditions on which electors may participate in any primary election; and Pol. Code, § 1367, declares that a voter at a primary election must declare a bona fide present intention of supporting the nominees of such political party at the next ensuing election, and any voter may be challenged, and his right to vote may be withheld unless he make oath or affirmation as to his bona fide present intention to support the nominees of the convention to which delegates are to be so chosen for such political party or organization. *Held*, that such requirement and declaration were not in violation of Const. art. 2, § 5, providing that "all elections by the people shall be by ballot or by such other method as may be prescribed by law: provided, that secrecy in voting be preserved."

In Bank. Petition by Joseph Rebstock for an alternative writ of prohibition against the superior court of the city and county of San Francisco and William P. Lawlor, one of the judges thereof. Writ denied.

A. S. Newburgh and Burke & O'Grady, for petitioner. Chas. L. Weller, Geo. T. Wright, and John A. Hosmer, for respondents.

ANGELLOTTI, J. On October 13, 1904, an indictment was presented by the grand jury of the city and county of San Francisco to the superior court thereof, against petitioner, charging him with a violation of the provisions of section 41 of the Penal Code, in that he, being an election officer in Primary Election Precinct 80 of said city and county, at a primary election held therein on August 9, 1904, had willfully and knowingly neglected and refused to perform a duty incumbent on him as such officer; it being alleged that he had willfully and knowingly refused to administer an oath, or affirmation to a challenged elector at such election, as required by section 1367, Pol. Code, and had allowed such elector to vote without making the necessary oath or affirmation. The superior court, proceeding in the usual mode, has caused petitioner to be arraigned upon said indictment, has required him to plea thereto, and will proceed with his trial thereunder unless restrained by this court. Petitioner seeks a writ of prohibition restraining the superior court from proceeding further in the matter of said indictment; claiming that such court is without jurisdiction in the matter, by reason of the fact that prior to the finding of the indictment he appeared before the grand jury that found the same, in response to a subpœna issued by the district attorney under direction of the grand jury, and there, in an investigation then being conducted by such grand jury relative to irregularities in said precinct at said election, was compelled to testify and did testify for the prosecution in regard to the offense for which he has been indicted.

Section 64 of the Penal Code, which is a part of title 4 of part 1 thereof, and in which title is included said section 41, provides as follows: "No person otherwise competent as a witness shall be disqualified or excused from testifying concerning any of the offenses enumerated and prescribed in this title, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against such witness for any such offense concerning which he testified for the prosecution." Petitioner's claim that the superior court is without jurisdiction to entertain or proceed upon said indictment is based upon the provisions of this section.

Conceding, for the purposes of this proceeding, that the petition for a writ of prohibition establishes a case in which petitioner is entitled to invoke the provisions of this section as exempting him from all liability for the offense alleged in the indictment, we cannot see that a case is made that will justify a writ of prohibition restraining the superior court from proceeding under said indictment. Prohibition lies only when the threatened proceedings "are without or in excess of the jurisdiction of" the tribunal sought to be prohibited. Section 1102, Code Civ. Proc. The defendant was charged by the indictment with having, in the city and county of San Francisco, committed a public offense triable by the superior court of that city and county. Such an indictment having been presented, it was the duty of the court, in the exercise of its jurisdiction, to proceed thereunder in the usual mode, with a view to a determination of the issues proposed thereby; and it was and is open to the defendant to show to the court having such jurisdiction, in response to any showing that may be made by the prosecution, any reason why, if originally guilty of the offense charged, he could not be convicted thereof. He says to this court, in this independent proceeding, in effect, that, although he may have committed the offense charged, he cannot be found guilty thereof, for the reason that he testified concerning the same, for the prosecution, before the grand jury that found the indictment. His claim in this regard may be well founded, in view of the provisions of section 64, Pen. Code; but his position, so far as the jurisdiction of the court in which the indictment is pending is concerned, is precisely the same as if he here alleged that the statute of limitations had run against the offense prior to the finding of the indictment, or that he had heretofore been acquitted of the offense, or had once been in jeopardy for such offense. His claim, if well founded in fact, is a full and complete defense to the charge against him; but it is, like the other defenses just enumerated, nothing more than a defense, and, like all other defenses, including that of a denial of the truth of the allegations of the indictment, must be presented for determination as to its sufficiency to the tribunal having jurisdiction of the proceeding, which, in the exercise of its jurisdiction, will determine as to the sufficiency of the defense, and any error committed by such court in the exercise of its jurisdiction in regard thereto can be corrected on an appeal. It must necessarily be for the court in which a charge against a person for a public offense within its jurisdiction is pending to determine as to any and all defenses offered thereto, and in so determining it cannot be held to be acting in excess of its jurisdiction. It may act erroneously, but the remedy for its error in this regard is not to be found in a writ which lies only to prohibit acts in excess of jurisdiction.

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*Rehearing denied March 22, 1905.

Section 1020 of the Penal Code provides that "all matters of fact tending to establish a defense, other than that specified in the third and fourth subdivisions of section one thousand and sixteen [former conviction or acquittal and once in jeopardy], may be given in evidence under a plea of not guilty." Under his plea of not guilty, defendant may therefore show the facts here alleged, just as he could show a defense under the statute of limitations, and, if improperly denied his rights in this regard, may have the error corrected on appeal.

It probably would not be contended that there was any doubt as to the correctness of what has been said, as applied to the defense of limitations. Reliance is placed here upon the language of section 64, that "no prosecution can afterwards be had against such witness," as placing any such prosecution beyond and outside of the jurisdiction of any court. We cannot construe this language as taking from the court in which a criminal proceeding is pending the jurisdiction to determine whether or not such proceeding is barred by reason of facts bringing the case within the provisions of said section 64. The precise question here presented has not been decided in any case that has come to our attention, but in the cases involving the question as to whether statutory provisions substantially similar to those of section 64 furnish all the protection guarantied by the constitutional provision to the effect that no person shall be compelled in any criminal case to be a witness against himself, and a witness consequently be compelled to testify thereunder, it has been recognized, wherever the matter was suggested, that the exemption given by the statute is purely a matter of defense. Thus in the case of Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, where the statute provided that no person so testifying "shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify," it was decided by the United States Supreme Court, by a bare majority, that the statute did furnish all the protection guarantied by the constitution; but it was recognized by both the majority and minority opinions that a person so testifying, if afterwards prosecuted, must, under such statute, prove his immunity by way of confession and avoidance. In the majority opinion—page 608, of 161 U. S., page 651 of 16 Sup. Ct. (40 L. Ed. 819)—it was said: "The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted, and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself; but, unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him." In the minority opinion it was said —page 621 of 161 U. S., page 660 of 16 Sup. Ct. (40 L. Ed. 819)—speaking of the clause "no person shall be prosecuted": "How possibly can effect be given to this provision, if taken literally? * * * When an indictment has been found, and the accused has been called upon to plead to it, he assuredly has been prosecuted. So that all that can be said is that the witness is not protected by the provision in question from being prosecuted, but that he has been furnished with a good plea to the indictment, which will secure his acquittal. But is that true? Not unless the plea is sustained by competent evidence. His condition, then, is that he has been prosecuted; been compelled, presumably, to furnish bail, and put to the trouble and expense of employing counsel and furnishing the evidence to make good his plea."

In State v. Nowell, 58 N. H. 314, the statute discussed provided, "nor shall he be thereafter prosecuted for any offense so disclosed by him." The court, speaking of the objection that the witness might be called on to defend against a subsequent prosecution, said: "It is true that a witness who discloses may afterwards be wrongfully prosecuted for the offense disclosed, notwithstanding the statutory exemption. But the witness has, under the statute, all the protection which the common-law right, adopted by the Bill of Rights in the common-law sense, gives him. * * * The legal protection of the witness against prosecution for crime disclosed by him is, in law, equivalent to his legal innocence of the crime disclosed. So far as his constitutional right is concerned, the case is as if the express provision of the statute were that a clerk, servant, or agent testifying against his principal is not guilty of such violations of chapter 99 as he discloses. The witness, regarded in law as innocent if prosecuted for a crime which he has been compelled by the statute to disclose, will stand as well as other innocent persons; and it was not the design of the common-law maxim, affirmed by the Bill of Rights, that he should stand any better. Were the case put by the respondent to occur, improbable as it may seem, he could plead and show that he had disclosed the same offense upon a lawful accusation against his principal, and thus make a perfect answer in bar or abatement of the prosecution against himself. Having testified, there would be, as to him, no statute authorizing a prosecution. * * * The indictment would be dismissed, or a verdict ordered in his favor."

It has been held in many cases that a witness is not exempted, under the constitutional provision, in the absence of any statutory provision exempting him from prosecution for offenses concerning which he is asked to testify, from testifying concerning any offense which is, as to him, barred by the statute of limitations. See Brown v. Walker, 161 U. S. 598, 16 Sup. Ct. 644, 40 L. Ed. 819, and cases there cited. The reason for such ruling is that he is immune from legal punishment for any such offense, because of the running of the statute. He may be prosecuted for such offense, but the statute of limitations affords him a legal defense therefor, which is sufficient to satisfy the requirements of the constitutional provision. Such doubtless would also be the rule where the witness had been pardoned as to the offense, or had been finally convicted or acquitted thereof, or had once been in jeopardy thereon. The effect of the decisions is that a statute exempting a witness from all liability to punishment for any offense in reference to which he may testify affords protection equal to that given by the constitutional provision, and that under such a statute he may be compelled to testify. Such is the ruling of the Supreme Court of the United States upon a constitutional provision which is practically the same as ours (Brown v. Walker, supra), and the ruling of this court in Ex parte Cohen, 104 Cal. 524, 38 Pac. 364, 26 L. R. A. 423, 43 Am. St. Rep. 127, in considering section 32 of the purity of election law of 1893 (St. 1893, p. 26, c. 16). That section not only provided that the person testifying "shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment for the offense with reference to which his testimony was given," but also that he "may plead or prove the giving of testimony accordingly in bar of such indictment, information, or prosecution." The section was fully as strong regarding exemption from prosecution as is section 64, Pen. Code. Of it, this court said: "The statute purports to compel him to testify in the same manner as any other person, and, as the equivalent for his constitutional protection, gives him a legislative protection of equal scope and effect, by exempting him from all liability to punishment for the offense with reference to which he testifies. The exemption is as broad as the compulsion, and the protection is equal to that given by the Constitution. * * * If, in giving such testimony, the testimony has reference to another offense committed by himself, he is within the protection of the statute, and upon any prosecution for such offense is authorized to plead or prove in bar thereof that under the compulsion of this section he gave testimony with reference to such offense." It is true that the statute there expressly provided that the witness might plead or prove the giving of testimony in bar of the indictment or information, but such provision was entirely unnecessary, in view of the express provision of section 1020, Pen. Code, heretofore cited. It also provided that the witness "shall not thereafter be liable to indictment * * * nor to prosecution," making it practically the same in this regard as section 64, Pen. Code. If the court in which the indictment is pending is, under said section 64, without jurisdiction to hear and determine as to the sufficiency of such a defense, so, also, it must have been without jurisdiction so to do in a case arising under the section considered in Ex parte Cohen, supra.

The language of section 64, Pen. Code, is certainly no stronger than that used by our law relative to jeopardy and former conviction or acquittal. The Constitution provides, in terms, that no person shall be twice put in jeopardy for the same offense (section 13 of article 1), and it is provided by section 687 of the Penal Code that "no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." Yet, in the face of this language, it is thoroughly settled that jeopardy, former conviction, and former acquittal are available to a defendant only by way of defense; and under the provisions of sections 1017, 1020, Pen. Code, matters of fact tending to establish such defenses can be given in evidence only under the special pleas provided for in subdivisions 3 and 4 of said section 1017. If such defenses are not tendered by such special pleas, they are waived, and, despite the peremptory language of section 13, art. 1, of the Constitution, and section 687, Pen. Code, cannot operate to save the defendant from conviction and punishment. See People v. Lee Yune Chong, 94 Cal. 379, 387, 29 Pac. 776; People v. Stoll, 143 Cal. 689, 696, 77 Pac. 818. Under the provisions of section 1020, Pen. Code, the defense here invoked is available under the plea of not guilty.

The object of all such provisions as those contained in section 64, Pen. Code, is simply to provide one coming within its terms with an absolute legal defense to any prosecution that may thereafter be instituted against him for any offense concerning which he may have testified. The section simply means that the showing of the facts therein stated, when made to the court having jurisdiction of the case, shall be a full and complete defense to any prosecution thereafter instituted. So construed, it, under the decisions, satisfies the constitutional guaranty.

It is unnecessary to here determine whether the indictment should have been dismissed by the superior court upon the motion for dismissal made by petitioner upon the grounds here urged in support of the application for a writ of prohibition. If the court erred in denying the motion, its error can be rectified upon an appeal from any judgment that may hereafter be pronounced.

It is suggested that the indictment fails to state a public offense, for the reason that the oath which the defendant omitted and refused to administer is in violation of section 5, art. 2, of the Constitution of California, which provides as follows: "All elections by the people shall be by ballot or by such other method as may be prescribed by law: provided, that secrecy in voting be preserved." The oath mentioned, to be taken by a voter challenged on the ground that he has not a bona fide present intention of supporting the nominees of the party in whose nominating convention he seeks to participate, by voting for delegates thereto, is one to the effect that he has a present bona fide intention to support the nominees of such convention. Assuming that the question thus raised is one that may properly be determined in this proceeding, it is manifest that there is nothing in the point thus made. By section 2½ of the same article of the Constitution, adopted in the year 1900, the Legislature is expressly empowered to determine the tests and conditions upon which electors may participate in any primary election; and there is nothing in a provision enacted by the Legislature in pursuance of this authority, requiring one seeking to participate in such an election as a member of any particular party to openly declare his allegiance to such party, which in any degree violates the constitutional provision invoked. Such a declaration is absolutely essential to the proper working of any primary law. By his mere offer to vote for delegates to a convention of any party, the elector does, in effect, declare his intention to support the nominees of such convention, and the oath is provided for as a guaranty of the truth of the declaration already made by such offer to vote.

The alternative writ of prohibition heretofore issued is discharged, and the petition for a writ of prohibition is denied.

We concur: BEATTY, C. J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.

(146 Cal. 339)

PEOPLE v. GRIFFITH. (Cr. 1,179.)*

(Supreme Court of California. March 1, 1905.)

CRIMINAL LAW — INSTRUCTIONS — DEFENSE OF INSANITY—EVIDENCE—ORDER OF PROOF —QUESTIONS TO EXPERTS.

1. On a prosecution for assault with intent to commit murder, the defense was alcoholic insanity at the time of the crime. There was evidence that defendant had drunk liquor on the day of the crime. One of his physicians testified that, from defendant's statements, he judged that defendant drank about a pint of whisky a day for a great many years, and hypothetical questions addressed to the physicians assumed the drinking from a pint to a pint and a half of whisky a day, together with quantities of champagne; and his wife testified that he had questioned her about his being poisoned by her, such questions being from the effects of drink. The court, at the request of defendant, charged that, while voluntary intoxication is no excuse for a criminal act committed under its influence, the jury were to consider insanity caused by it in the same way as insanity produced by any other cause. *Held*, that under such evi-

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*Rehearing denied March 29, 1905.

dence, and in view of the instruction given, it was not error for the court to instruct that voluntary intoxication is no excuse for crime, but may be considered when the existence of a particular motive is necessary, and in determining the degree of crime, and that the jury, in weighing the evidence offered to show the excessive use of alcohol, should keep in mind the distinction between a state of ordinary drunkenness and alcoholic insanity.

2. Where the defense on a prosecution for assault with intent to commit murder was insanity, and the jury were repeatedly instructed on the doctrine of reasonable doubt, and upon insanity, proved by a preponderance of the evidence, entitling a defendant to an acquittal on any criminal charge, an instruction that if the jury entertained the conviction, beyond a reasonable doubt, that defendant committed an assault on prosecutrix with an intent to kill her, they should find defendant guilty of assault with a deadly weapon, was not erroneous on the ground that, the assault being admitted, the instruction commanded the jury to find defendant guilty.

3. Where, on a prosecution for assault with intent to commit crime, the only issue was whether defendant was insane at the time of the commission of the assault, the refusal of an instruction that defendant was presumed to be a man of good character was not erroneous.

4. On a prosecution for assault with intent to commit murder, an instruction stating the penalty for an assault with a deadly weapon was no ground for reversal; the instruction being correct in point of law, and the giving of the same being a mere impropriety.

5. An instruction that, when partial insanity or insane delusion or hallucination is relied on as a defense in a criminal prosecution, it must be made to appear that the crime charged was the offspring of such insanity, and not the result of sane reasoning and natural motives, was proper.

6. On a prosecution, where the defense was alcoholic insanity, witnesses for defendant testified, as experts, that he was suffering from chronic alcoholic insanity, and were cross-examined on the symptoms and hallucinations found in such cases. The state then introduced experts who testified that defendant was not a victim of alcoholic insanity, because of the absence of a certain delusion always found in such cases; and the defense then sought to ask experts, in surrebutter, as to whether the delusion in question was an essential element in the determination of alcoholic insanity. *Held*, that the question called for an opinion in reference to a matter which was not surrebutter.

7. The rule as to privileged communications between a physician and patient does not apply in a criminal case.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 769.]

8. On a prosecution for assault with intent to commit murder, where the defense was insanity, a witness for the state was asked a hypothetical question, which, after setting forth the evidence as in an assumed case, concluded, "Now state whether or not, in your opinion, such a subject * * * was laboring under a delusion." *Held*, that the question was not improper, as asking for the opinion of the witness as to whether defendant was insane at the time of the crime.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1073-1076.]

Department 2. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

J. Griffith was convicted of assault with a deadly weapon, and he appeals from the judgment, and from an order denying a motion for a new trial. Affirmed.

Earl Rogers, J. W. McKinley, John T. Jones, and Luther G. Brown, for appellant. U. S. Webb, Atty. Gen., and Henry T. Gage, I. B. Dockweiler, and W. I. Foley, Special Counsel, for the People.

HENSHAW, J. Defendant was charged with the crime of assault with intent to commit murder. The jury returned a verdict finding him guilty of the lesser crime of assault with a deadly weapon. From the judgment which followed upon the entry of this verdict, and from the order denying his motion for a new trial, he appeals.

The assault was committed upon the person of defendant's wife, and her narrative of the occurrence may be thus set forth: The Griffiths had been living at the Arcadia Hotel, in Santa Monica, and were about to remove to Los Angeles. Upon September 3d the defendant went from Los Angeles to Santa Monica, and proposed to his wife a walk upon the beach. They took this walk, purchasing some souvenir postal cards at a curio store; thence to the plunge bath; and thence back to the hotel, where the wife resumed the packing of her trunks, as they were to leave the hotel the following day. She had nearly packed her trunk when her husband entered. He took his overcoat from the closet and placed it in the trunk which she was packing, went into another of their apartments, and, when next he entered the room, brought with him his wife's prayer book. His wife, noticing it, said: "Never mind about the things in the top bureau. I will pack them later." Her husband handed her the prayer book, and told her to get down on her knees and swear to certain things he was about to ask her. She was very much alarmed, and she took the book, got down on her knees; and then, noticing a revolver in his hand, she pleaded with him to put the revolver away. He said, "Close your eyes, and do as I command you." When his wife saw he was determined, she asked him to let her pray, and raised her eyes and prayed. After she had ceased her prayer, he asked her three questions. He took a slip of paper out of his pocket, and read the questions from the slip, and asked her the first question—if she knew who had been responsible, or who had poisoned Mr. Briswalter. She answered no; that Mr. Briswalter had not been poisoned, but had died from blood poisoning. She undertook to narrate the circumstances of his sickness, when her husband immediately stopped her, and said, "That is enough." He then asked, "Have you ever been implicated in trying to poison me?" and she replied, "Why, papa! I have never harmed as much as a hair of your head." "The third question was, if I had ever been untrue to him. I said, 'You know I have not,' and with that I was shot. I immediately jumped up on my feet, and I said, 'Why did you shoot me?' and I backed towards the window, with one hand up against my face, and with the other I raised the window, and out I went on my back. As soon as I struck the roof below, I picked myself up as well as I could, and reached the room directly under this, got up and raised the window, and went over to the stand, and got a towel and stayed the wound—the flow of blood. In the meantime, Mr. Wright, of the Hotel Arcadia, opened the door, and Mr. Wright's back stood— I could see the face of Mr. Griffith, and I says: 'For God's sake, don't let him in! He has just shot me. He must have been crazy,' I said in an offhand way." The bullet struck the unfortunate woman upon the eyebrow, and the lead was split, part of the missile destroying the sight of her eye.

The defense was alcoholic insanity. The defendant was not a witness in his own behalf, but evidence was offered to show, and the line of defense was, that he had always been a man of oddities, and eccentricities; that for years he had been a heavy drinker, and usually a secret and solitary drinker. This excessive use of liquor, so persisted in, acting upon his mind, a trifle eccentric at all times, produced a condition which the physicians for the defense described as chronic, alcoholic, illusional insanity; that he was a man of overweening and inordinate vanity; that he entertained the delusion that his wife had been attempting his death by poison; that he entertained the delusion that his wife had been false to her marital vows; that he entertained the delusion, in connection with the poisoning, that his wife, who was of the Catholic faith, was the chosen instrument of the church for his destruction. As to the circumstances attending the shooting of Mrs. Griffith there is little or no substantial controversy, saving upon one matter—the nature of the shooting itself. Here the contention of the defense is that the defendant, even in his insanity, did not designedly cause the discharge of the pistol; that his wife was making oath, as her husband was demanding, so that there was no occasion to shoot her; that the pistol was a hair-trigger weapon; and that it was discharged accidentally, either because of the extreme nervousness of the insane man, or because his wife, in her terror and fear, grasped it and attempted to wring it from his hands. Upon the part of the prosecution it was, however, contended, and evidence was offered to show (as tending both to prove sanity and motive), that while defendant was, admittedly, an extremely vain and self-sufficient man, he was fully competent to transact, and did transact, business of magnitude and consequence; that he drank heavily, and while in his drunken fits was suspicious, jealous, and abusive of his wife; that differences had existed between them, of long standing, over religious questions, and over the wife's property rights, concerning which she had tried, and tried in vain, to compel from him a settlement; that she had threatened to leave him if he continued to drink; and that, in his wrath over all these matters, inflamed by liquor, he had brutally done the deed.

The Griffiths were people of wealth and consequence in the community. Special counsel, eminent in the law, were, as is usual in such cases, employed upon either side. The trial was a protracted one. Much expert evidence from physicians was produced upon either side, and many exceptions were reserved by the defense, all of which are here pressed upon us for consideration. We can notice only those which present matters of serious consideration. Some of the others, even if technically errors, could not, from the nature of the case, have injured in the slightest respect the defendant's rights. Nor do we consider it necessary to present the facts of the case with any more elaboration and detail than as above given. It is, perhaps, however, proper to add that it was not pretended by the defense that there was any foundation, in the slightest degree, for the charges and insinuations which the defendant brought against his wife; but, to the contrary, it was admitted that she stood wholly blameless in all those matters.

The instructions given and refused by the court upon the subject of insanity are first attacked, and at the outset it is said that the court erred in instructing the jury to the effect that voluntary intoxication is no excuse for crime, but may be considered when an actual existence of a particular motive is necessary to constitute a crime, and in determining the degree of crime, and in further instructing the jury that in weighing the evidence offered to show the excessive use of alcohol by the defendant, as bearing upon the question of his responsibility, they should keep in mind the distinction between a state of ordinary drunkenness and alcoholic insanity. It is urged that these instructions were prejudicial to the defendant, in that there was no evidence to show that at the time of the shooting the defendant was drunk or voluntarily intoxicated, or in a condition of involuntary intoxication. But there was positive evidence that the defendant had drunk liquor upon the very day of the shooting. It was in evidence from the testimony of at least one of his physicians that, from the defendant's statements, he judged that he drank about a pint of whisky a day for a great many years, and sometimes greatly exceeded this. The hypothetical questions addressed to the physicians assumed "that a man has used from a pint to a pint and a half of whisky a day, intermixed with quantities of champagne"; and in the testimony of the wife, when asked upon the cross-examination whether her husband, in times past, had not propounded similar questions to her about her infidelity and about his being poisoned. she answered that he had done so "when he was drunk." Counsel for the defense then asked this question: "And after he had been drinking and hardly recovered, sometimes? A. Well, it was principally from the effects of drink he propounded these questions." Such being the condition of the evidence, it not only cannot be said that it was error for the court to instruct upon the subject of voluntary intoxication, but, to the contrary, it was the duty of the court so to have instructed, in order that the jury might be enlightened as to the difference between such voluntary intoxication and insanity, the result of long-continued and excessive alcoholism. And finally, upon this point, it may be added that the court not only cautioned the jury to distinguish between voluntary intoxication, and insanity which may be the result of it, but charged the jury, at the request of the defendant, in this language: "While voluntary intoxication or drunkenness is no excuse for a criminal act committed under its influence, yet you are to consider insanity caused by it in the same way as insanity produced by any other cause."

Appellant detaches from its context an instruction which the court gave, to the effect that if they entertained a conviction, beyond a reasonable doubt, that the defendant committed an assault upon the person of his wife, as charged in the information, but not with an intent to kill her or murder her, they should find the defendant guilty of assault with a deadly weapon. It is charged against this instruction that as, admittedly, such an assault had been made, it commanded the jury to find him guilty. But the vice of this is, as has been frequently pointed out by this court, in detaching the instruction and asking that it be read as though it were the only instruction given by the court upon the whole subject-matter. The jury were repeatedly and re-repeatedly instructed upon the doctrine of reasonable doubt and upon insanity proved by a preponderance of evidence, entitling a defendant to an acquittal on any criminal charge.

The court refused to give an instruction at the request of the defendant to the effect that the defendant was by law presumed to be a man of good character, in the absence of any evidence to the contrary; and, to show error, reliance is had upon People v. Gleason, 122 Cal. 370, 55 Pac. 123. In that case, however, an instruction was actually given by the judge to the effect that the people are not permitted to assail the character of a defendant until the defendant has himself put his character in issue by calling witnesses and offering evidence in its support, and, unless put in issue by the defendant, the people can in no way attack his character. This court's language in People v. Gleason was directed to that state of facts, and it was held that it constituted an unwarranted reflection upon the defendant, in suggesting to the jury that, if the prosecution had an opportunity to do so, they might possibly have shown that he was not a man of good character. In the present case no evidence as to character was introduced, and no instruction as to character was given; and, as is said further in People v. Gleason, "Instructions upon abstract rules of law, which have no application to the evidence in the case, tend to confuse rather than to enlighten the jury, and ought not to be given." While in People v. Doggett, 62 Cal. 27, it is said that a defendant's good reputation as to traits involved in the charge, if proved, should be weighed as any other fact established. The error of the court in the Gleason Case arose from the giving of an instruction not addressed to the evidence, and extremely prejudicial to the defendant. It may not be said that in this case, in the absence of any evidence, the court's refusal to give the desired instruction was error, to the prejudice of defendant, for the reason that the acts charged against the defendant were admitted, and are in the brief of the appellant expressly admitted. It is further admitted that those acts, if committed by a sane man, constituted the crime of which the defendant was convicted. The single issue, therefore, before the jury, over which contest was raised, was whether or not the defendant was sane at the time of their commission.

After having retired to deliberate upon their verdict, the jury asked to be returned to court to receive further instructions, and, when in court, asked, "What is the penalty for an assault with a deadly weapon?" In answer to this query, the court correctly instructed them as to the penalty. It has been held that an incorrect instruction upon this subject is not only erroneous in itself, but is to be regarded as prejudicial to a defendant. Blashfield's Instructions to Juries, par. 189. But upon the other hand, where the instruction upon this point is correct in point of law, this court has declared that, while it is an impropriety and irregularity, it is not such an irregularity and impropriety as should work a reversal of the case. "Nor is it one of which the defendant may justly complain, since the influence upon the jury is most favorable to him." People v. Dice, 120 Cal. 202, 52 Pac. 477; People v. Jackson, 57 Cal. 316.

The instruction to the effect that, when partial insanity or insane delusion or hallucination is relied upon, it must be made to appear that the crime charged was the product or offspring of such insanity, insane delusions, or hallucinations, and not the result of some sane reasoning and natural motives, was an instruction approved by this court in bank in People v. Hubert, 119 Cal. 216, 51 Pac. 329, 63 Am. St. Rep. 72; and, upon reconsideration, we are still of the opinion that it is not only sound in point of law, but, as addressed to the evidence in the case at bar, was pertinent and admissible.

The foregoing disposes of appellant's objections raised upon the instructions.

Upon the rulings of the court in admitting and rejecting evidence, it is urged that the court erred in refusing the defense an opportunity to present evidence in rebuttal upon the proposition of chronic alcoholic insanity. The defendant, it seems, had submitted himself for examination to certain medical men shortly after the shooting, and had declared to them his symptoms, hallucinations, or beliefs. Upon this they testified as experts that he was suffering from chronic alcoholic insanity, or, as one of the physicians phrased it, "He may not be legally insane, but he certainly is not sane." These physicians were carried through a long course of cross-examination upon the symptoms and hallucinations found in chronic alcoholic insanity, and testified fully upon these matters. The prosecution, to meet this evidence, called their physicians and medical men as experts, who gave their views as to the symptoms and hallucinations which were present in and necessarily accompanied chronic alcoholic insanity. They were asked and answered hypothetical questions addressed to the evidence in the case, and declared that, in their view, the defendant was not suffering from chronic alcoholic insanity. A great deal of this evidence was offered and received upon either side. Finally, when the prosecution rested its rebuttal, defendant attempted to recall his medical experts to disprove by them certain statements made by the experts for the prosecution, and in particular this statement: Certain of the medical experts for the prosecution had testified, in expressing their belief that the defendant was not the victim of chronic alcoholic insanity, that the existence of a delusion touching the sexual organs was always found in such cases. The question sought to be asked by the defense of their experts in surrebutter was the following: "Referring to the symptoms of chronic alcoholic insanity, state whether, in your opinion, a delusion with reference to the sexual organs of the patient is an essential element in the determination of the existence of chronic insanity in the patient." The question was objected to, and the objection sustained, upon the ground that it called for an opinion in reference to a matter which is not surrebutter. We think the ruling was correct. The defense, in making out its case of insanity, had called its experts. They had been interrogated as to the symptoms which they themselves said were necessarily present in a patient so afflicted. In rebuttal the prosecution asked their experts for their opinions under the evidence in the case; and, in the view of these experts, the defendant was not suffering from this form of insanity. Some of these experts, as reason for their belief, stated that this particular delusion was an essential delusion in chronic alcoholic insanity. If it be conceded that it was technically surrebutter to allow the defense, in turn, to show by the opinion of their recalled experts that such a delusion was not essential, nevertheless it was but touching directly upon a matter which these same witnesses had discussed indirectly in their first examinations. If the practice could be continued without being checked in the discretion of the court, it could go on to infinity. So that, even if it be regarded as technically evidence in surrebutter, the whole ground of the examination had previously been completely covered. What has here been said refers to the whole line of questions upon the same general subject-matter which were asked by the defense in surrebutter, and to which questions the court sustained the objections of the prosecution. To illustrate that the matter had been gone into upon the defendant's case in chief, it will be sufficient to quote the question put to Dr. Nichols, appellant's witness, by one of his counsel: "Q. Do you further agree with Spitzka on this proposition? The persecutory delusions of alcoholism relate to the sexual organs, to the sexual relations, and to poisoning. This fact is so constant a one that the combination of a delusion of the sexual organs with the delusion that the patient's food is poisoned, and that his wife is unfaithful to him, may be considered as nearly to demonstrate the existence of alcoholic insanity as any one group of symptoms in mental pathology can prove anything. A. That is absolutely correct."

Error is urged also in the asking of certain hypothetical questions by the prosecution, it being insisted that these questions contain elements not found in the evidence itself. It would unduly and uselessly prolong this to set forth these matters in detail, and it must suffice to say that an examination of the evidence in the case does not disclose that there was any unfairness or any hardship to appellant or to his case from the questions which were permitted. Nor do we perceive that the court erred in limiting the cross-examination of certain of the experts.

As to the alleged error in admitting the evidence of Drs. Bryant and Davisson, in that it called for a disclosure of privileged communications, not only was no such point or objection made at the trial, but the rule as to privileged communications between a party and his physician does not apply in a criminal case. People v. West, 106 Cal. 89, 39 Pac. 207. Of a hypothetical question asked of Dr. Gardner, it is said that it contained a résumé of the acts of the defendant at the time of the shooting, and concluded by asking for the opinion of the witness as to whether the defendant was laboring under an insane delusion at the time of the act. The objection is highly technical, and is not supported by the record itself. The question, after setting forth the evidence as in an assumed case, concludes: "Now, state whether or not, in your opinion, such a subject, asking such questions, and acting in such a manner, was laboring under a delusion in respect to his wife's infidelity, or was laboring under a delusion in respect to poisoning." In every case where a hypothetical question is asked, based upon the evidence, it is not to be presumed that the jury is so stupid as not to understand that it is addressed to the supposed acts, facts, and conditions of the defendant in the case; and the answer which the witness gives to such hypothetical question must have its weight with the jury as bearing upon the defendant's individual case, or else the jury, through their ignorance and density, would be unfit to sit in any cause. But we cannot perceive in this question any just ground for complaint. It is true, the facts embraced in the hypothetical question were the facts disclosed by the evidence; but the witness was not asked if, under these circumstances, the defendant was sane or insane. The interrogatory was based upon assumptions, and the question in conclusion was whether "such a subject" would be sane or insane, and not whether the defendant was sane or insane.

We have thus considered all the points which seem to call for special mention. Upon a review of the whole case, we do not perceive that the defendant had other than a fair and impartial trial. The acts which he committed were brutal and unpardonable, excepting upon the theory of insanity. The jury seems to have concluded that he was legally sane and responsible for his acts, but seems further to have entertained a reasonable doubt as to whether or not he actually and deliberately did the shooting, or whether his crime ceased with the assault, and the actual shooting was the result of misadventure. It gave him the benefit of the doubt in this instance, and so convicted him of a lesser crime; and, for the reasons above given, the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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146 Cal. 335

KOEHLER v. HOLT MFG. CO. (Sac. 1,329.)

(Supreme Court of California. Feb. 28, 1905.)

JUDGMENT — RES JUDICATA — MATTERS LITIGATED—ISSUES RAISED BY PLEADINGS.

1. Where, in an action for monthly sums due under an order made by a third person whereby he directed defendant to pay out of moneys to become due from him to the third person a specified sum per month to plaintiff, the question whether the order had been revoked was litigated, the decision that it had been revoked was conclusive in a subsequent suit by plaintiff for other installments alleged to be due under the order.

2. The fact that the action originated before a justice of the peace, and that the judgment was rendered by the superior court on appeal, did not affect the conclusiveness of the matter litigated.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1153.]

3. In an action in justice's court for the amounts due under an order directing defendant to pay to plaintiff a specified sum per month, the complaint alleged that there was due under the order a specified sum. This allegation was denied. *Held*, that the pleadings were sufficient to raise the issue whether the order had been previously revoked, and defendant, under the issue, could prove that the order had been revoked, so that there was nothing due under it.

4. A court having jurisdiction of an action has power to determine what facts are put in issue by the pleadings, when they are imperfectly stated, and, having such power, it may make an erroneous decision of the question, which cannot be questioned collaterally.

Department 1. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by J. P. Koehler against the Holt Manufacturing Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Jacobs & Flack, for appellant. Louttit & Middlecoff, for respondent.

SHAW, J. On January 15, 1901, one George E. Chapman, upon a sufficient and valid consideration, made an order in writing directing the defendant, out of the moneys thereafter to become due from him to Chapman, to pay to the plaintiff, from and after the date thereof, the sum of $25 per month, to be applied upon the purchase price of a certain tract of land theretofore purchased of said Koehler by Kate Chapman, who was the wife of said George E. Chapman, and from whom he was living separate and apart. The defendants on the same day accepted the order in writing. Thereafter, until January 1, 1902, the defendant paid the sums specified in the order, in accordance therewith. On January 25, 1902, Chapman executed an instrument purporting to revoke, annul, and cancel the said order, and served it upon the defendant; directing it to make no further payments under the order. The present suit is to recover the sum of $325, alleged to be due, under the terms of the order, for the 13 months beginning May 1, 1902, and ending June 1, 1903. The defendant answered, the court made its findings and entered judgment in favor of the defendant, and the plaintiff appeals from the judgment, and also from an order denying his motion for a new trial.

The answer, among other things, alleged that theretofore, on May 26, 1902, the plaintiff began an action in a justice's court to recover the amounts due under the order for the months of January, February, March, and April of 1902; that thereafter such proceedings were had that the defendant appeared in said action after judgment was duly given in said justice's court in favor of the defendant; that plaintiff appealed therefrom to the superior court of the county of San Joaquin; and that in the superior court judgment was duly given in favor of the defendant, to the effect that the defendant was not and is not liable on account of the contracts set forth in the complaint in this action, and that the acceptance of the order set forth in the complaint in this action had been abrogated and annulled. The facts concerning the former adjudication are found by the court as alleged in the answer.

We are of the opinion that the plaintiff is estopped by the former judgment. It is true, it was not rendered in a suit to recover the same installments that are involved in this action, and consequently it is not technically a bar to the present action. But it appears by the record in the former action that it was a suit to recover the amounts due, under the terms of the accepted order, for the four months previous to the time here involved; that in defense the defendant relied upon the same revocation of January 25, 1902, upon which he relies in the case at bar; that the validity and effect of that revocation was litigated and submitted to the court in that action; and that the court decided that it was valid, that its effect was to abrogate and annul the defendant's acceptance of the order and put an end to its liability thereon, and rendered judgment accordingly. The case comes clearly within the principle that a judgment operates as an estoppel to preclude the "parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them, has been, on such issue joined, solemnly found against them." Outram v. Morewood, 3 East, 346; Cromwell v. County of Sac, 94 U. S. 353, 24 L. Ed. 195; Wiese v. S. F. Mus. Soc., 82 Cal. 645, 23 Pac. 212, 7 L. R. A. 577; Freeman v. Barnum, 131 Cal. 389, 63 Pac. 691, 82 Am. St. Rep. 355. If in the former suit the defense had been based exclusively on some other point than the effect of the revocation to terminate its liability—as, for instance, on the claim that the installments there sued for had been paid—there would be no bar, for the present suit is for different installments; and it would not have constituted an estoppel, for a decision that those installments had been paid would not affect the right to recover other installments. But the point involved and decided was the effect of the revocation upon the liability of the defendant, which is precisely the point involved in the defense to the present action; and, as it was solemnly decreed and adjudged against plaintiff in that action, he is now precluded from contending to the contrary of what was there decided.

The effect of the estoppel is not changed by the circumstance that the former action originated before a justice of the peace, and that the judgment relied on was given by the superior court on appeal. Wiese v. S. F. Mus. Soc., supra.

The objection that the validity of the revocation was not put in issue in the former suit is not tenable. There was, it is true, no formal answer setting up the revocation, such as might be considered necessary in a suit begun in the superior court. But the pleadings in justices' courts are not required to be in any particular form, and when the case comes before the superior court on appeal their effect and sufficiency are to be judged by the same standards as when it is before the justice of the peace. In construing them, when they come under consideration collaterally, as in the present case, the rule excluding conclusions of law, as no proper part of a pleading, does not apply. Indeed, it may be doubted if, for the purpose of exhibiting the contentions of the respective parties in cases in a justice's court, conclusions either of law or fact are not always to be given full effect in any subsequent review of the proceedings. The complaint in the former case alleged that "there is now due, owing, and unpaid from said defendant to plaintiff for said months, * * * under said written instrument, the sum of $100," and this allegation was denied. This appears sufficient to raise the issue. If the order had previously been revoked and annulled, there would not be any sum due or owing as alleged, and hence, under the liberal rule allowed in justices' courts, the defendant, upon this issue, could prove a revocation of the order.

Furthermore, it must be conceded that the court, having jurisdiction of such an action, has power to determine what facts are put in issue by the pleadings, where they are ambiguously or imperfectly stated; and, having such power, it may make an erroneous decision of the question, and such decision cannot be questioned collaterally. There can be no doubt as to the action of the superior court in the present instance. In the judgment rendered upon the appeal it made special findings, in which the order, the acceptance, and the revocation are set out in full; and, as a conclusion of law, it decided that the acceptance of the order was annulled and abrogated by the revocation. It did in fact in that case adjudge the very point here in issue, and the plaintiff is thereby estopped. The estoppel was properly pleaded, and the court found the facts upon sufficient evidence, and rightfully gave judgment in favor of the defendant. This issue is conclusive of the case, and it is unnecessary for us to consider the other points here presented.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

146 Cal. 329

CASTAGNETTO v. COPPERTOWN MINING & SMELTING CO. et al.

(S. F. 3,422.)

(Supreme Court of California. Feb. 25, 1905.)

LABORER'S LIEN—NOTICE OF LIEN—SUFFICIENCY—APPEAL—ALLOWANCE OF ATTORNEY'S FEES.

1. The court on appeal from a judgment without any bill of exceptions must assume that the findings are supported by the evidence.

2. A notice of a laborer's lien for work performed in a mining claim, which states the

name of the reputed owner, who is found to be the owner in fact, and which states that the labor was performed at the request of a person named, who was then the superintendent of the corporation operating the mine, is sufficient within Code Civ. Proc. § 1187, requiring a notice of laborers' liens to state the name of the owner or reputed owner and the name of the person by whom he was employed.

3. A notice of a laborer's lien for work performed in a mining claim, which states that the labor was performed by the day at an agreed price of $2.75 per day between designated dates, and that the amount claimed was justly due, sufficiently gives the terms and conditions of the contract of employment.

4. A notice of a laborer's lien for work performed in a mining claim, which states that the claimant performed labor "on that certain copper mine situated," etc., and that he claims a miner's lien "upon said mining claim," sufficiently shows that the labor was performed "in a mining claim."

5. The court on appeal from a judgment foreclosing 12 separate laborers' liens cannot, in the absence of any evidence as to the amount of services, disturb an allowance of $75 for attorney's fees in each of the liens.

Commissioners' Decision. Department 1. Appeal from Superior Court, Mariposa County; John M. Corcoran, Judge.

Action by Daniel Castagnetto against the Coppertown Mining & Smelting Company and Lorenzo Costa. From a judgment for plaintiff, defendant Costa appeals. Modified.

Congdon & Congdon, E. B. Young, and Aylett R. Cotton, for appellant. J. J. Trabucco, R. B. Stolder, and J. S. Larew, for respondent.

COOPER, C. This action was brought by plaintiff in his own right and as assignee of several other parties to foreclose liens for labor performed in a mining claim on the premises of appellant described in the complaint. He recovered judgment for the amount of the claims, interest, and attorney's fees. A decree was accordingly entered, directing a sale of appellant's property to satisfy the judgment. From the judgment this appeal is taken by Costa, the owner of the premises.

The appeal being from the judgment without any bill of exceptions, we must presume that the findings are supported by the evidence. No question is made as to the judgment not being the legal conclusion from the facts found. The main point relied upon is that the demurrer to the complaint should have been sustained, and this goes to the sufficiency of the notices of liens, as they are each annexed as an exhibit to the complaint, and made a part thereof. The notices are all practically in the same form, and subject to the same criticism, and the discussion of the first one—that of plaintiff's individual claim—will be sufficient. It is, so far as material here, as follows: "Know all men by these presents: That I, Daniel Castagnetto, a resident of Hunter's Valley, in the county of Mariposa, state of California, have done work and performed labor by the day at the agreed price of two 75-100 dollars per day on that certain copper mine situated in Hunter's Valley mining district, in the county of Mariposa, state of California, known as and called the Tandem Copper Mine and Mill Site; * * * that such work was done by me between the 1st day of August, A. D. 1901, and the 20th day of September, A. D. 1901, at the instance and request of A. V. Oliver, who was the superintendent of the Coppertown Mining & Smelting Co. (a corporation), which was then and there in the possession of and was operating said mine; that the name of the reputed owner of said mine and mill site is Lorenzo Costa; that thirty days have not elapsed since the last work and labor was done and performed by me on said mine; that, after deducting all just credits and offsets to my said demand, there is now justly due and owing to me thereon the full sum of one hundred and forty 25-100 dollars, for which sum I intend to claim and hold, and do hereby claim and hold, a miner's lien upon said mining claim, together with its improvements and appurtenances, under and by virtue of the statute in such case made and provided." It was signed and properly verified.

The first objection made to it is that it fails to state what the title of the Coppertown Company was, or what relation existed between the company and appellant. The statute only requires in this regard that a notice of laborers' lien shall state the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed. Code Civ. Proc. § 1187. This notice states the name of the reputed owner, who is found to be the owner in fact. It states that the labor was performed at the request of Oliver, which is substantially a statement that the claimant was employed by Oliver. The statute does not require the lien claimant to state in his notice the relation that exists between the person occupying or in possession of the property and the owner. It would often be a matter beyond the knowledge of the claimant and difficult, if not impossible, to ascertain. These notices of lien are often made out on a blank form by the claimant, or some friend or person not versed in the law, and are surrounded with sufficient difficulties and obstacles by requiring that the statute be substantially complied with, without imposing terms and conditions not required by the statute. A substantial statement of the facts required by the statute is sufficient. Whether, the facts being truly stated, as required by the statute, the person in possession of the property, or the person by whom the laborer was employed, had authority to bind the owner as agent, is a matter for allegation and proof at the trial. Lumber Co. v. Gottschalk, 81 Cal. 641, 22 Pac. 860; Reed v. Norton, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426.

It is next urged that the notice does not give the statement of the "terms, time given, and conditions of its contract." It states that the labor was performed by the day at the agreed price of $2.75 per day, between the 1st day of August and the 20th day of September, 1901, and that the amount is justly due and owing. This is a statement sufficient as to the claim of a laborer. He was to be paid by the day an agreed price, to labor in a certain mine described in the notice. There are no conditions or terms mentioned that are left uncertain or in doubt. Every one knows what such a contract of employment means. It was a substantial compliance with the statute. Tredinnick v. Mining Co., 72 Cal. 78, 13 Pac. 152; Blackman v. Marsicano, 61 Cal. 639.

Objection is made that the notice does not show or state that the labor was performed "in a mining claim," but "on that certain copper mine." Again we think the objection extremely technical. It appears that the plaintiff claims a "miner's lien upon said mining claim." If the labor was not performed in the mining claim, it could have been easily proven at the trial. The court found that the labor was performed in and upon the said mines. It was said by Judge Field in Smelting Co. v. Kemp, 104 U. S. 649, 26 L. Ed. 875, that in one sense the terms "his mining claim" and "location" are "identical, and the two designations may be indiscriminately used to denote the same thing." The court held in Malone v. Big Flat Gravel Mining Co., 76 Cal. 585, 18 Pac. 772, that work in a blacksmith shop in making pipe and sharpening picks and drills used in mining was "work upon the mine" for which the laborer had a lien. In Hamilton v. Delhi Mining Co., 118 Cal. 150, 50 Pac. 378, the notices of liens of the laborers described the work as performed "on the plant and consolidated mines of defendant," and the liens were held good, although the point here was not discussed. In Helm v. Chapman, 66 Cal. 291, 5 Pac. 352, this court, in speaking of a lien on a mining claim, said: "The intention of the lawmakers seems to have been to give a lien upon the whole claim for labor performed on, and for material furnished for and used in any structure, or on or in the alteration or repair of any structure, or on or in the mining claim." While the courts always require a substantial compliance with the statute in regard to the statement in the notice of lien and the proceedings thereunder, yet they will not give the statute such a narrow or technical construction as to fritter away, impede, and destroy the right of the lien claimant. Ascha v. Fitch (Cal.) 46 Pac. 298; Hagman v. Williams, 88 Cal. 151, 25 Pac. 1111; Russ Lumber Co. v. Garrettson, 87 Cal. 595, 25 Pac. 747; McGinty v. Morgan, 122 Cal. 105, 54 Pac. 392. In the latter case it is said: "The statute is a remedial statute, and for the purpose of carrying it into effect the object for which it was enacted is to receive a liberal construction, and the notices which under its provisions are required to be given have regard to substance rather than to form." The above statement was repeated and quoted with approval in Macomber v. Bigelow, 126 Cal. 16, 58 Pac. 312.

Finally, it is suggested that the court erred in allowing $75 for attorney's fees in each of the 12 separate liens, making $900 in all. The fee certainly seems on its face to be large, but we cannot, upon the record before us, say that it is more than the court, in its discretion, should have allowed. See Pacific Mut. L. I. Co. v. Fisher, 106 Cal. 234, 39 Pac. 758. It is admitted that the judgment and decree should not have barred the appellant from all right at any time to redeem the said premises after sale.

The decree should be modified by inserting therein, after the sentence, "And forever barred and foreclosed of all right and equity of redemption of, in, or to said premises," the following: "From and after the delivery of the sheriff's deed after sale as hereinafter provided." As so modified, the judgment should be affirmed, the respondent to recover his costs on this appeal.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment as modified is affirmed, the respondent to recover his costs on this appeal. ANGELLOTTI, J.; VAN DYKE, J.

SHAW, J. (concurring). I concur. The court below, knowing the time occupied in the trial, the difficulties presented, and the labor, knowledge, and skill required in the conduct of the case throughout, together with the facts appearing from the papers on file, could therefrom make a just estimate of the value of the services of the plaintiff's attorney. But this court, seeing only the judgment roll, cannot, from that alone, intelligently review the decision of the lower court on the subject. If it affirmatively appeared that nothing was done in the lower court except what is shown by the judgment roll, I should not doubt that the allowance was too large. But there may have been facts to justify it, the existence of which are not negatived by anything appearing on the face of the roll. If the appellant desired this court to review that part of the decision, he should have placed before us, by bill of exceptions or otherwise, not necessarily the evidence in the case, but at all events, the evidence, if any, on that question, and a statement of the facts relating to the amount and value of the services performed by the attorney which were within the knowledge of the court below, and which it must have considered in making the allowance.

146 Cal. 261

REYNOLDS v. PACIFIC ELECTRIC RY. CO. et al. (L. A. 1,642.)

(Supreme Court of California. Feb. 11, 1905.)

STREET RAILROADS — FRANCHISES — CONSTRUCTION—ISSUANCE OF TRANSFERS—ASSIGNMENT OF RIGHTS.

1. A grant, assignment, lease, or transfer of a street railway franchise carries with it and imposes upon the grantee or assignee all the duties and obligations which rested upon the original holder of the franchise.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 123-126.]

2. An assignee of a street railway franchise, a condition of which required the holder thereof to issue transfers to other lines in the city operated by it or its assigns, which assigned its rights in the franchise to another, and ceased operating cars under the franchise, could not be compelled to interchange transfers with its assignee from and to its remaining lines operated under other franchises.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action of mandate by D. S. Reynolds against the Pacific Electric Railway Company and another. From a judgment granting the relief sought, defendants appeal. Reversed.

Bicknell, Gibson & Trask and Dunn & Crutcher, for appellants. Emmet H. Wilson and W. B. Mathews (H. J. Goudge, of counsel), for respondent.

HENSHAW, J. This action was in mandate to compel the defendants to interchange transfers upon their respective lines of street railways intersecting East Ninth street in the city of Los Angeles. Eliminating from consideration the question of the right of the petitioner to seek relief in mandate, the following are the undisputed facts presented: In 1897 the city of Los Angeles granted to one Kays and his assigns a franchise for the construction and operation of an electric street railway over and along certain streets in the city of Los Angeles, and in particular over a portion of Ninth street between Santa Fé avenue and Spring street. Many conditions and burdens went with the franchise — paving and macadamizing the roadway between the tracks and for two feet on each side, establishing and maintaining grades, flumes, and culverts, furnishing transportation to school children at half fare, carrying policemen, firemen, and city officials free of charge; and (we here quote from section 6 of the ordinance): "Sec. 6. Provided, further, that said grantee and his assigns will issue to and receive from the present line of street railway located on Mateo street and Santa Fé avenue, and all other lines of street railways in said city operated by said grantee or his assigns, transfers good for continuous single trips thereon in said city." Thereafter the defendant the Los Angeles Railway Company acquired the Ninth street franchise by assignment, and until January, 1904, the Los Angeles Railway Company operated a street railway upon Ninth street. It likewise operated other lines of street railway, and during all of the time it owned the Ninth street franchise, it issued transfers from the Ninth Street Line to its other lines, and, conversely, transfers from its other lines to the Ninth Street Line. The Los Angeles Railway Company in turn duly sold, assigned, and transferred to the Pacific Electric Railway Company the franchise upon East Ninth street, and the latter company has ever since been the owner and holder of this franchise. In January, 1904, the Los Angeles Railway Company ceased to operate any cars upon Ninth street, and "since said date has not had, and does not now have, any right, power, or authority to operate any car or cars over that portion of East Ninth street referred to in said petition, or any part thereof, and since said 1st day of January, 1904, has not had, and does not now have, any power or authority to issue transfers to passengers, entitling them to ride upon the Pacific Electric Railway Company's cars on said East Ninth street, except under and by virtue of the terms of the franchise, and in particular by virtue of the terms of section 6 thereof." "The operation of the cars and car lines of the said Los Angeles Railway Company is not nominal only, and the said cars and car lines alleged in the said amended petition to be operated by the said Los Angeles Railway Company are not operated and controlled by the said Pacific Electric Railway Company, but are actually operated and controlled by the said Los Angeles Railway Company." The quotations are from the findings. The Pacific Electric Railway Company has never issued transfers to passengers entitling them to ride upon the cars of the Los Angeles Railway Company, nor has the Los Angeles Railway Company ever issued transfers from its cars entitling passengers to ride upon the cars of the Pacific Electric Railway Company running upon East Ninth street. The court concluded that by force of the provisions of section 6 of the ordinance, above quoted, it became the duty of the defendant companies to interchange transfers, and issued its mandate accordingly.

The plain and obvious meaning of section 6 is that the person or corporation owning and enjoying the franchise to operate cars upon East Ninth street shall be bound to the performance of certain obligations by reason of that ownership and enjoyment, and amongst these obligations is the one that he shall give and receive transfers to the Ninth Street Line, and from the Ninth Street Line from and to such other intersecting lines of street cars as he may operate. It is a well-settled rule that a grant, assignment, lease, or transfer of a franchise such as this carries with it and imposes upon the grantee or assignee all the duties and obligations which rested upon the original holder of the franchise. It is the simple proposition that he who enjoys the privileges shall suffer the burdens. But the construction which is sought by the respondent to be placed upon this franchise would impose upon every intermediate assignee or grantee these burdens, while all the privileges and benefits had been passed on to others. Respondent cites us to numerous cases laying down the well-settled rule to which we have adverted that a transfer of a franchise carries its liabilities and duties as well as its privileges, but the industry of his counsel and our own independent investigation has failed to bring to light one case where it is held that the liabilities and burdens remain when the full enjoyment of the franchise and its privileges have been legally passed on to another. Cases will be found where the owner of a franchise has not been allowed to discontinue the operation of a part of the railroad for which a franchise was granted. Per contra, cases will be found holding that the remedy in such a case is not to compel the operation of the abandoned portion of the railroad, but lies in an action for forfeiture of franchise. But no case, as we have said, has been pointed out, or has been discovered, where, under an assignable franchise such as this, all rights have been parted with and all obligations yet remain. In reason, and in justice, as well could respondent insist that it is the duty of the Los Angeles Railway Company to perform all of the other burdens imposed upon the owner of the Ninth-street franchise—the grading and repair of streets, the construction of culverts, and the like, as to insist that this particular burden shall remain.

There is no ambiguity in section 6 calling for construction. The language is clear and unmistakable that Kays, the grantee of the franchise, and whoever else may hold it by assignment, shall fulfill the obligations in consideration of the benefits. While the Los Angeles Railway Company was the assignee of Kays, it admittedly fulfilled all obligations. When it transferred the franchise by valid legal sale, as the court finds, to the Pacific Electric Railway Company, the Los Angeles Railway Company ceased to be the assignee of the franchise, and the Pacific Electric Railway Company then became the assignee.

It is found that the two corporations defendant are independent, and no right existed to compel an interchange of transfers between them.

The judgment appealed from is therefore reversed.

We concur: BEATTY, C. J.; McFARLAND, J.; LORIGAN, J.; ANGELLOTTI, J.; VAN DYKE, J.

SHAW, J. I concur. In order to maintain the contention of the respondent it would be necessary to hold that when the franchise granted to Kays was assigned to the Los Angeles Railway Company the effect was that thereupon there became affixed to the franchises of all the connecting lines then operated and owned by the Los Angeles Railway Company a new condition or covenant running with the property, and binding upon all subsequent assignees of such connecting lines, whereby the persons operating them would be obliged to give and receive transfers to and from the Kays line. The new condition would be a qualification or limitation upon the estate of the Los Angeles Railway Company in its connecting lines, and of every subsequent holder thereof. It would be attached to the estate, and be thereafter inseparable from it. The language of the sixth clause quoted in the main opinion will not bear this construction. It does not require that the person operating the connecting lines shall have any estate therein, but merely that he be operating the same. It manifestly imports a mere personal covenant to be temporary to the extent that it shall be obligatory only while the respective lines are operated by the same person or corporation, and to cease as soon as the joint operation ceases.

It should be added that there is nothing in the case requiring a decision on the question whether or not the person operating the Ninth Street Line is still obliged to give and receive transfers to and from the Mateo Street and Santa Fé Avenue Line which is mentioned in the sixth clause, nor whether or not a like burden rests upon the holder of the last-named line, although it may be held by a person or corporation not operating the Ninth street part of the line.

146 Cal. 350

CHASE v. TROUT. (L. A. 1,217.)

(Supreme Court of California, March 2, 1905. On Rehearing, March 31, 1905.)

MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—BONDS — VALIDITY—CONSTITUTIONAL LAW — STATUTES — CONSTRUCTION — LIEN — MORTGAGE—PRIORITIES.

1. That part of the procedure under the Vrooman act (St. 1885, p. 147, c. 153) concerning street improvements, by which city councils are given jurisdiction to order any of the improvements therein mentioned, and providing that the proceedings shall be begun by a resolution of intention to do the work, which must be posted and published; that a notice of the work and resolution is then to be posted and published by the street superintendent; that at any time after the first publication of the resolution, and before the assessment is issued, any property owner may appear before the council and remonstrate or object to the proceeding in any particular, and obtain a hearing and decision thereon; that at the expiration of 25 days after the resolution has been fully published, and 20 days after notice is given by the street superintendent, the council is deemed to have acquired jurisdiction to order the work done—constitutes due process of law, within the constitutional requirement.

2. That part of the procedure under the Vrooman act (St. 1885, p. 147, c. 153) concerning street improvements, which, after the city council is declared to have acquired jurisdiction to order the work done, provides in detail for advertising and receiving bids for the work, letting the contract to the lowest bidder, and the execution of the contract in pursuance thereof; that the supervision thereof shall be by city overseers; and, after the work is completed to the satisfaction of the city authorities, requiring an assessment to be made on the property benefited, in accordance with minute directions of the statute, and that, when properly certified and recorded, the several amounts assessed shall become a lien on the several lots—is within the legislative discretion; and hence Street Bond Act (St. 1893, p. 36, c. 21) § 4, providing that the bonds, after their issuance, shall be conclusive evidence of the regularity of all proceedings thereto and of the validity of the lien, is effective, after the bonds have been issued, to cure an objection that the time for the completion of the work was extended after the time first fixed had expired.

3. It also cured an objection that the notice of the time of recovering bids for the contract was not posted or published for the precise number of hours or days required by the law.

4. It also cured an objection that the contract did not contain a provision that the materials used should comply with the specifications, especially as the contract did require the contractor to furnish the materials according to the contract.

5. It also cured an objection that the street superintendent recorded the assessment, but did not properly certify to such record.

6. It also cured an objection that the time for beginning the work under the contract was not precisely fixed by the contract.

7. It also cured an objection that the certificate of the engineer did not show that he measured the work.

8. A lien for street improvement assessments is paramount to a mortgage existing at the time the proceedings leading up to the construction of the improvements were in progress.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1225.]

9. Street Bond Act (St. 1893, p. 36, c. 21) § 4, providing that the bonds, after their issuance, shall be conclusive evidence of the regularity of all proceedings thereto, and of the validity of the lien, is not unreasonable merely because it arbitrarily fixes a period of 30 days after which defects which before may have been fatal are placed beyond inquiry.

10. Under the Vrooman act (St. 1885, p. 147, c. 153) concerning street improvements, providing that the council shall pass a resolution of intention, describing the work, a resolution declaring it to be the intention of the council that the described street be graded, graveled, and guttered in accordance with the plans and profiles on file in the office of the city engineer, and specifications in the office of the city clerk;

that a cement curb be constructed along each line of the roadway of the street in accordance with the specifications, and that a cement sidewalk, five feet in width, be constructed along each side of the street, in accordance with the specifications—contains a sufficient description of the work, where the plans and specifications referred to supply all the information required to make the character of the work and materials absolutely certain, in view of the maxim of Civ. Code, § 3538, that that is certain which can be made certain.

11. Under the Vrooman act (St. 1885, p. 147, c. 153) concerning street improvements, providing that the council shall pass a resolution of intention, describing the work, and requiring the resolution to be published, plans and specifications referred to in the resolution do not become part of the resolution, so that they must be published, to comply with the statute.

12. Street Bond Act (St. 1893, p. 33) § 2, provides that whenever the city council shall find, on estimates of the engineer, that the cost of any proposed work will be greater than 50 cents per front foot, it may determine that bonds shall be issued under the act. Section 3 (page 34) provides that, when the city council shall determine that bonds shall be issued, it shall so declare in the resolution of intention. *Held*, that a resolution, after the recital as to cost, declaring that it is "hereby determined that bonds shall be issued" as provided in the act, implies a finding that the cost exceeded 50 cents per front foot, and renders unnecessary an express finding of that fact.

13. An attack on the validity of bonds purporting to have been issued pursuant to the Vrooman act (St. 1885, p. 147, c. 153) concerning street improvements, on the ground that the city council, being in session the day before the contract for the improvement was let, adjourned its session to the next day at 10 o'clock, but that in fact the adjourned session was called to order and began its session at 9 o'clock, and that the contract was awarded on the same day, is untenable where it did not affirmatively appear that the contract was awarded before 10 o'clock.

14. Where the record of an assessment for street improvements for which bonds were issued under the Vrooman act (St. 1885, p. 147, c. 153) showed that the documents were copied in the proper book by the street superintendent, followed by the words, "Recorded 9:15 a. m. Apr. 11, A. D. 1896," and the signature of the official, the fact that the documents occupied several pages of the record raises no presumption that all of them were not recorded at the time stated.

15. The validity of bonds purporting to have been issued pursuant to the Vrooman act (St. 1885, p. 147, c. 153) concerning street improvements was attacked on the grounds that section 2 of the act (St. 1885, p. 147, c. 153, as amended by St. 1893, p. 172, c. 144) provides that, whenever the grade of a street "shall hereafter be changed, the petition of the owners of a majority of the feet fronting thereon asking for grading the same to the new grade, shall be a condition precedent to the ordering of such grading to be done"; that the grade had been changed before the proceedings involving the validity of the bonds were begun, and that the change of grade was made on a petition which was not signed by the owners of the major part of the frontage, as required by section 38 of the act of 1891 (St. 1891, p. 116, c. 114), as amended by St. 1893, p. 89, c. 79; that the resolution of intention to do the work for which the bonds were issued was preceded by and founded on a petition asking that the street be graded to the new grade, which petition was not signed by the owners of a majority of the frontage, as required by section 2. *Held* that, as the resolution of intention is of itself conclusive evidence that at its passage the persons whose names appeared on the petition were owners of a majority of the frontage, the attack was untenable, and, furthermore, since amended section 38 requires the filing of a petition by a majority of the owners of the frontage as a condition precedent to the change, the same as section 2, in case of an order for the grading to be done, so that, if the absence of such petition would render the proceeding void under section 2, it would have the same effect under amended section 38, the attack was self-destructive.

16. Though under the direct provisions of the Vrooman act (St. 1885, p. 147, c. 153) concerning street improvements, when the street superintendent procures the certificate of the city engineer to aid him in making an assessment, the certificate must be recorded, as the statute does not require it to be made nor prescribe its contents, the certificate is immaterial.

17. A resolution of a city counsel of its intention to construct street improvements, and issue bonds in payment thereof, under the Vrooman act (St. 1885, p. 147, c. 153), specifying that the bonds shall be issued to represent the cost of the improvement, shall be serial, extending over a period of 10 years, an equal portion to be paid annually on the 2d day of January of each year after their date, and to bear interest at 7 per cent. per annum, payable on the 2d days of July and January, is in the positive requirements of the statute concerning the form and contents of the bonds, and describes them sufficiently, without setting out the proposed bonds in full.

18. The contractor's return on an assessment for street improvements purporting to have been made in pursuance of the Vrooman act (St. 1885, p. 147, c. 153) need not state with whom the street superintendent contracted, and hence any irregularities in that respect are immaterial to the validity of bonds issued in payment for the work, especially in view of Street Bond Act (St. 1893, p. 36, c. 21) § 4, providing that the bonds, after their issuance, shall be conclusive evidence of the regularity of all proceedings thereto, and of the validity of the lien.

On Rehearing.

19. A mortgagee of property affected by a street assessment has the right of appeal to the city council, secured by Vrooman Act (Laws 1885, p. 156, c. 153) § 11, as fully as the owner of the property.

Henshaw, McFarland, and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Lucien Shaw, Judge.

Action by Delia W. Chase against John H. Trout. From a judgment for plaintiff by default, and an order refusing to vacate the judgment, defendant appeals. Judgment reversed, and appeal from order dismissed.

Edwin R. Fox and Frank G. Finlayson, for appellant. C. W. Chase, for respondent. R. M. F. Soto, amicus curiæ.

SHAW, J. The defendant appeals from a judgment taken upon his default, and from an order refusing to vacate the default and judgment. The complaint sets forth a cause of action to quiet title. The defendant's claim is alleged to consist of certain bonds for an assessment for streetwork, issued in pursuance of the laws commonly known as the "Vrooman Act" (St. 1885, p. 147, c. 153, and amendments thereto) and the "Street Bond Act" (St. 1893, p. 33, c. 21). The proceedings leading up to the issuance of the bonds are set forth at length in the complaint, and it is claimed that there are numerous irregularities and defects therein, which make the bonds absolutely void.

1. Section 4 of the street bond act of 1893, p. 36, c. 21, declares that "said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under said street work act, and this act, previous to the making of the certified list of all assessments unpaid to the amount of fifty dollars or over by the street superintendent to the city treasurer, and of the validity of said lien, up to the date of said list." Appellant contends that under this provision the plaintiff is precluded from making the objections, and that the defects and irregularities are thereby cured.

In Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920, we held that this clause of the bond act was constitutional, in so far as it does not estop inquiry concerning those parts of the proceedings which are essential. It is there said that it may be regarded as settled that the Legislature may make a tax deed or street bond "conclusive evidence of a compliance with all provisions of the statute which are merely directory of the mode in which the power of taxation may be exercised, but that it cannot make it conclusive evidence of those matters which are essential to the exercise of the power; that as to those steps which are jurisdictional in their nature, and without which the power of taxation cannot be called into exercise—such as the listing or assessment of the property, a levy of the tax, some notice of its delinquency, and that the property will be sold therefor—the Legislature cannot deprive the owner of the right to show want of compliance." See, also, German Sav. & L. Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067. There has been some confusion as to the significance of the word "jurisdictional" in this and other decisions on the subject. The respondent appears to claim that every act required by law to be done by any person, officer, or body in the course of the proceeding is "jurisdictional," in the sense here intended, so that its omission or defective performance ousts jurisdiction and renders all subsequent acts void, and that none of these irregularities are affected by the curative clause. It can be easily shown that this would make the curative clause without substantial effect. By section 11 of the Vrooman act (page 156) any person affected by the improvement or by the assessment is given the right to appeal to the council, and thereby obtain a hearing and determination as to any defect in the performance of the work, or irregularity in the assessment, whereby he may be injured or prejudiced. By a long line of decisions it has become the settled doctrine that, with respect to any material defect or irregularity which could be cured by the council, the remedy by appeal is the only remedy, so that if the party does not appeal he waives the objection, and if he does appeal the judgment of the council is conclusive. As to this entire class of defects and irregularities, therefore, the curative clause could not have been intended to have any effect, for, as above shown, they must all have been disposed of, either by a failure to appeal, or by the action of the council upon such appeal, before the issuance of the bonds—the event which brings into life the curative clause. As to all other irregularities up to the issuing of the warrant—those which are material and which cannot be remedied by the council—another series of decisions has established the principle that they are fatal and render the entire proceeding void. In treating of this class of irregularities, the requirements of the law found to have been disregarded have been frequently referred to as "jurisdictional" in character, and this without regard to whether they were or were not a part of the proceeding constituting, or necessary to constitute, a compliance with the mandates of the state or federal Constitution; the intention evidently being merely to express the idea that the statute made the requirement a material and essential part of the statutory plan of procedure.

Respondent now claims that this class of irregularities is not affected by the curative clause. These two classes comprise all the material irregularities that can possibly occur, except the few that might occur after the recording of the assessment, and before the making of the certified list of assessments unpaid; that is, irregularities or omissions in the demand and collection of the amount due upon the land assessed. Immaterial omissions or defects would not invalidate the proceedings, nor call for any curative provision. With the trifling exception above mentioned, there would be no class of irregularities upon which the conclusive evidence clause could have the slightest effect. It is not to be supposed that the provision was intended to be so futile. It is clear that the clause was intended to have a much wider scope, and to cover any irregularity in the entire proceeding. The true intent is put beyond doubt in Ramish v. Hartwell, and by the authorities cited in that case in support of the proposition above quoted, and by other authorities on the subject. In Ensign v. Barse, 107 N. Y. 338, 14 N. E. 400, 15 N. E. 401, the court says, speaking of a subsequent validating act: "If the thing wanting or omitted which constitutes the defect is something, the necessity for which the Legislature might have dispensed with by prior statutes, or if something has been done, or done in a particular way, which the Legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute." And on petition for rehearing the court, on this precise question of the meaning of the word "jurisdictional," said: "A defect may be in one sense jurisdictional relatively to the authority of the assessors acting under an existing law, and yet not so as it respects the power of the Legislature to pass a statute curing the defect." Page 346 of 107 N. Y., page 402 of 15 N. E. The proposition is thus stated by other authorities: "Where directions upon the subject might originally have been dispensed with or executed at another time, irregularities arising from neglect to follow them may be remedied by the Legislature." Williams v. Supervisors, 122 U. S. 163, 164, 7 Sup. Ct. 1244, 30 L. Ed. 1088. "It is competent for them [the Legislature] to sanction retroactively such proceedings in the assessment of the tax as they could have legitimately sanctioned in advance." Exchange Bank Cases (C. C.) 21 Fed. 100. "The Legislature may make the tax deed conclusive evidence of compliance with every requirement which the Legislature might originally, in the exercise of its discretion, have dispensed with." In re Douglas, 41 La. Ann. 765, 6 South. 675; Breaux v. Negrotto, 43 La. Ann. 434, 9 South. 502. "Inasmuch as it is entirely competent for the Legislature to prescribe such formulas as it pleases with regard to the levy and collection of taxes, it is fully within its power, by retroactive legislation, to dispense with their necessity and obviate the evils of their nonobservance." Vaughan v. Swayzie, 56 Miss. 709. "The healing act must in all cases be confined to validating acts which the Legislature might previously have authorized or omitted." Jones v. Landis Tp., 50 N. J. Law, 376, 13 Atl. 251. The power to pass such curative statutes is the same with respect to local assessments as to general taxes, and is "without any limit except such as is imposed by constitutional restrictions or limitations." In re Com'rs of Elizabeth, 49 N. J. Law, 497, 10 Atl. 363; Blount v. Janesville, 31 Wis. 658. A curative statute or clause may preclude all investigation except "the single inquiry whether, in the case presented, the effect of applying the statute is to deprive the party of his property without due process of law." Judson on Taxation, § 337. The following authorities are substantially to the same effect: Rollins v. Wright, 93 Cal. 395, 29 Pac. 58; Haaren v. High, 97 Cal. 445, 32 Pac. 518; Larson v. Dickey, 39 Neb. 463, 58 N. W. 167, 42 Am. St. Rep. 595; Marx v. Hanthorn (C. C.) 30 Fed. 579; In re Lake, 40 La. Ann. 142, 3 South. 479; Raley v. Guinn, 76 Mo. 263; Joslyn v. Pulver, 59 Hun, 129, 13 N. Y. Supp. 311; Id., 128 N. Y. 334, 28 N. E. 604; People v. Turner, 145 N. Y. 451, 40 N. E. 400; Castillo v. McConnico, 168 U. S. 674, 18 Sup. Ct. 229, 42 L. Ed. 622; Tifft v. Buffalo, 82 N. Y. 210; Hatzung v. Syracuse, 92 Hun, 204, 36 N. Y. Supp. 521; 2 Cooley, Tax. (3d Ed.) p. 1014; Burroughs on Tax. p. 336; 2 Desty, Tax. 618, 619.

The two cases last mentioned, and many others which might be cited, are cases of local assessments. The correct proposition is that, as the Legislature has power to devise any scheme for the assessment and levy of taxes for local improvements, provided such scheme includes such notice and opportunity for hearing to the owner of property taxed as will be sufficient to constitute the due process of law required by the Constitution, and otherwise complies with constitutional limitations and restrictions, so the Legislature, by a curative clause in the law establishing the scheme, may provide that the issuance of a bond or the execution of a deed in the enforcement of such levy or assessment shall be conclusive evidence of the regularity of the performance of all the required steps in the proceeding, excepting those that are necessary to constitute the due process of law, or to comply with any other constitutional prerequisite. As to all these other statutory steps or acts, the same power which prescribes them is competent to declare that their nonobservance shall not be fatal to the validity of the tax, and that no inquiry may be made concerning them. This is substantially the effect of the statute in question here. The conclusive evidence clause of section 4 of the bond act (St. 1893, p. 36, c. 21) is a part of the law under which the proceeding was carried on, and its effect is the same as if it declared that, although all of these intermediate steps are directed, yet, if they are not performed as required, and the owner permits the matter to proceed until the bond is issued, he shall be thenceforth precluded from proof of such nonobservance, and the requirements shall be conclusively presumed to have been complied with, excepting those which are necessary to comply with constitutional mandates.

It is intimated, rather than claimed, by the respondent, that the phrase "regularity of all proceedings," included in the clause of section 4 in question, does not include such defects as the failure to perform a required act, but only refers to the defective or imperfect performance of such acts as appear to have been at least attempted. Some support for this contention is found in the opinion in Ramish v. Hartwell, supra, where it is said: "This clause does not necessarily imply that any proceedings were in fact taken, but is limited to the 'regularity' of such as were taken." This, however, was said with reference to those parts of the prescribed proceeding as should be deemed essential to a compliance with the constitutional restrictions upon the power of the Legislature. Any other signification would make the opinion contrary to all authority. An "irregularity" is a "violation or nonobservance of established rules and practices." Black's Law Dic. 644. It "consists either in omitting to do something that is necessary for the due and orderly conduct of a suit, or in doing it at an unseasonable time or in an improper manner." Ex parte Gibson, 31

Cal. 625, 91 Am. Dec. 546; 17 Am. & Eng. Ency. of Law, 481; Jackson v. Kittle, 34 W. Va. 212, 12 S. E. 484. The decisions cited by respondent on the proposition that an act which is void in toto cannot be validated by statute are inapplicable, except to such acts as are void because in violation of the Constitution. All other parts of the proceedings are subject to the rule that the power which creates can also destroy.

What, then, are the essentials, the nonobservance of which cannot be cured? The property must be within the jurisdiction of the local board; there must be the actual performance of some work which is to be paid for (that is, a subject-matter of which the council can acquire jurisdiction); an assessment or apportionment of the amount to be raised must be made; and, as above stated, there must be sufficient notice and opportunity for the hearing and determination of grievances and objections to constitute due process of law. In some cases relating to ordinary annual taxes it is said there must be some notice of sale, and this is among the essentials mentioned in Ramish v. Hartwell. But these decisions do not apply to local assessments under our statute, where notice of sale is provided for by the requirement that a sale can be made only in execution of a judgment of foreclosure, in which the law for ordinary execution sales applies.

In this case the location of the street within the jurisdiction of the council, the actual performance of the work as ordered, and the making of a de facto assessment are all admitted. By the Vrooman act the city council is given jurisdiction to order made any of the improvements therein mentioned, by the proceeding therein prescribed. The proceedings are begun by a resolution of intention to do the work, passed by the council, which must be posted and published. A notice of the work and resolution is then to be posted and published by the street superintendent. At any time after the first publication of the resolution, and before the assessment is issued, any property owner may appear before the council and remonstrate or object to the proceeding in any particular, and obtain a hearing and decision thereon. At the expiration of 25 days after the resolution has been fully published, and 20 days after the notice is given by the street superintendent, the statute declares that the council is deemed to have acquired jurisdiction to order the work done. This part of the proceeding constitutes "due process of law," and satisfies the constitutional requirement. Brown v. Drain (C. C.) 112 Fed. 585; Id., 187 U. S. 635, 23 Sup. Ct. 842, 47 L. Ed. 343; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71. These seem to comprise all the essentials required by either the state or federal Constitution.

The act then makes provision, with much detail, for advertising for and receiving bids for the work, letting the contract for the work to the lowest bidder, the execution of a contract in pursuance thereof for the performance of the work, and the supervision of its performance by city overseers. After the work is completed to the satisfaction of the city authorities, an assessment is to be made upon the property benefited in accordance with the minute directions of the statute, and when properly certified and recorded the several amounts assessed become a lien on the several lots. All persons are deemed to have notice of the assessment from the time it is recorded.

It is obvious that the manner of procedure after the council has acquired jurisdiction to order the work done—the entire subject of letting the work, executing the contract, completing the work, and the minor details as to the mode and manner of making the assessment—are matters within the legislative discretion. If a plan entirely different in detail from that contained in the statute, but arriving at the same result, had been adopted by the Legislature for the accomplishment of these objects, and had been enacted as law, instead of the one embodied in the statute, such law, from a constitutional point of view, would have been a valid enactment. There is nothing in the Constitution which made the plan adopted a necessary one in these particulars. The Legislature could at any time amend the law by omitting all the details, after jurisdiction is acquired, and giving the council general power to get the work done by such means and in such manner as it deems best, and the law would still be constitutional. It must be equally competent to provide, in the law itself, that a disregard of its provisions as to any of these intermediate proceedings shall not be fatal to the validity of the assessment, or that, after a given stage in the matter has been reached, all inquiry as to such proceedings shall be cut off, and they shall be conclusively presumed to have been performed in the manner required by the law.

2. Many of the plaintiff's objections to the proceedings are within the scope of this proposition. Among these objections are the following: That the time for the completion of the work was extended after the time first fixed had expired; that the notice of the time of receiving bids for the contract was not posted or published for the precise number of hours or days which plaintiff claims the law directs; that the contract did not contain a provision that the materials "used" should comply with the specifications; that the street superintendent recorded the assessment, but did not properly certify to such record; that the time for beginning work under the contract was not precisely fixed by the contract; and that the certificate of the engineer does not show that he measured the work. Without determining whether or not these objections would be fatal or material if offered in a proceeding in which they

could be made, it is sufficient to say that, under the curative clause of the bond act, after the bonds are issued the objections are conclusively presumed to have no foundation in fact. The Legislature undoubtedly could have enacted a valid law, which would have authorized the extension of the contract after the time first fixed had expired, or the receiving of bids after a more limited notice, or providing that a contract need not expressly provide that the materials used shall comply with the specifications, or that the record of the assessment need not be certified, or that the time to begin work need not be fixed in the contract, or that no certificate need be made by the engineer. Having such power, it likewise has power to declare that after the issuance of the bonds it shall be conclusively presumed that such directions, if any such exist, have been followed.

The same may be said of the objection that the specifications delegated to the street superintendent powers which the law vests in the council. Such powers might lawfully have been given to the street superintendent in the first instance, and hence they are subject to the curative effect of the clause in question. There might, of course, be an attempt to give him such power as to enable him to make a complete departure from the statutory plan of procedure, and substitute for the work ordered by the council a different character of work. This would be equivalent to an attempt to compel the making of the improvement without notice of the character of the work to be done—that is, without due process of law—and it would necessarily be void notwithstanding a curative clause. So, also, the alternative plan giving him power to change the amount of the contract price and of the assessment, as was attempted and condemned in Bolton v. Gilleran, 105 Cal. 247, 38 Pac. 881, 45 Am. St. Rep. 33, may be beyond the reach of a curative provision, because it would give power to that officer to improve the street and levy an assessment without a substantial compliance with constitutional conditions. But we have here no attempt to make any such radical departure. The contract price was fixed by the council, and could not be changed. The only discretion given to the superintendent of streets was with respect to the manner of performance of certain subordinate parts of the contract—details in the application of the general plan of the work to the actual physical conditions disclosed by the doing of the work, which could not be absolutely determined beforehand. The details here left to that officer consists of such things as the substitution of good earth for spongy material found in place beneath the proposed deposit of gravel, the quality of earth to be used for fills, and the allowance for settling, and the corresponding change in the form of what is called the "cross-section"; the culverts to be put in where drainage is necessary; the slope of the banks of fills; and the exact shade of the "dark slate color" to be given to the surface of the sidewalk. However desirable it would be to have the precise details of the work, even to the smallest fraction, fixed in advance of the bids, so that the exact cost to the contractor, as well as the contract price, may be known at the time the contract is let, it always has been and always will be impossible to do so. As was said in Haughawout v. Hubbard, 131 Cal. 678, 63 Pac. 1079: "To some extent, such details must depend on unanticipated contingencies, and can be determined only by the exigencies of the actual construction. The specifications must therefore always fail, more or less, in certainty or completeness of detail; and hence the most accurate and detailed specifications must leave unprovided for many questions arising in the course of the work, as to the kind and amount of the work or materials, and other details of construction." The giving of discretion to some person as to all these details, the culverts possibly excepted, is inevitable in every such work. If not vested in and exercised by the street superintendent, it will be exercised by the contractor himself. The statute recognizes this condition, and itself provides that the work must be done to the satisfaction of the street superintendent. The culverts may not be subject to this necessity, and, in the absence of a curative clause, might be sufficient to invalidate the assessment. Grant v. Barber, 135 Cal. 188, 67 Pac. 127. But unquestionably the Legislature might have provided in the statute that the number and location of the culverts to be placed under any graded streets should be controlled by the street superintendent, and that the contractor for any such work should construct them where directed by such officer. Hence the curative provision validates the assessment in this respect. Much more is this true of the other details. All of them relate to the manner of the work, and the method of procedure to get it done, and not to the subjects of the notice to the owners, the hearing of grievances, the fact that work was done, nor to the existence of a uniform assessment. With respect to the objection as to the failure of the contract to declare that the materials "used" shall comply with specifications, it may be observed that the contract does require the contractor to "furnish" the materials required thereby and according thereto. Counsel's argument is that materials can be furnished without being used. The answer is that no materials can be used without being furnished, and, if the materials furnished are sufficient, the materials used must be sufficient also.

Some other questions require more particular notice:

3. The fact that the plaintiff at the time the proceedings were in progress was a mortgagee only, and became an owner subsequently upon a foreclosure of her mortgage, even if it is conceded that such fact is aver-

red, is entirely immaterial. As mortgagee she was as much bound by the proceedings as if she had been the owner, and her lien as mortgagee, although it may have been prior in point of time to that of the assessment, was not, because of that priority, paramount thereto. The assessment lien covered the entire estate, and was paramount to all existing liens of a private nature. German S. & L. Soc. v. Ramish, 138 Cal. 125, 69 Pac. 89, 70 Pac. 1067; California, etc., Co. v. Weis, 118 Cal. 492, 50 Pac. 697.

4. The fact that the conclusive evidence clause of the bond act arbitrarily fixes a period of 30 days, after which defects which before may have been fatal are placed beyond inquiry, does not make the law unreasonable. There is no strict analogy between such a law and a new statute of limitations shortening the time previously allowed for the bringing of an action. In such cases it has been held that the new law is void if it prescribes a period so short that it does not give the party a reasonable time after it takes effect within which to begin his action. Here the notice of the proceedings is sufficient to constitute due process of law. The period of 30 days after the date of the warrant, within which the statute permits an owner to prevent the issuance of any bond by filing an affidavit and requesting that no bond be issued, gives a reasonable time to the owner within which to make his election whether he will take advantage of the extension of time afforded by the issuance of a bond, or, by requesting that no bond be issued, preserve such rights as he may think he has to defeat the assessment for irregularity in the proceedings. The notices having been given, he is conclusively presumed to have knowledge of his right to so elect. It should not be forgotten that, at the time the assessment becomes due, other persons have valuable property rights at stake, as well as the owner.

5. It was not necessary that the resolution of intention should have given a more complete description of the work. The act provides that the council shall pass a resolution of intention, "describing the work." The resolution in question declares it to be the intention of the council that the described street "be graded, gravelled and guttered in accordance with the plans and profiles on file in the office of the city engineer and specifications on file in the office of the city clerk of the city of Los Angeles; * * * that a cement curb be constructed along each line of the roadway of said" street in accordance with said specifications; and "that a cement sidewalk five feet in width be constructed along each side of said" street in accordance with the said specifications.

It is claimed that the resolution does not sufficiently describe the work, and also that the plans and specifications on file are made a part of the resolution by the reference to them, and that the proceedings are void because these plans and specifications were not incorporated into the resolution and published. The appellant, in answer to this claim, contends that the curative clause of the bond act covers these defects, if such they are. The resolution of intention is the first step in the proceeding. It is to be published, and it is by means of such publication, and the notice thereafter given, which refers to it for particulars, that the council acquires jurisdiction. It is a part of the "due process of law" required by the Constitution, the want of which cannot be cured or waived by the Legislature. There must be a substantial compliance with the provisions of the act in regard to this preliminary process.

In several decisions of this court involving resolutions which did not refer to any sufficient plans or specifications, it has been held that the phrase "describing the work," in the act, means that the resolution must not only describe the work proposed to be done, but must also state, in general terms, at least, the materials of which such work is to be composed. Thus it is said that a resolution declaring the intention that a certain street be "curbed" or "guttered," or that "suitable drains and inlets" be made, or that a "flushing apparatus" be provided, does not sufficiently describe the work, and that an assessment founded upon such a resolution is void. Schweisau v. Mahon, 128 Cal. 114, 60 Pac. 683; Fay v. Reed, 128 Cal. 358, 60 Pac. 927; Bay Rock Co. v. Bell, 133 Cal. 152, 65 Pac. 299; Williamson v. Joyce, 137 Cal. 107, 69 Pac. 854. In Bay Rock Co. v. Bell and Fay v. Reed there was a reference to plans and specifications, but it was found that the reference was incomplete, or that such plans or specifications were themselves defective and insufficient to remove the uncertainty as to the materials. The question whether or not an ordinance can be aided by a reference to documents on file was mentioned, but in each case it was expressly left undecided. There is no decision in this state on the exact point. It has been held that such an ordinance can be aided, as to the description of the street to be improved, by a reference to records, or to facts manifest to the eye on the street itself. Williams v. Bergin, 116 Cal. 57, 47 Pac. 877; Cohen v. Alameda, 124 Cal. 507, 57 Pac. 377. It was not claimed that the things thus referred to must also be published. There are other cases of similar import. The authorities of other states, with practical unanimity, establish the rule that a reference to plans and specifications on file will serve to make sufficient the description of the work in a resolution of this character, where, by the terms of the description in the resolution itself, it would be void. The following authorities are substantially to this effect: Stone v. Cambridge, 6 Cush. 270; Boehme v. Monroe, 106 Mich. 404, 64 N. W. 204; Jenney v. Des Moines, 103 Iowa, 350, 72 N. W. 550; Carlinville v. McClure, 156 Ill. 496, 41

N. E. 169; C. & N. P. R. Co. v. Chicago, 172 Ill. 69, 49 N. E. 1006; Lehmers v. Chicago, 178 Ill. 530, 53 N. E. 394; Claflin v. Chicago, 178 Ill. 549, 53 N. E. 339; Shannon v. Hinsdale, 180 Ill. 202, 54 N. E. 181; Brewster v. Peru, 180 Ill. 124, 54 N. E. 233; 2 Beach, Pub. Cor. § 1182; McQuillin, Mun. Ord. § 545.

This does not make the plans and specifications referred to an integral part of the resolution, so that they must also be published, in order to comply with the statute requiring the publication of the resolution. The rule is but an application of the maxim, "That is certain which can be made certain." Civ. Code, § 3538. It applies not only to ordinances, but to all documents alike. It is the same rule which allows references to a map, plat, or to other documents in a description of land. Where such descriptions are required to be published, as in a notice of sale of land, for instance, it is never necessary to incorporate in the publication the map or plat referred to, in order to make a legal publication. The purpose to be served by the publication of the resolution is, in the first place, to inform interested persons of the general character of the improvement proposed; and, in the second place, to make a specific declaration of the particular kind of improvement, as a basis of future action. The plans and specifications being on file in a public office, both purposes will be as well accomplished by a mere reference to them as by setting them forth in full as a part of the resolution. The plans and specifications referred to supply all the information required to make the character of the work and materials absolutely certain. We hold that a resolution of intention sufficiently describes the work if it states the kind of work to be done, as stated in the statute, and refers to plans and specifications on file in the office of the city clerk or engineer, which give the details as to the materials to be used, and that the matters referred to need not be published.

6. The bond act provides (section 2) that "whenever the city council * * * shall find, upon estimates of the engineer, that the cost of any proposed work * * * will be greater than fifty cents per front foot," it may determine that bonds shall be issued under the act, and (section 3) that, when said city council shall determine that bonds shall be issued, "it shall so declare in the resolution of intention to do said work" (St. 1893, pp. 33, 34, c. 21). These provisions do not make it necessary that the council should by a formal statement declare such finding. The council must, of course, ascertain and find that the cost will exceed the amount named; but this does not mean that there must be an express written declaration of such finding, simliar to that required in an action in the superior court, or at all. The resolution, after the recital as to the cost, declares that "it is hereby determined that bonds shall be issued" as provided in the act. The passage of the resolution containing this declaration sufficiently indicated that the council had found the necessary fact. Where a legislative body is given power to act whenever it shall find a given fact to exist, it is not necessary, as a condition to the exercise of the power, that such body should previously or contemporaneously make a declaration that the fact exists. The fact that it takes the action raises the presumption that it had, upon inquiry, ascertained the existence of the fact, unless the statute giving the power explicitly requires an express finding or declaration of the conditions precedent. The bond act does not require any declaration whatever as to the cost. All that is required to be stated in the resolution is the determination of the council that bonds shall be issued. This the resolution does, and this implies a finding that the cost exceeded the amount required. McQuillin, Mun. Ord. § 140; German Sav. & L. Soc. v. Ramish, 138 Cal. 130, 69 Pac. 89, 70 Pac. 1067; Spaulding v. Homestead, etc., Ass'n, 87 Cal. 45, 24 Pac. 600, 25 Pac. 249; Farmers', etc., Bank v. Board, 97 Cal. 328, 32 Pac. 312; People v. Los Angeles, 133 Cal. 342, 65 Pac. 749.

7. It is claimed that the contract was awarded at a time when the council was not lawfully in session. There is nothing in the point, even if we concede that the curative clause does not place it beyond inquiry. It is alleged that the council, being in session the day before, had adjourned that session to the next day at 10 o'clock, but that in fact said adjourned session was called to order and began to transact business at 9 o'clock, and that the contract was awarded on that day. It is not alleged that the contract was awarded before 10 o'clock, and it will certainly not be presumed that such was the fact. Further comment is unnecessary.

8. With regard to the supposed defect in the certificate attached to the record of the assessment and in the record itself, it may be further said that the facts alleged show no such irregularity. It appears that the warrant, assessment, diagram, and engineer's certificate were copied in the proper book by the street superintendent, and that the certificate was in the following words, written underneath them: "Recorded 9:15 a. m. Apr. 11, A. D. 1896. P. A. Howard, Street Superintendent City of Los Angeles." The criticism seems to be that the documents may have occupied several pages of the record, and the certificate is insufficient, because it does not expressly state that all of the documents were recorded at that time. This, however, is implied from the words used, and the place where they appear immediately following the documents, coupled with the further consideration that the law required all these documents to be recorded by that officer in that book. This would be a sufficient showing to admit the record in evidence, and it by no means justifies or author-

izes the conclusion that the documents, or any of them, were not recorded at the time stated.

9. Section 2 of the Vrooman act provides "that whenever the grade of a street * * * shall hereafter be changed, the petition of the owners of a majority of the feet fronting thereon, asking for grading the same to the new grade, shall be a condition precedent to the ordering of such grading to be done." St. 1885, p. 147, c. 153, as amended by St. 1893, p. 172, c. 144. It is alleged that the grade had been changed before the proceedings here involved were begun, and that the change of grade was made upon a petition which was not signed by the owners of the major part of the frontage, as required by section 38 of the act of 1891 (St. 1891, p. 116, c. 114) as amended in 1893 (St. 1893, p. 89, c. 79). It is further alleged, in effect, that the resolution of intention to do the work for which these bonds were issued was preceded by, and founded upon, a petition asking that the street be graded to the new grade, which petition was not signed by the owners of a majority of the frontage, as required by section 2, above quoted. Hence it is claimed the proceeding was unauthorized and the bonds void. In German Sav. & L. Soc. v. Ramish, 138 Cal. 130, 69 Pac. 89, 70 Pac. 1067, it is said that in such a case the passage by the council of the resolution of intention to do the work "is itself conclusive evidence that at its passage the persons whose names appeared upon the petition were owners of a majority of the frontage," and this seems to answer the contention. A further and sufficient answer to the point is that, as pleaded, it is completely self-destructive. The act of 1893 aforesaid, relating to a change of the theoretical grade, just as positively requires the filing of a petition therefor by the owners of a majority of the frontage, as a condition precedent to the change, as does section 2 of the Vrooman act, above quoted, in case of an order for the grading to be done. If the absence of such petition would render the proceeding void in the latter case, it would have the same effect upon the former. Hence, taking the whole allegation as true, as we must, it follows that the order purporting to change the theoretical grade was itself void, or, in other words, that there has been, in contemplation of law, no change of the grade, such as is contemplated by the quoted clause of section 2 aforesaid. There having been no change of grade, there was no necessity for any petition of property owners, as a condition precedent to the power of the council to order the grading done to the legal grade. The bonds are unaffected by the filing of an insufficient petition purporting to be made in pursuance of a provision not applicable to the case. The resolution to do the work of grading does not specify any particular level, altitude, or grade to which the surface of the street must be reduced or raised, and it must therefore be taken to refer to whatever grade was then lawfully established.

10. In regard to the contents of the certificate of the city engineer recorded with the assessment, it should be said that the act nowhere specifies what such certificate shall contain, nor requires that any such certificate shall be made. If the street superintendent finds himself able to make the assessment without the aid of any certificate from the engineer, there is nothing in the statute forbidding him from doing so. If he procures such certificate to aid him, the statute requires that the same, whatever it contains, must be recorded. Only that, and nothing more. Reid v. Clay, 134 Cal. 215, 66 Pac. 262; O'Dea v. Mitchell (Cal.) 77 Pac. 1020.

11. The description of the bonds in the resolution of intention was sufficient. It specifies that the bonds shall be issued to represent the cost of the improvement, and shall be serial, extending over a period of 10 years, an equal portion to be paid annually on the 2d day of January of each year after their date, and to bear interest at 7 per centum per annum, payable semiannually on the 2d days of July and January. This, in connection with the positive requirements of the statute concerning the form and contents of the bonds, describes them sufficiently. It is not intended that the resolution should copy the proposed bonds in full.

12. We can see no reasonable objections to the form or sufficiency of the contractor's return upon the assessment. It was not necessary that it should state with whom the street superintendent contracted. The warrant was in favor of Stansbury and Moore. The return was made by Moore, and states that he is the contractor named in the assessment, diagram, and warrant. Moore was certainly named in the warrant, and, as the diagram and assessment are not in the record, we must presume that they also name him, so that the statement is not untrue, even if Stansbury was also named, and the statement was material. It is clearly shown therein that the demand was made by virtue of the warrant, though it is not expressed in the same language as that which counsel for respondent uses in his brief to express the same idea. Besides, these irregularities, if material, are cured by the conclusive evidence clause.

The conclusion is that the complaint sets forth no irregularity in the proceedings which is not cured by the bond act, and hence that the bonds of the defendant are valid, and the complaint does not state a cause of action. The judgment must be, therefore, reversed.

The writer of this opinion was the judge of the court below who presided when the judgment was rendered. He desires to say that the judgment was given on default, ex parte, and without any consideration of the effect of the curative provision here discussed.

13. The appeal from the order refusing to vacate the default may as well be dismissed. The reversal vacates the judgment, and no further proceedings can be had in the court below, except upon an amended complaint, which must be served on the defendant. This will necessarily open the default. The appeal therefore presents a question wholly immaterial to the rights of the parties, except as to costs; and, as the two appeals are presented on the same transcript and briefs, the appellant will recover all costs.

The appeal from the order is dismissed, and the judgment is reversed, with costs.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.

HENSHAW, J. I dissent, and adhere to the subjoined opinion, heretofore rendered in department. I think the correct rule for the interpretation of the statute in question was laid down in Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920, which case, and others which have followed its construction of the law, are reversed by the prevailing opinion. Moreover, they are reversed upon a line of authority dealing with the general taxing power, which is not only a high prerogative power of a government itself, but one whose daily exercise is necessary to the very existence of the government. It is natural, therefore, in dealing with questions of the collection of taxes—the very life blood of a nation's existence—to find courts construing somewhat liberally curative acts, and looking in their interpretation to discover but one thing, namely, whether the subject who is taxed has had his day in court. But I do not believe it was the intention of our Legislature, nor yet necessary to a construction of this law, to clothe street contractors with this high governmental prerogative, and, by putting a bond for streetwork in their hands, to declare, as is declared in the opinion, that the property owner is forever, and in every forum, shut out from the right of contesting its legality.

We concur: McFARLAND, J.; LORIGAN, J.

The following is the opinion in department, above referred to:

HENSHAW, J. This action was brought to quiet plaintiff's title against a lien upon her lands claimed by defendant by virtue of his ownership of certain street bonds. The plaintiff sought to have the bonds, the assessment, the warrant, the diagram, and the proceedings for the streetwork, and the contract for it, so far as they affected her lands, declared to be null and void, and sought further to have the bond delivered to the clerk of the court, and by him canceled. The complaint is therefore, in its nature, a bill of peace against the outstanding street bonds. Defendant made default, and the judgment granted plaintiff the relief sought. Defendant appeals from that judgment, and from the order of the court refusing to vacate his default.

The questions here presented have to do with the provisions of the general street laws of the state, the Vrooman act, and the street bond act (St. 1893, p. 33, c. 21). The latter portion of section 4 (page 36) of said last-named act, after setting forth the conditions whereunder and the terms whereby such bonds may be issued, provides as follows: "Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under said street work act and this act, previous to the making of the certified list of all assessments unpaid to the amount of $50 or over by the street superintendent, to the city treasurer, and of the validity of said lien, up to the date of said list." In Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920, this conclusive evidence clause, as it may, for convenience, be called, was considered by this court. It was there determined that the provision making the bond conclusive evidence of the validity of the lien was unconstitutional and void, as depriving a person of his property without due process of law, and the true rule regarding the extent and scope of the operation of the conclusive evidence clause is distinctly and succinctly laid down. It is there said: "We have seen that the Legislature had the authority to declare that the issuance of the bond should be conclusive evidence of certain facts, provided such facts were not essential to the jurisdiction of the officers to create the assessment; and, to the extent that the Legislature could exercise this power, it should be upheld. In the first portion of the sentence above quoted, the Legislature has not assumed to make the bond conclusive evidence of the existence of any jurisdictional fact, or that any step essential to the creation of an assessment has been taken, but has merely declared that it shall be conclusive evidence of the 'regularity' of all proceedings prior thereto. This clause does not necessarily imply that any proceedings were in fact taken, but is limited to the 'regularity' of such as were taken, and leaves the owner at liberty to show in defense of his property that no jurisdiction to authorize the work or make the assessment was in fact acquired." Under the rule here laid down, which may not be gainsaid, we may turn without further discussion or citation of authorities to the attacks made by the complaint against the validity of the bonds—attacks which, for the purposes of this appeal, are to be taken as true upon all matters of fact properly averred. These attacks are some 15 or more in number, but it will not be necessary to consider them all, since the grounds of some of them, at least, are well taken, and they are sufficient to invalidate the bonds in question.

1. It appears that the contract was dated upon September 28, 1895, and the work was

to be completed "one hundred and twenty days thereafter." This means the designated number of days after the date of the contract. Palmer v. Burnham, 120 Cal. 366, 52 Pac. 664. The time for the completion of the work, as originally fixed, expired on the 26th day of January, 1896. The only extension of time was that granted by the council on February 3, 1896, and was made by the street superintendent on February 6, 1896, when a 40-days extension was attempted to be given. Under a numerous and unbroken line of authorities, the council did not have the power to authorize the extension after the time for the completion of the contract had expired, and the assessment which followed would be void. Turney v. Dougherty, 53 Cal. 619; Beverdige v. Livingstone, 54 Cal. 54; Mappa v. Los Angeles, 61 Cal. 309; Fanning v. Schammel, 68 Cal. 429, 9 Pac. 427; Dougherty v. Coffin, 69 Cal. 455, 10 Pac. 672; Brock v. Luning, 89 Cal. 319, 26 Pac. 972; Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664.

This radical defect, however, appellant insists, is cured by the conclusive evidence clause of the bond act, and herein the reasoning is that the conclusive evidence clause of the act is in its nature curative, and validates anything and everything done or not done, jurisdictional or otherwise, the doing of which the Legislature might in the first instance have dispensed with. This, within certain limitations, is true; but the limitations are set forth in Ramish v. Hartwell, supra, and are all important. If, for example, the Legislature has prescribed certain steps as being necessary to the acquirement or exercise of jurisdiction, the omission to take these steps will not be rectified by the conclusive evidence clause, nor will it be an answer to say that the Legislature might have dispensed with them or substituted others for them. It must be remembered that the conclusive evidence clause was not designed to confer, and could not, if it were designed, confer, any added or new jurisdiction; nor can it be construed to permit the acquirement of jurisdiction by pursuing a mode other than the one which the Legislature has advisedly prescribed. As well might it be said that because the Legislature could have provided for personal service of the notice of streetwork, instead of service by publication and posting, notice by publication and posting was utterly dispensed with, under the provisions of the conclusive evidence clause. It could not be dispensed with even if it were shown that actual notice was in fact given to every property owner, because the mode prescribed is a process of law, and the only process ordained by law for charging the property owner with notice. So in this instance it has been held by all of the decisions that after the expiration of the time fixed for the completion of the contract the council has not "power" to extend the time for the completion of the work. Lacking power, they lack jurisdiction, and an attempt to extend the time under such circumstances is an act in excess of jurisdiction, rendering subsequent proceedings void. Nor does it matter that the Legislature might have authorized the council to extend the time after such default upon the part of the contractor. The fact remains that it has not done so, and, as has been said, the conclusive evidence clause was not designed to confer any new or added jurisdiction upon the council, but merely to correct irregularities in proceedings done within their jurisdiction.

2. The specifications under which the street improvement was made, delegated powers which the law requires to be exercised by the council. Without setting forth these specifications, it is sufficient to say that they are identically the same as those discussed and condemned in Chase v. Scheerer, 136 Cal. 248, 68 Pac. 768, and substantially identical with those likewise condemned in Stansbury v. White, 121 Cal. 435, 53 Pac. 940, and Chase v. Treasurer of Los Angeles, 122 Cal. 541, 55 Pac. 414. The acquirement by the council of jurisdiction to order the work done means no more than that it acquires jurisdiction to legally order the work done. The conclusive evidence clause cannot operate to cure a defect of this nature—a defect going to the very exercise of the jurisdiction which the council had acquired. It was not within their jurisdiction to delegate these powers to the street superintendent, and, for the reasons above given under subdivision 1, the conclusive evidence clause cannot be construed to rectify proceedings taken by the council in excess of its jurisdiction and in violation of its powers.

3. The motion to vacate the default was based upon an alleged mistake in law upon the part of the defendant, who believed that the defects pleaded in the complaint were unanswerable, and fatal to the validity of his bond. As the sole ground for vacating the default was that this belief was mistaken, and as appears from the foregoing it was not a mistaken belief, the trial court properly refused to make the order.

The judgment and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

On Petition for Rehearing.

SHAW, J. The petition for a rehearing is denied. In response to an objection urged somewhat at length in the petition for a rehearing, we think it proper to say that a mortgagee of property affected by a street assessment has the right of appeal to the city council, secured by section 11 of the Vrooman act (Laws 1885, p. 156, c. 153), as fully as the owner of the property. The rule of strict construction in regard to proceedings to assess property for local public improvements does not apply to those provisions of the law which are made for the benefit of the property owners to enable them to present objections to irregularities in the proceedings. With respect to such provisions the statute will be liberally construed in favor of the person interested. City Street Imp. Co. v. Babcock, 139 Cal. 692, 73 Pac. 666. The provision that "all other persons directly interested in any work provided for in this act or in the assessment" may appeal to the council is intended to allow any person to appeal who has a direct interest, either as a lienholder or as owner in any property affected by the assessment, and to distinguish persons having such direct interest from those who have an interest only as members of the body usually designated as the public.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.

146 Cal. 317

WOOD v. MOULTON et al. (L. A. 1,324.)*

(Supreme Court of California. Feb. 23, 1905.)

WATERS AND WATER COURSES—SURFACE WATERS—WRONGFUL DISCHARGE—INSTRUCTIONS —VIEW—MISCONDUCT OF JURY—MISCONDUCT OF WITNESSES—APPEAL — HARMLESS ERROR— NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. The rule of the civil law is adopted in California as the rule governing the rights and obligations of parties with respect to surface water, and under that rule the owner of higher lands has no right to divert surface or storm waters from his lands onto the lands of another, over which they would not naturally have flowed, nor has he the right, by accumulating surface waters upon his own lands in ditches or other like artificial channels, to precipitate them upon his neighbor's lands in larger quantities or in different form from that which they would have taken in the course of nature.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 126–131.]

2. In an action for the wrongful discharge of surface water over plaintiff's lands, the court charged that defendants had the right to confine surface water flowing over their land into one channel, and to carry the same in substantially the same channel in which the water flowed naturally across their land, without substantially increasing the volume of water therein. In a subsequent instruction the jury were told that defendants had the right to confine two or three channels into one, and so carry the waters over their land, although such change might throw increased waters into the natural and customary channel. *Held* that, while the two instructions were obviously conflicting, defendants could not complain thereof, as the former fairly stated the law, and the latter was more favorable to them than they were entitled to.

3. Testimony was given for defendants that holes had been dug along a street, and that the soil disclosed no indication of sand. A view was granted, and the jury found a laborer filling the last of the holes, but on a suggestion from one of the jurymen he dug another hole, in which the jury noticed the character of the soil. There was no denial of the testimony of defendants' witnesses that there was no indication of sand in the soil. *Held* that, though the conduct of the jury was irregular, defendants were not prejudiced thereby.

4. Conduct of a witness for defendants, who accompanied the jury upon a view, in attempting to state what his testimony had been on the trial, was, if improper, not prejudicial, where the witness did not change his testimony in any way adverse to defendants, and it was not shown that he succeeded in his attempt.

5. An irregularity of a witness accompanying the jury on a view is not ground for complaint on appeal, where appellant failed to call the court's attention to the irregularity before the verdict was rendered.

6. Newly discovered evidence which is merely cumulative, or designed to contradict witnesses, is not ground for a new trial.

7. In an action for damages caused by the wrongful discharge of surface water over plaintiff's land, where there was no claim in the answer that any part of the damage was caused by waters flowing on to plaintiff's land, from sources over which defendants had no control, and it was shown that the ditch was capable of carrying the natural storm waters off if it had not been obstructed by the sand and gravel washed into it by defendants' acts, defendants were not entitled to an instruction limiting their liability to damages caused by water wrongfully diverted by them, and exempting them from liability for damages caused by waters flowing from sources over which they had no control.

Department 2. Appeal from Superior Court, Riverside County; Waldo M. York, Judge.

Action by A. A. Wood against J. F. Moulton and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Collier & Carnahan and O. P. Widaman, for appellants. Purrington & Adair, for respondent.

HENSHAW, J. Defendants are the owners of a large tract of land. Plaintiff's land (20 acres in extent) is contiguous to, and lower in elevation than, defendants' land. It is charged that defendants, in preparing their land for cultivation, changed the course of surface water which in times of rain accumulated in a ravine in the hills upon their property, erected an embankment across the original wash which these surface waters followed, and constructed a new channel for them to the canal of the Riverside Water Company. The result was that under a heavy rainfall the waters rushed over the land and down the channel into the canal of the Riverside Water Company, filling it with mud and other débris, and, breaking over the canal, continued their way across defendants' land and on to plaintiff's land, doing damage. It was charged that but for the interference by defendants with the natural flow of the surface waters they would never have reached plaintiff's land. The action was brought to recover damages, and to compel the defendants to abate the embankment and channel as a nuisance, and to restore the original channel to its earlier condition. A jury trial was had, and the jury returned its verdict for plaintiff in the sum of $1,000. Judgment for plaintiff in that amount followed. No disposition of any kind seems to have been made of plaintiff's prayer for a mandatory injunction and other equitable relief, and, as the case is presented to us, it is simply an action at law for damages to real property.

Appellants' principal contention is that, under the statutes of this state (St. 1850, p. 219, c. 95), and under section 4468 of the Political Code, as the common law of England is made the rule of decision in this state, where not repugnant to or inconsistent with out Constitution or laws, the defendants' acts in ridding themselves of this storm water were entirely consistent with their rights, and if plaintiff suffered damage therefrom it was damnum absque injuria. Such, indeed, was the rule at common law, but by a long course of decisions in this state, consistently adhered to, the rule of the civil law has been adopted, and has become our rule of property. Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575; Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; Los Angeles Cemetery Association v. City of Los Angeles, 103 Cal. 461, 37 Pac. 375; Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400; Cushing v. Pires, 124 Cal. 663, 57 Pac. 572; Larrabee v. Cloverdale, 131 Cal. 96, 63 Pac. 143; Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169. In Los Angeles Cemetery Ass'n v. City of Los Angeles, supra, the differences and distinctions between the rule at common law and that at civil law having been pointed out, it is said: "In a considerable number of states of our Union, California included, the doctrine of the civil law has been substituted for the common-law rule." In Cushing v. Pires, supra, it is said: "It is the settled law of this state that a landowner cannot protect his own land to the injury of another's land by turning the storm or surface water which would naturally flow thereon away from his own and on to the lands of another." It follows, therefore, that the owner of higher lands has no right, for his own relief, either to divert surface or storm waters from his lands on to the lands of another, over which they would not naturally have flowed, nor has he the right, by accumulating the surface waters upon his own lands in ditches or other like artificial channels, to precipitate them upon his neighbor's land in larger quantities or in different form from that which they would have had or taken in the course of nature. The rule of this state is the rule of the civil law, "Aqua currit, et debet currere, ut currere solebat," and we have, moreover, modified, to meet our conditions, the harsh and drastic common-law maxim of "Cujus est solum, ejus est usque ad cœlum et ad inferos," by applying with it the more benign and equitable rule of "Sic utere tuo ut alienum non lædas."

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*Rehearing denied March 23, 1905.

Appellants complain of instructions given by the court, but the gravamen of their complaint is that the instructions embodied the rule of the civil law and not that of the common law, and, for the reasons already given, their point is not well taken. In particular, however, appellant complains that there are contradictory instructions. Instruction 6 is as follows: "If you find that the defendants in this case, in a reasonable manner, and for the proper cultivation and improvement of their own land, confined the surface or flood waters flowing down upon their tract through a surface water channel (at certain points spreading out over their tract and assuming various channels) into one channel, and carried the same in substantially the same channel in which the water flowed naturally across their land, without substantially increasing the volume of water therein, then you are instructed that defendants were exercising a legal right," etc. In instruction 8 the jury was advised: "Defendants had the right * * * to confine the two or three channels in one, and so carry said waters along and over said tract, thus directing it into its natural channel lower down on defendants' land, even though such change might throw increased waters into said natural and customary channel below." It is not easy to perceive why the court should have given these two instructions so obviously conflicting, but appellants have no just cause for complaint. The sixth instruction fairly stated the law. Appellants certainly are not injured because in a later instruction the court laid down a rule more favorable to them than the law justifies.

The jury, under instructions of the court, were sent, with Francis Cuttle and J. R. Cuttle, in custody of the sheriff, to view the premises. Testimony had been offered by the defendants on the trial to prove that no wash had ever crossed a certain street, thus contradicting evidence upon that point offered by plaintiff. The evidence of defendants was that holes had been dug about three feet deep along the street for a hundred feet or so, and that there was no indication of sand there at all; it was rich ground—loam. When the jury reached this point, a laborer was filling the last of the holes. Upon being asked why he had done so, he offered to dig some more. He then proceeded to dig at that point, and made a hole about 15 or 18 inches deep. While the digging was going on, several of the jurymen stood about watching the result of the work and noticing the soil as it was exposed, and finally one of the jurymen said that that was sufficient, and the digging ceased. We do not perceive how this, if it be treated as an irregularity, could have been prejudicial to the defendants. There had been no denial of the testimony of their witnesses that there was no indication of sand in the soil which had been dug from the holes, and, except upon the theory that defendants' witnesses were false or mistaken in their testimony, defendants could not be prejudiced by the digging of a hole at this particular spot.

Defendants next complain because J. R. Cuttle, while on the ground with the jury, "stated, or endeavored to state, what his testimony had been on the trial as to where the water was accustomed to run." J. R. Cuttle was the superintendent of the defendants, and had been called as a witness by them, and had given evidence in their favor. However improper the effort of Cuttle may have been, it is impossible to see how appellant could have been prejudiced by it. It is not pretended that in his attempt to state what his evidence had been he changed his view in any way adverse to defendants' contention. Moreover, it does not appear that the witness succeeded in his attempt. So far as defendants' rights are concerned, the irregularity was one which did not impair them, and one, therefore, of which they have no just cause of complaint.

A more serious objection is that presented by the following facts: Francis Cuttle, who also accompanied the jury, stated, in reply to the question of one of the jurymen, "Where did the water run across here before the land was improved?" "It did not run here at all." The court, in sending the Cuttles with the sheriff in charge of the jury, instructed them that they were to express no opinion in regard to the matter, or to give any evidence, "except to answer questions which they may ask with regard to the points involved; and the sheriff will go with the jury to see to it that no one is allowed to talk to them in regard to the case, except these two gentlemen." Francis Cuttle had already testified to the same matter in court, and it might be said that this question and answer were fairly within the instructions given by the court, and amounted to no more than pointing out upon the ground the facts to which he had testified in court. Be this as it may, however, appellants cannot be heard to complain. They knew of the irregularity at the time, and had ample opportunity to call the court's attention to it before a verdict was rendered. They chose, however, to remain silent and trust to the chance of a verdict, and, that verdict having been unfavorable to them, they will not at this late day be allowed to urge the irregularity. In Monaghan v. Rolling Mill Company, 81 Cal. 190, 22 Pac. 590, it is said: "This circumstance was known to appellant at the time of its occurrence, and no objection was made; and he could not thus remain quiet and take the chance of a favorable verdict, and keep this point in reserve." See, also, 17 Am. & Eng. Ency. of Law (2d Ed.) p. 1206; 1 Hayne on New Trial and Appeal, § 27; Ipswitch v. Fernandez, 84 Cal. 639, 24 Pac. 298.

We perceive no error of the court in the admission or rejection of evidence that calls for special notice, nor can it be said that the court was in error in refusing a new trial upon the ground of newly discovered evidence. There is not a sufficient showing of diligence, and the evidence itself is, in its nature, cumulative and designed to contradict the plaintiff's witnesses, and the rule is that newly discovered evidence which is merely cumulative or designed to contradict witnesses is not of a character to warrant granting a new trial. People v. Anthony, 56 Cal. 397; Chalmers v. Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62.

In a supplemental brief appellants make an additional point that the court erred in refusing to give an instruction to the effect that, in considering the question of damage, they should determine whether any part of the damage was caused by waters flowing on to plaintiff's land from other sources over which defendants had no control, and that, if they so found, defendants were liable, if liable at all, only for that portion of the damages caused by water wrongfully diverted by them. This instruction was addressed to a contention that the waters of the Riverside Water Company's ditch intermingled with the waters from defendants' land, and that the damage was caused, at least in part, by waters from this ditch. But there was no issue presented by the answer of the defendants that any part of the damage was caused by waters flowing on to plaintiff's land from other sources over which they had no control, and it is made to appear very clearly that the ditch was capable of carrying the natural storm waters if it had not been obstructed and damaged by the sand and gravel washed into it by defendants' acts. It cannot reasonably be contended under this state of the case, therefore, that the Riverside Water Company's canal, to which reference in the instruction is made, was joint tort feasor with defendants.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

7 Cal. Unrep. 202

In re HOVEY. (Cr. 1,090.)

(Supreme Court of California. March 3, 1905.)

ATTORNEYS—ADMISSION TO PRACTICE—JURISDICTION OF COURT.

Under Act Feb. 15, 1905, vesting in the district courts of appeal created by Const. art. 6, as amended November 8, 1904, the exclusive power to admit persons to practice as attorneys and counselors in the several courts of the state, the Supreme Court has no original jurisdiction of an application for such admission; and a contested application originating in the Supreme Court will be transferred to the proper district court of appeal.

In Bank. Application of Frank W. Hovey to be admitted to practice as an attorney. Transferred to district court of appeal for Second district.

PER CURIAM. Whereas, heretofore, at a session of this court held on June 17, 1904, Frank W. Hovey made application to this court for an order admitting him to practice as an attorney and counselor in all the courts of this state, and was thereupon duly examined by this court as to his qualifications, and upon said examination was by this court found qualified, and there being opposition to his said application for admission to practice, this court thereupon proceeded to make inquiry as to the good moral character of said Frank W. Hovey, and, to that end, made an order referring that question to Hon. M. T. Allen, judge of the superior court of Los Angeles county, as referee, to take testimony, and therefrom report to this court his findings concerning the character of said applicant, and said referee having thereafter made and filed in this court his report and finding in regard to the moral character of said applicant, and the matter having been thereupon continued for argument and determination upon said report; and whereas, there has been no hearing or determination thereon, and by an act approved February 15, 1905, it has been provided that power to make orders admitting persons to practice as attorneys and counselors in all the courts of this state is now lodged exclusively in the several district courts of appeal created by the amendment adopted November 8, 1904, to article 6 of the Constitution: Now, therefore, it is ordered by this court that the aforesaid application of Frank W. Hovey be transferred to the district court of appeal for the Second District for hearing and determination upon the report of said referee, and that the clerk of this court, when said district court of appeal is organized, do forthwith send to said court all the papers on file in said proceeding, together with a copy of this order and all other orders made by this court therein.

146 Cal. 379

GREEN et al. v. DUVERGEY et al. (Sac. 1,143.)*

(Supreme Court of California. March 18, 1905.)

VENDOR AND PURCHASER—FRAUD—RESCISSION—TENDER—PAYING MONEY INTO COURT—APPEAL—ERRORS OF LAW OCCURRING AT TRIAL—NONSUIT.

1. On appeal from an order denying a new trial neither the sufficiency of a pleading nor the action of the court upon a demurrer thereto or a motion to strike out can be considered, and, where no evidence was introduced, only the errors of law occurring at the trial and excepted to can be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3478.]

2. The action of the court in granting a nonsuit upon the opening statement of counsel is, if improper, an error of law occurring at the trial, which may be reviewed on appeal from an order denying a motion for a new trial.

3. Code Civ. Proc. § 572, provides that a party may be required to pay money into cour*

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*Rehearing denied April 7, 1905.

when it is admitted by the pleading or shown upon the examination of the party that he has in his possession any money which, being the subject of litigation, is held by him as trustee for another, or which belongs to or is due another. In an action to set aside a deed plaintiff offered to pay the consideration received into court whenever the court should order reconveyance, which offer was not accepted by defendant. *Held*, that it was error to require plaintiff to pay the money into court as a condition precedent to his right to continue the action.

4. Under Code Civ. Proc. § 462, providing that the statement of any new matter in the answer must on trial be deemed controverted, the overruling of a demurrer to a defense set up in the answer does not authorize the granting of a judgment of nonsuit, in the absence of any proof of the facts alleged in the answer, or an admission by plaintiff that they are true.

5. A motion for nonsuit upon the opening statement and admission of plaintiff concedes the truth of all plaintiff's averments.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 372.]

6. Where defendants, by means of fraud and undue influence, obtained property from plaintiff at a sum greatly less than its value, and upon discovering the fraud plaintiff immediately notified defendants of his rescission of the transaction, demanded a reconveyance, and tendered back the consideration, which he remained able and willing to return at any time, he was entitled to reconveyance of the property.

7. Civ. Code, § 1691, declares that the rescission of a contract is accomplished by complying with certain rules therein prescribed, and that, if such rescission is not acceded to, it may be enforced by action, and provides that the party making rescission must restore everything of value which he has received from the other party under the contract. A person from whom a conveyance was obtained by fraud gave notice of rescission immediately upon discovering the fraud, and tendered back the certificate of deposit which he had received as consideration for the conveyance. *Held*, that the rescission was completed by the tendering of the certificate, and that plaintiff was not thereafter required to keep the certificate intact, but was entitled to a reconveyance on tendering back the amount of the certificate in money.

Commissioners' Decision. Department 1. Appeal from Superior Court, Trinity County; N. D. Arnot, Judge.

Action by Robert Woodburn against H. Duvergey and others. Pending the action plaintiff died, and R. M. Green and others, as executors, were substituted. From a judgment for defendants, plaintiffs appeal. Reversed.

D. J. Hall, T. B. Dozier, and Milton J. Green (Gavin McNab, of counsel), for appellants. Reid & Bartlett, James W. Bartlett, C. W. Cross, and H. R. Given, for respondents.

HARRISON, C. This action was brought by Robert Woodburn to obtain a judgment canceling and declaring void a deed of conveyance of certain mining property made by him to the defendants, upon the ground that it was executed by him by reason of fraudulent representations and undue influence on the part of the defendants, and at a time when he was mentally incompetent to transact ordinary business, and that, upon being restored to capacity, and discovery of the fraud, he had rescinded the transaction and demanded a reconveyance of the property, offering at the same time to restore the consideration he had received therefor.

The deed of conveyance was executed October 14, 1899, and the notice of rescission and the demand for a reconveyance was made October 24, and upon its refusal this action was commenced against the grantees therein October 28, 1899. Issues were joined upon the allegations of the complaint, but before the trial of these issues Woodburn died, and in April, 1901, the executors of his will (the appellants herein) were substituted as plaintiffs in the cause. In the complaint it is alleged that at the time of the execution of the deed Woodburn received from the defendants the sum of $25,000 as the consideration for its execution, and that the property was then, and at all times since has been, of the value of $150,000. In their original answer the defendants denied that they "paid" to Woodburn $25,000 as the consideration for the execution and delivery of the deed, "except as follows"; and alleged that they were at that time the owners of a certificate of deposit for $25,000, deposited in the Bank of California in San Francisco, which by its terms was made payable to one of them, and that at the time of the execution of said deed the payee named in the said certificate of deposit duly indorsed the same to Woodburn, or his order, and that Woodburn received and accepted the said certificate of deposit in full payment and satisfaction for the execution to them of the said deed of conveyance. In August, 1901, after the appellants had been substituted as plaintiffs in the action, the defendants filed a supplemental answer, in which they alleged that Woodburn, in November, 1899, borrowed from the Bank of Shasta County $5,500, and transferred and assigned to the bank the said certificate of deposit as collateral security therefor, and that on April 23, 1900, he borrowed from that bank the further sum of $3,000, and that the said bank received and continued to hold the certificate of deposit as such collateral security until after his death; that in December, 1900, by virtue of an agreement on the part of the executors of his will (the present plaintiffs) the certificate of deposit was paid by the Bank of California to the Bank of Shasta County, and that the latter bank, after reimbursing itself for the moneys loaned to Woodburn, paid the remainder to the plaintiffs as his executors, and that the assets of the estate of Woodburn do not exceed the sum of $16,000. Upon these facts the defendants alleged that the transaction was ratified and confirmed both by Woodburn in his lifetime and by his executors since his death, and that, as they have put it out of their power to restore to the defendants the certificate of deposit which was given to Woodburn, they cannot maintain the present action.

When the case came on for trial, the plaintiffs, having previously given notice thereof, moved the court to strike out defendants' supplemental answer, and also presented a demurrer to its sufficiency. During the argument thereon it was admitted on their behalf that the averments in said answer of the pledge of the certificate of deposit by Woodburn to the Bank of Shasta County as collateral security for loans to him, and its subsequent collection by that bank from the Bank of California and payment of the balance thereof to the plaintiffs, were true. The court thereupon ordered that the plaintiffs immediately deposit with the clerk of the court $25,000, or a certificate of deposit of the Bank of California for that sum, payable upon demand to the order of the clerk to abide the result of the trial, and that upon such deposit the demurrer to the supplemental answer would be sustained, and the motion to strike it out would be granted, and that, failing to make such deposit, the pleading would stand. The plaintiffs excepted to this order, and the hearing of the case was continued until September 30, 1901, and the plaintiffs were given until that day within which to make the said deposit. When the cause was called for trial on that day, the plaintiffs' counsel stated that they declined to make the deposit ordered by the court, upon the ground that the court had no authority to require them to make such deposit before a decree was rendered in their favor. The court thereupon ordered that the demurrer to the supplemental answer be overruled, and that the motion to strike it out be denied, to which order the plaintiffs thereupon duly excepted. The court then stating that it was ready to proceed with the trial of the cause, counsel for the plaintiffs made an opening statement to the effect that they would prove all the allegations set forth in their complaint, and, while admitting that the facts set forth in the aforesaid supplemental answer, so far as relates to the hypothecation by Woodburn of the certificate of deposit and the subsequent cashing of the same, were substantially true, stated that they would also prove that at all times since the commencement of the action Woodburn and his executors had been and were then able, ready, and willing to return to the defendants, or to pay into court subject to their order, $25,000, either in gold coin or in the form of certificate of deposit for that sum, whenever the court should by its decree and judgment order the reconveyance of the mining properties to the plaintiffs. Upon this statement, Mr. Cross, of counsel for defendants, said, "Then we ask this court, as preliminary to the proceedings in this case, that you pay that money into court for us." And upon the court replying, "You may take such an order," counsel for the plaintiffs excepted thereto, and stated that they declined to pay it, upon the grounds previously stated. Thereupon Mr. Cross moved for a nonsuit upon the grounds that they were entitled thereto by reason of the opening statement and the admission made by plaintiffs' counsel, and the failure of plaintiffs to pay into court the $25,000, which the court had ordered them to pay as a condition of the right to proceed with the trial of the cause. The court thereupon granted the motion for a nonsuit, and ordered that a judgment of dismissal be entered, to which the plaintiffs duly excepted. The plaintiffs afterwards moved for a new trial, which was denied by the court, and from this order the present appeal has been taken.

Upon an appeal from an order granting or denying a new trial only such matters can be considered as are made grounds upon which the superior court is authorized to grant or deny the motion. Neither the sufficiency of a pleading nor the action of the superior court upon a demurrer thereto, or upon a motion to strike out the pleading, or any portion thereof, can be considered. As no evidence was introduced before the court in the present case, only the errors of law occurring at the trial and excepted to by the plaintiffs can be considered. The trial of a cause includes all the rulings of the court and the proceedings before it which conduce to the decision which it makes upon the issues in the case as the basis of its judgment. People v. Turner, 39 Cal. 270; Moore v. Bates, 46 Cal. 29. Any erroneous ruling, by virtue of which a party is precluded from introducing evidence in support of his cause of action as set forth in his complaint or his defense, is an error of law occurring at the trial. The action of the court in improperly granting or refusing a nonsuit is also an error of law, whether made upon the opening statement of counsel or after the close of the evidence in the cause. Craig v. Hesperia Land & Water Co., 107 Cal. 675, 40 Pac. 1057. Under these principles, the order of the court requiring the plaintiffs to pay into court the sum of $25,000 as a condition upon which they could proceed to trial, and the order granting a nonsuit upon the opening statement and admissions of their counsel, may be reviewed as errors of law occurring at the trial. We are of the opinion that in each of these rulings the court committed error, and that the plaintiffs' motion for a new trial should have been granted.

1. A party to a controversy involving a right to a certain sum of money cannot be required to pay that money into court, unless it is either clearly admitted by him in his pleading, or shown in some proceeding in the cause, that he has himself no right to retain it, and that his antagonist is entitled to it, or at least has an absolute interest therein. Such admission must be free from any condition, and the antagonist must himself claim an immediate right to the money before he can ask that it be deposited in court. If the admission make the right of the other party dependent upon his per-

formance of some condition, or if the other party does not claim any right to the money, or disputes the existence of the condition, the court will not order the money to be deposited before a hearing in the cause and a judicial determination of the respective rights of the parties, for the reason, as given by Lord Cairns in Hagall v. Currie, Law Rep. 2 Ch. App. 449, that "if money is ordered to be brought in, which is not clearly due, very gross injustice may be done, as the defendant may be put to great inconvenience, and afterwards be told that his view of the case was correct." A court ought not to require a litigant to surrender his property to another, or for his benefit, until there has been a judicial hearing and determination that he has no right to such property; but an order that he pay money into court without such hearing is, in effect, an arbitrary judgment against his right to its possession. The principle upon which the rule rests was very fully considered in McKim v. Thompson, 1 Bland. 150, wherein it was held that the order for such payment must depend upon a judicial determination, upon the facts as then shown to the court, that the party from whom the payment is asked has no right or title to hold the money, and that he cannot be allowed at any subsequent stage of the cause to contradict or explain away those facts. The same principle was declared by Lord Cottenham in Richardson v. Bank of England, 4 My. & Cr. 165. See, also, Peacham v. Daw, 6 Madd. 98; Hopkins v. McEldery, 4 Md. Ch. 23; McTighe v. Dean, 22 N. J. Eq. 81; Daniell, Ch. Prac. *1780. Section 572, Code Civ. Proc., prescribes the condition under which the courts of this state may make such an order to be "when it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs to, or is due to another party." If the money in the possession of the party is not the subject of the litigation, but its payment is an incident thereto, dependent upon the judgment to be rendered in the action, as in the case of an action for redemption, specific performance, accounting, rescission, or the like, the provisions of this section do not authorize such order; and in all cases when it may be made it must appear that the party holds the money as trustee, or that it "belongs or is due to another party." In Jenkins v. Hinman, 5 Paige, 309—an action to redeem from a mortgage—the court denied the defendant's motion for an order that the plaintiff pay into court the amount admitted by him to be due upon the mortgage, upon the ground that the defendant claimed the absolute title to the land, and repudiated the idea that anything was due to him upon the mortgage. Birdsall v. Waldron, 2 Edw. Ch. 315, was an action by a vendee for specific performance. Prior to commencing the action the vendor (defendant in the action) had refused to accept the purchase money which the vendee had tendered him. While the action was pending the defendant asked for an order requiring plaintiff to pay into court the money which he had tendered before suit. The court denied his application, saying: "The complainant would not be obliged to pay the purchase money before obtaining a title, and much less can he be compelled to part with his money while the vendor is resisting the performance." The offer of Woodburn to restore the certificate of deposit was not a tender made in discharge of an obligation on his part which the defendants could require him to perform on pain of some forfeiture, nor was it an admission by him that it belonged to them. The offer was coupled with a demand for performance on their part, and could not be enforced by them without such performance. As the offer was kept good by the averments of the complaint, the defendants cannot demand that the money be paid into court, unless they signify their acceptance of the offer in accordance with the terms of the demand. See Irvin v. Gregory, 13 Gray, 215.

Counsel for respondents have not presented any principle of law in their briefs in support of this order, nor have they cited any authority in which such an order has been sustained. Miller v. Louisville, etc., 83 Ala. 274, 4 South. 842, 3 Am. St. Rep. 722, cited by them, involved only the sufficiency of the complaint as against a general demurrer; and although the court, in reply to the objection that the complaint failed to show that a tender of the money had been made, stated that the averment on this point would have been more complete if the complainant had offered to bring the same into court, yet, by affirming the order overruling the demurrer, and holding that the omission was not fatal to the complaint, it necessarily held that as it was not necessary to make such averment, the plaintiff could not be required to deposit the money in court in advance of the trial. In Sneed v. Town, 9 Ark. 575, the proposition does not appear to have been presented in the case, and was not determined, or even discussed, in the opinion therein.

2. Although the order overruling the plaintiffs' demurrer to the supplemental answer was a judicial declaration that the facts alleged in that answer stated a defense to the plaintiffs' cause of action, yet the court was not, for that reason, authorized to grant a nonsuit or render judgment dismissing the complaint without any proof of the facts alleged in the answer, or an admission by the plaintiffs that all of these facts were true. In the absence of such admission, all of the allegations were controverted by virtue of section 462, Code Civ. Proc., and it devolved upon the defendants to establish

them by evidence, and unless so established the court was not authorized to grant a nonsuit. The order overruling the demurrer disposed of the issue of law presented by the pleading, but the order granting a nonsuit could be made only upon a consideration by the court of the evidence introduced by the plaintiffs, or their statement of what they intended to prove, and a decision by it that it was insufficient to establish the cause of action set forth in their complaint. Such decision, if erroneous, would be an error of law occurring at the trial, and reviewable upon an appeal from the order denying a new trial. The motion by the defendants for a nonsuit upon the opening statement and admissions of the plaintiffs conceded the truth of all the averments in the complaint and the amendments thereto. This was an admission that the defendants had, by means of fraud and undue influence, obtained the mining property from Woodburn at a sum greatly less than its value; that upon discovering the fraud Woodburn had immediately notified them of his rescission of the transaction, and demanded a reconveyance of the property, and had tendered to them the certificate of deposit which he had received from them, and that upon their refusal he had commenced the present action; that at all times since said tender the said Woodburn, during his lifetime, and the plaintiffs, as his executors, since his death, had been able, ready, and willing to restore to them, or pay into court subject to their order, the money which had been received from the defendants, upon receiving from them a good and sufficient reconveyance of said mining property. Upon these facts being shown by the plaintiffs, or admitted by the defendants, the court was not authorized to grant a nonsuit.

The ground chiefly relied upon by the respondents in support of the nonsuit is that by reason of the conduct of Woodburn and the plaintiffs in reference to the certificate of deposit they had put it out of their power to restore it to the defendants, and that, inasmuch as they cannot restore the identical property which was received from the defendants, they have lost their right of rescission. This proposition, however, is not sustained either by the authorities cited in its support or by the statute. None of the cases cited hold that, when a defrauded party has promptly rescinded the transaction, and immediately thereafter commenced an action to enforce such rescission, he has been denied relief merely because at the hearing of the cause he was not able to restore the identical property which he had received. Section 1691, Civ. Code, makes no such requirement, but merely requires him to restore "everything of value" which he has received from the other party under the contract. This provision is based upon the equitable principle that he who seeks equity must "do equity"; but the requirement to do equity will vary with the circumstances of the cases in which the rule is invoked, and in the present case the rule will be satisfied by returning the $25,000 in gold coin which the certificate of deposit represented.

The "certificate of deposit" was not the consideration for which the defendants purchased the mining property from Woodburn. They did not agree to give him the certificate of deposit in exchange for the mining property, but they purchased the property from him for the sum of $25,000, and the certificate of deposit was accepted by him in payment therefor, as representing that amount of money. It would be a reproach upon the administration of justice to concede that equity is too feeble to relieve a party from a fraudulent transaction upon the ground that he has collected the amount of a certificate of deposit, or check, or other obligation which he received in that transaction, and is thus unable to restore the identical thing which he received. It is not an invariable rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in statu quo. If equity can still be done between the parties, courts will grant relief to the defrauded party. Neblett v. McFarland, 92 U. S. 101, 23 L. Ed. 471; Pierce v. Wilson, 34 Ala. 596; Myrick v. Jacks, 33 Ark. 425; Gatling v. Newell, 9 Ind. 572; Tarkington v. Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607; Montgomery v. Pickering, 116 Mass. 227; Brown v. Norman, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663; Paquin v. Milliken, 163 Mo. 79, 63 S. W. 417, 1092; Masson v. Bovet, 1 Denio, 69, 43 Am. Dec. 651; Bank v. Peters, 123 N. Y. 279, 25 N. E. 319; Wharton on Contracts, § 285. "Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts." Neblett v. McFarland, supra. "Restoration is not exacted on account of any feeling of partiality in regard to the fraudulent party. The law cares very little what his loss may be, and exacts nothing for his sake." Masson v. Bovet, supra. The provision in section 3407, Civ. Code, that in case of rescission on the ground of "mistake" it is sufficient if the party against whom it can be adjudged can be restored to "substantially the same position as if the contract had not been made," taken in connection with section 3408, clearly indicates that such restoration is sufficient in case of rescission on the ground of fraud. Section 1691, Civ. Code, declares that the rescission of a contract which is authorized by section 1689, Civ. Code, is "accomplished" by complying with the rules prescribed therein, and, if such rescission is not acceded to by the other party, it may be enforced by action. In such action the court determines whether the plaintiff had a sufficient ground for rescinding the contract, and whether he has complied with the provisions of section 1691. If so, the judgment therein affirms the rescission made by the plaintiff, and determines the rights of the parties as they existed when the rescission was made. "The court proceeds on the principle that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction." Neblett v. McFarland, supra. Woodburn, upon the discovery of the fraud, gave to the defendants herein prompt notice of his rescission, and his offer at that time to restore the certificate of deposit made the rescission complete. This offer, though refused by the defendants, followed almost immediately by the offer made in the complaint, entitled him to the aid of the court in securing him the result and fruit of such rescission. Loaiza v. Superior Court, 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197. After he had "accomplished" the rescission and commenced his action for its enforcement, he was not required to keep the certificate of deposit intact, at the risk of any subsequent inability of its maker to pay the same, nor, if collected, was he required to let the money lie idle in his possession. The refusal of the defendants to accept it when tendered to them did not require from him more than to be able to restore it or its equivalent when they should tender him their deed of reconveyance, or when he should obtain judgment in the action. As was said in the Loaiza Case, he was only required to be able to "make the offer good whenever they should comply with his demand." The collection of the money represented by it, or his depositing it as security for a loan of less than half its amount, did not have the effect to revoke or withdraw his rescission. Any inference that his rescission was thereby withdrawn is fully overcome by the offer in his complaint, and his ability during his lifetime and that of his executors after his death to restore the $25,000 whenever the defendants should demand it, or whenever its restoration should be adjudged by the court. "Equivocal acts which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind. The act must be unequivocal, and must show an election to retain the property, after discovering the deceit, before the right to rescind is gone. Where subsequent acts are relied on as a defense in a case where fraud is clearly established, the act must stand upon the clearest evidence, and must evince a purpose to waive or forgive the fraud, and must amount to a clear election not to rescind." Tarkington v. Purvis, supra. "When the original fraud is clearly established by circumstances not liable to doubt, a confirmation of such a transaction is so inconsistent with justice, so unnatural, so liable to be connected with fraud, that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence as an act done with all the deliberation that ought to attend a transaction the effect of which is to ratify that which in justice ought never to have taken place." Morse v. Royal, 12 Vesey, 373. See, also, Pierce v. Wilson, 34 Ala. 606; Montgomery v. Pickering, 116 Mass. 227.

To the extent that the court granted a nonsuit upon the ground that the plaintiffs had failed to pay the $25,000 into court, it erred, for the reasons stated in the former part of this opinion.

The order denying a new trial should be reversed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the order denying a new trial is reversed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

146 Cal. 266

VALLEY LUMBER CO. v. STRUCK et al.

(S. F. 3,411.)

(Supreme Court of California. Feb. 11, 1905.)

MECHANICS' LIENS—INSTALLMENTS OF PRICE—WHEN DUE—PREMATURE PAYMENT—APPEAL—APPEARANCE—CONSOLIDATED ACTIONS.

1. On appeal in an action which had been consolidated with another, a stipulation in such other action that the pleadings therein should be omitted from the transcript, but that the action should be determined by the result of the appeal, was an appearance to the appeal rendering notice to the successful party in the consolidated action unnecessary.

2. Under Code Civ. Proc. § 1184, relative to mechanics' liens, and declaring that no payment made by the owner before it is due shall defeat any lien except that of the contractor, the payment, after completion, but before acceptance by the architect, of an installment due when the building should be "completed and accepted by the architect," was not premature, the provision for acceptance being solely for the benefit of the owner.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Valley Lumber Company against P. E. Struck and others. From a judgment for plaintiff, defendants appeal. Reversed.

A. M. Drew and F. H. Short, for appellants. L. L. Cory, for respondent.

McFARLAND, J. This is an action to foreclose certain liens of plaintiff and his assignors under the mechanic's lien law. Judgment was for plaintiff, and defendants appeal from the judgment, and also from an order denying their motion to set aside the judgment and render another judgment, etc.

Respondent contends that the appeal should be dismissed because the notice of appeal was not served upon one F. A. Duncan. It appears that said Duncan had also instituted an action to foreclose a mechanic's lien against the same property involved in the action of the plaintiff herein, and that the two actions had been consolidated, and a judgment rendered giving to plaintiff herein the amount found due it, and to Duncan the amount found due him, and enforcing a lien as to each. This appeal is taken upon the judgment roll, and the transcript does not contain the pleadings in the Duncan Case. The consolidation of the two actions is shown by the findings and the judgment; but the transcript does not show any service of the notice of appeal on Duncan, and for this reason respondent contends that the appeal should be dismissed. But this point is not tenable. There is in the transcript a stipulation between the attorneys for Duncan and the attorneys for appellants which is as follows: "F. A. Duncan, plaintiff, versus P. E. Struck et al., Defendants. It is hereby stipulated that the pleadings in the case of F. A. Duncan v. P. E. Struck et al. may be omitted from the transcript on appeal in the case of the Valley Lumber Company v. Struck et al., and that the final judgment in said Duncan v. Struck et al. shall depend upon and be determined by the judgment in the case of the Valley Lumber Company v. P. E. Struck et al., now on appeal to the Supreme Court of the state of California, and that the omission of the pleadings in said action shall in no way affect the rights of the plaintiff or any party to said action in the said case of Duncan v. Struck et al. It is stipulated and agreed that the pleadings in said action of Duncan v. Struck et al. are the same as those in the case of Valley Lumber Company v. Struck et al., printed in said transcript on appeal, and if the judgment in favor of said Valley Lumber Company shall be reversed or affirmed such reversal or affirmance shall apply to and fully cover the said case of Duncan v. Struck, and upon the return of the remittitur on appeal to the trial court said trial court shall make all such orders as may be necessary to place said two consolidated actions in the same position so that in all respects the same orders and proceedings shall be had and taken in each of said consolidated actions, except that the rights of the said plaintiff shall be unaffected by any reversal of said judgment if the same be reversed in connection with the order referred to in said notice of appeal. Dated this 12th day of November, 1902. A. M. Drew and Frank H. Short, Attorneys for Defendants. A. C. Williams, Attorney for Plaintiff."

This stipulation is clearly an appearance by Duncan to the appeal, and takes away from the respondent herein the right to make the somewhat technical point that its judgment cannot be reviewed because Duncan's judgment might be affected without his having had his day in court. The motion to dismiss the appeal is denied.

The facts out of which the only point involved in the appeal arises are these: On April 30, 1901, the defendant Hines entered into a written contract with the defendant Struck for the altering and improvement by the latter of a certain building. The contract price was $2,180, to be paid in four installments, as follows: $400 when certain named work should be done, $500 when certain other work should be done, $735 when the buildings and improvements shall be "completed and accepted by the architect," and the last payment of $545 35 days thereafter. The question on the appeal relates to the said third payment of $735. The building was completed on August 17, 1901, and the said third payment was made on that day; but there was no certificate of the architect until two days thereafter, to wit, on August 19, 1901, on which last-named day the architect gave a certificate of acceptance, which he dated August 17th. The contention of respondent and the decision of the court are that because this third payment was made before the execution of the architect's certificate it was made prematurely, and therefore the owners of the building must pay the said amount over again to the lienholders, under section 1184, Code Civ. Proc., which provides that "no payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person, except the contractors, but as to such liens such payments shall be deemed as if not made, and shall be applicable to such liens." And by the judgment in the case the said sum of $735 is decreed to be subject to plaintiff's lien. We do not think that this position is tenable. The Code itself does not require any acceptance by an architect or a certificate of such acceptance, and has no reference to that subject. The provision in the contract as to acceptance by the architect is solely for the benefit of the owner of the building—merely a means of satisfying the owner of the fact of completion and not for the benefit of the lienholder. The time when the payment was due was the completion of the building; the acceptance by the architect was merely evidence of such completion, which the owner has a right to require as against the contractor; but when the completion had taken place, and the owner was satisfied of that fact, he could safely make the payment as against any third party—at least, as against any party who had not previously given the notice of having performed labor or furnished materials which is provided for in the latter part of said section 1184; and no such notice had been given in the case at bar. This view of the statute has heretofore been expressed by this court. It was declared in Blethen v. Blake, 44 Cal. 117, where the court held that (we quote from the syllabus): "In a contract for the erection of a building where there was a clause providing that the payment should be made in installments upon the certificate of the architect that the materials and labor had been furnished in accordance with the plans and specifications, held, that the clause as to the production of the certificate was for the benefit of the owners of the building, and that they might waive it at their option and accept other proofs of the required fact." It was also so held in McLaughlin v. Perkins, 102 Cal. 502, 36 Pac. 839, where the court says that similar provisions in the contract there under review "were intended simply for the protection of the owner by making the approval of the architect a condition precedent to the contractor's right to demand payment of the money. This condition, however, the owner was at liberty to waive, if he chose to do so, and he might, without any certificate from the architect, have accepted the building and paid for it as he had agreed to do." And the result of the general authorities on the subject is correctly stated in 24 Am. & Eng. Ency. of Law, p. 933 (1st Ed.) as follows: "The provision requiring certificates of approval is placed in the contract for the benefit of the owner, merely to provide a method by which he can satisfy himself that the contract has been performed. He may waive it at his option, and receive other proof of the required fact, or pay without proof." In Loup v. Cal. S. R. R. Co., 63 Cal. 97, cited by respondent (which was not a mechanic's lien case), the question was merely whether a plaintiff who had done work under a certain contract could maintain an action against the party for whom the work was done before certain estimates had been made by an engineer as provided in the contract. And the case of Newport, etc., Co. v. Drew, 135 Cal. 585, 58 Pac. 187, also cited, deals entirely with the rights of materialmen who had given the notice provided for in the latter part of said section 1184 to have a lien on unpaid installments, whether matured or not; and the amounts of the various installments, except the last one, were not specified in the contract, but were to be fixed, from time to time, by "estimates" of the superintendent of construction, to be evidenced by his certificates. The case, therefore, has no applicability to the one at bar. Respondent relies on section 1201, Code Civ. Proc., which provides that "it shall not be competent for the owner or contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of other persons"; but the payment of the third installment when the building was completed did not affect or impair any claim or lien of plaintiff; its right would have been no different if the payment had not been made until two days later, when the certificate was given.

Under the foregoing views the court below erred in finding and decreeing that the amount of said third installment, $735, is in the hands of the appellant I. B. Hines to be applied to respondent's lien; the only amount so in his hands to be so applied is the last payment of $545; and for this reason the judgment must be reversed. There is also an appeal from "an order denying said defendants' motion to vacate the judgment and to enter another and different judgment," etc.; but, as the transcript does not show any such motion or order, said appeal cannot be considered, and is dismissed.

The judgment is reversed and the cause remanded, with directions to the court below to enter judgment in accordance with this opinion.

We concur: ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

SHAW, J. I concur in the judgment of reversal, but I cannot agree to the grounds upon which it is based in the majority opinion. It has not been and will not be contended by any one that, as between the owner and the contractor, the provision in the contract with respect to acceptance by the architect could not be waived, nor that the owner could not, if he chose, make the payment when the building was completed, or at any time previous thereto, so far as he himself was concerned. In a building contract, as in any other contract, the owner may, so far as his rights are concerned, waive any condition therein, regardless of whether it is for his benefit or not. The point that the condition is for his benefit is entirely immaterial. In the case at bar $545 of the contract price was made payable 35 days after completion. This delay was no doubt in part intended to be and was for the benefit of the owner. Yet it will not be claimed that the owner could waive this condition giving him further time, and by paying this installment on completion cut off the right of the lien claimants to compel him to pay it again. Nor does the statute declare, as the main opinion seems to tacitly assume, that it is only payments made prior to the times mentioned in the statute itself which cannot be prematurely made without subjecting the owner to liability to pay it again. The statute does not fix the time of any payment except the final installment, and it does not make the time there fixed the test of liability. The contract must furnish the test. The provision is that no lien shall be defeated or diminished by a payment made before it becomes due "under the terms and conditions of the contract." And it applies as forcibly to any intermediate payment provided in the contract as to the final payment fixed by the statute. Here the contract does not make the payment due on completion. A subsequent event must occur before it matures; the architect must accept it as complete. Under the majority opinion the owner is given power to deviate from the recorded contract—a power of which he is expressly deprived by the statute itself. The statute declares that any payment "made prior to the time when the same is due under the terms and conditions of the contract" shall as to such liens "be deemed as if not made, and shall be applicable to such liens"; that is, to all liens except that of the contractor. Code Civ. Proc. § 1184. There is no exception in favor of conditions beneficial to the owner, nor any permission to him to waive conditions fixing the time of payment, and thereby evade the penalty. He is rigidly held to the exact conditions stated in the contract, and he can no more declare a payment due in advance of its maturity without the consent and to the injury of persons entitled to liens than could the contractor without his consent. The effect of the statute, so far as it applies in favor of the holder of a lien, is that he is substituted to the rights of the owner so far as the terms of the contract are concerned, and that it is the lienholder and not the owner who has the power to waive an express condition of the contract, and thereby defeat, diminish, or impair his lien. The payment made two days before the architect accepted the building cannot be justified on the theory that the owner had the right to waive the condition. It can be justified, if at all, only upon the theory that the architect's certificate was a trivial matter, and that the actual completion of the building was a substantial performance by the contractor, and would entitle him to recover without the acceptance by the architect. Generally the law is satisfied with a substantial performance. 7 Am. & Eng. Ency. of Law (2d Ed.) 145; Harlan v. Stufflebeem, 87 Cal. 511, 25 Pac. 686. But the majority opinion is not founded on this principle, and I express no opinion on the question whether, in view of the strong language of the statute, the rule applies to contracts of this character, where the rights of third persons are affected.

In the former consideration of this case by the court in bank the judgment was affirmed on the authority of Sweeney v. Meyer, 124 Cal. 512, 57 Pac. 479. In that case it was held that where a premature payment was made the owner was liable to be again called upon to pay it to the lienholders, although their liens were filed after the payments were made, and they had not given any notice under the subsequent clauses of section 1184, requiring the owner to withhold a sufficient amount of the contract price to pay their claims. So long as this decision is not overruled by this court I cannot perceive any theory upon which a judgment of affirmance can stand. In my opinion, however, the following portion of the dissenting opinion of the Chief Justice, filed upon the former hearing in bank in this case, states the correct construction of the statute upon this subject:

"By the mechanic's lien law the owner and contractor are authorized to stipulate for the payment of three-fourths of the contract price of a building by installments to become due, at their option, at or before its completion; but no notice of lien can be recorded until after completion, and consequently no lien can be acquired upon the building by merely recorded notice for any greater portion of the contract price than the 25 per cent. which must be made payable not less than 35 days after completion, unless the owner and contractor voluntarily agree that a larger proportion may be retained until after the time when the lien notices may be recorded. But the law also provides for personal and actual notice to the owner by a laborer or materialman of his claim at or at any time after the time it accrues, irrespective of the completion of the building, and this notice operates as a garnishment to intercept the payment of any installment of the contract price not then due by the terms of the contract, compelling the owner to withhold a sufficient sum to answer such claim and costs. Upon due service of such notice the owner becomes liable to the extent of all money to become due upon the contract, and in the event that a notice of lien is afterwards duly recorded by the claimant his building is subjected to a lien as security for the just amount of the claim, and that notwithstanding he may have made a premature payment upon the contract price before the receipt of notice. But this is as far as the statute goes. It does not make the premature payment of an intermediate installment of the contract price invalid as to all materialmen, laborers, etc., but only when the effect of allowing it validity would be to defeat, diminish, or discharge a lien in favor of persons other than the contractor. So that if it is an essential condition prerequisite to the creation of a lien upon the building for any portion of a particular installment of the contract price that written notice of the claim should be served upon the owner before payment is due, and no such notice is served, a premature payment of such installment does not defeat, diminish, or discharge the lien—there is no lien to defeat or impair—and the failure of the security is due, not to the fault of the owner, but to the default of the claimant, who has omitted to take the step made essential by the statute for the acquisition of a lien. His lien has not been discharged or defeated or diminished by the premature payment, because it has never come into existence. If a payment is due on the 19th, and a materialman desires, for his better security, to have it withheld by the owner, he must give notice of his claim before the 19th, or the owner may make payment with perfect assurance that he will not have to pay again on account of the materialmen's claim, as the latter well knows. But if he with this knowledge omits to give the notice (the present case), what right then has he to complain that payment was made on the 17th? He is no worse off than he would have been if it had not been made till the 19th. His notice of lien subsequently filed attaches to the last payment due thirty-five days after completion of the building, but according to the intent, no less than the language of the statute, it does not attach to any previous installment not garnished by actual notice before it fell due.

"The decision in Sweeney v. Meyer resulted, in my opinion, from the assumption that the provisions of the statute as to notice to the owner and invalidity of premature payments are separate and independent. They are, indeed, separate, as every clause of every statute is necessarily separate from other clauses, but that they are independent I cannot admit. They are related parts of one general scheme, designed to be complete and harmonious, operating for the benefit of laborers, mechanics, and materialmen, without injustice to owners of property. Upon each class a duty is imposed, and the performance of this duty is the condition of enjoying the rights conferred. To intercept a payment and secure a lien notice of the claim must be served before the payment is due. To give the amplest opportunity for service of notice, the owner must make no payment until it is due according to the terms of his recorded contract. If he makes a premature payment he does it at the risk of having to pay twice, but he incurs this liability only in case of a timely notice. If no notice is given there is no lien, and to hold the payment valid harms no one."

Any other construction than that given by the Chief Justice would make the statute in question a highly penal statute. Courts are very averse to giving statutes a construction which will result in the imposition of a penalty not justly deserved. The construction given will afford a reasonable remedy to all prospective lien claimants who desire to reach the fund in the hands of the owner, and at the same time will protect the owner from being subjected to a second payment of the same installment. I am of the opinion that Sweeney v. Meyer should be overruled, and that the provision of section 1184, Code Civ. Proc., with respect to premature payments, should be held to be applicable only in cases where the lien claimant has given a notice to the owner to withhold the money due from the contractor, and such notice has been served prior to the time when the payment is made, or to cases where the lien is filed in the recorder's office before the premature payment has been made.

I concur: BEATTY, C. J.

ANGELLOTTI, J. While I have already concurred in the majority opinion, it is proper to add, in view of what is said in the concurring opinion, that, as stated by me in my dissenting opinion upon the former consideration of this case, I entirely concur in the views of the Chief Justice as to the construction which should have been placed on that portion of section 1184, Code Civ. Proc., relative to the effect of a premature payment, and in what is said in the concurring opinion in regard thereto, and am of the opinion that Sweeney v. Meyer, 124 Cal. 512, 57 Pac. 479, should be overruled.

146 Cal. 407

SNEDIKER v. AYERS et al. (Sac. 1,119.)

(Supreme Court of California. March 21, 1905.)

CORPORATIONS—PURCHASE BY DIRECTORS ON EXECUTION SALE.

Civ. Code, § 2230, providing that a trustee or his agent may not take part in any transaction concerning the trust in which he has an interest adverse to that of his beneficiary, does not, in the absence of fraud, invalidate the sale on execution of the property of a corporation to directors thereof under a judgment obtained by them on claims against it which they had bought with their own funds.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1387.]

Commissioners' Decision. Department 2. Appeal from Superior Court, Nevada County; F. T. Dillon, Judge.

Action by Emma S. Snediker against David P. Ayers and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Frank M. Parcells, for appellant. J. M. Walling, for respondents.

GRAY, C. This is an action brought by the plaintiff to recover his interest in a certain mine known as the "Eagle Bird." It is alleged and found that one of the defendants, the Eagle Bird Mining Company (a corporation), and its trustees and agents, Ayers and Underwood, in working and developing said Eagle Bird mine, became legally indebted, and that two of the other defendants, Raeder and Powell, who were directors thereof, bought up the outstanding claims against the corporation, and, bringing suit thereon, obtained judgment and sold out the mine and the other property of the corporation under execution, and became the purchasers thereof at said sale. The plaintiff's contention is that this judgment and sale were fraudulent and void, and should be canceled. The judgment was for the defendants, and the appeal is by the plaintiff from said judgment.

The question presented for decision is, could the directors of the corporation legally purchase with their own funds claims against their corporation, and enforce payment thereof by suit and execution sale, purchasing the property themselves at said sale? It is found as follows: "Neither Ayers, Raeder, nor Powell have been guilty of any fraud or misrepresentations whatever, nor have they or either of them conspired to defraud plaintiff, or to prevent the development or sale of said mining claims. That, at the time of the purchase next hereinafter described, defendants Raeder and Powell were directors of said Eagle Bird Mining Company. The purchase of Raeder and Powell of claims against said Eagle Bird Mining Company, and the taking of assignments thereof to themselves, was done by them in good faith, and only for the purpose of protecting their interests in said property. That, before such purchase was made, plaintiff and all others interested were by the secretary of said corporation notified in writing of the financial condition of the company; the amount due from each; that, if payment was not made, the property would be lost; and that attachments had been levied upon the property by creditors thereof. Plaintiff failed and refused at all times to pay any amount whatever to liquidate the company indebtedness. No judgment was obtained by Raeder and Powell, or either of them, by collusion. The corporation made default for the reason it had no defense to the action. Ayers was not an officer of, and was not a representative of, said corporation, except that he held the title to said property in trust for said corporation. Ayers, Raeder, and Powell collectively did not, nor did either of them, at any time own a majority of interest in said corporation, nor did said parties, or either of them, control the board of directors of said corporation. Plaintiff had full knowledge of all proceedings taken by Raeder and Powell against said trustee and said corporation. After a sale of said mining claims under execution was had, and before the period of redemption thereof had expired, a stockholders' meeting was had, at which plaintiff was represented by proxy. At such meeting the condition of affairs of the company was considered, and each party interested was called on to contribute their proportion to redeem said mining claims. Plaintiff failed and refused to do so. That all claims held by Raeder and Powell against said corporation, and included in the judgment obtained by them against said corporation, were just and legal demands, due and unpaid, and were purchased by said Raeder and Powell at their full face value with their own private funds."

It is provided by section 2230 of the Civil Code that "neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary." The above section applies to the directors of a corporation, but it was not intended thereby to make, nor is there anything in any other provision of the law which makes, a transaction between a director and his corporation in which the former has a personal interest ipso facto void. Such a transaction is subject to rigid scrutiny, and is voidable for any fraud or violation of the duties of their trust on the part of the directors. But it will not be held void where it is shown that the directors' actions were open and above board, and taken in good faith without any purpose of fraud. Schnittger v. Old Home, etc., Min. Co., 144 Cal. 603, 78 Pac. 9, and cases therein cited.

The plaintiff alleged fraud and collusion on the part of the directors, and the burden was on him to establish these allegations. The findings show the contrary. The findings also show that Raeder and Powell did not own a majority interest in the corporation, and did not control the board of directors. It is fair to presume, therefore, that the action of the corporation in reference to the suit was taken through the directors other than Raeder and Powell, and that the votes of the latter, if they voted at all, were not necessary to the action taken on behalf of the corporation. In Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439, it was held that a director could recover against the corporation, on a note assigned to him, the amount which he paid for the note.

It violates no principle of law or equity to permit the judgment creditor, even though he be a director of the debtor corporation, to become the purchaser at the execution sale of the corporation property. Such a case is distinguishable from those cases where a director, with no personal interest in the action, becomes the purchaser under execution sale in a suit of a third party against the corporation. The findings support the judgment.

We advise that the judgment be affirmed.

We concur: HARRISON, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment is affirmed: HENSHAW, J.; LORIGAN, J.; ANGELLOTTI, J.

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146 Cal. 404

In re PICHOIR'S ESTATE. (S. F. 3,897.)

(Supreme Court of California. March 20, 1905.)

ESTATES — DISTRIBUTION — JUDGMENTS—MODIFICATION—RES JUDICATA—APPEAL — REMITTITUR—DISCRETION OF TRIAL COURT.

1. Where, on appeal from a distribution decree, it was held that a certain trust was void as to the real estate only, and the trial court was directed to distribute the real property to the heir, and to use the personal property to carry out the trust, the trial court, after remittitur, had no jurisdiction to modify the Supreme Court decree by marshaling the assets of the estate so as to impose the expense of administration ratably on the real and personal property.

2. Where it was determined on appeal that a testamentary trust was void as to the real estate and valid as to the personalty, and a judgment was rendered that the real property should be distributed to the heir and the personal property to the trustee under the will, and a final order was thereafter entered settling the executor's accounts, such accounts were not subject to re-examination for the purpose of allowing to the heir as real estate rents collected therefrom which had been treated in the settlement as personalty, the heirs being entitled only to such portion of such rents as accrued since the settlement.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Judicial settlement of the estate of Henry Pichoir, deceased. From an order denying an application to resettle a distribution decree, Louise Mooser and others appeal. Affirmed.

The following is the opinion of the court in department:

VAN DYKE, J. By the will of Henry Pichoir, deceased, he devised and bequeathed all his property and estate to Antoine Borel, Ami Vignier, and Hamilton Smith, Jr., as joint tenants, and not as tenants in common with right of survivorship, in trust, to pay his sister, Ida Amadi, during the term of her natural life, the sum of $1,800 a year in semiannual installments, the same to be paid out of the income of his estate, and, if that should not be sufficient, then resort was to be had to the principal; and that if his estate in the hands of said trustees at the time of his death, or should at any time, exceed in value the sum of $25,000, they were directed to pay over to William Mooser, architect, residing in San Francisco, or, in case of his death, then to his wife, or, in case of her death, to their children, to be divided among them, share and share alike, the excess of his estate over $25,000, but not exceeding $5,000; and that upon the death of his sister, the said trustees should pay over such of his estate as then remained in their hands to said William Mooser, or, in case of his death, to his wife, in case she should then be living, or, if she should then not be living, then to his children as before stated. The trustees named were also appointed executors of the will, without bonds, with power to sell any or all of the estate, at public or private sale, as such trustees might see fit, and without the necessity of applying to the court for authority. The will bears date June 23, 1882. The testator, Henry Pichoir, died in San Francisco October 24, 1898, over 16 years after the will was executed. November 18, 1898, letters testamentary upon said will were issued to Ami Vignier, who qualified and acted as sole executor of the will of said deceased. Said executor, in due course of administration of said estate, paid, out of the personal property belonging to the same which came into his possession and control, all the debts of the deceased, and such payments appeared by the first account and the final account filed by him therein. The first account was filed November 13, 1899, and was settled and allowed November 27, 1899, on the application of said executor, and by the consent of Louise Mooser, the widow of William Mooser (he having previously died), and their six children. On the 19th day of January, 1900, the said executor filed his final account in said estate, which was in due course approved and confirmed February 1, 1900. Thereupon, upon the application of the executor and the members of the Mooser family before mentioned, an order was entered distributing and assigning the residue of the estate according to the directions of said will. The estate then consisted of real property of the value of about $10,000 and personal property of the value of about $142,000. From this decree of distribution Ida Amadi, the sole heir of said deceased, appealed. The contention of the appellant on that appeal was that the trust created by the will was a forbidden trust as far as it related to the real property, and that the real and personal property were so interwoven as to be inseparable, and therefore the whole trust failed; relying upon the authority of Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70.

It was held by this court that the will did contain a forbidden trust as to the real property of the testator, but further held that the real and personal property were not so inseparably connected as to render the disposition of the personal property given by the will invalid, as in the Fair Case; and the order appealed from was reversed, and the court below directed to make and enter an order distributing all the real property of the decedent to the appellant, Ida Amadi, and all the personal property to Antoine Borel and Ami Vignier in trust for the uses and purposes declared in the will of the said Henry Pichoir, deceased. 139 Cal. 682, 73 Pac. 606. Upon the going down of the remittitur, upon the application of Ida Amadi and Ami Vignier, the executor of the last will of said deceased, for distribution of said estate according to the direction of this court, the Mooser family, through their attorneys, appeared and asked the court to have the debts and expenses of administration distributed and the assets of the estate marshaled, so as to impose said expenses upon the real estate ratably with the other property. The court below denied the application upon the ground that the order settling the first and final accounts of the executors concluded the Moosers as to such matters, and entered an order distributing the estate according to the direction of this court. From this order, distributing the real property to Ida Amadi, the Moosers appeal.

There is no merit in the appeal. The court below had no power to grant the order requested by these appellants, or to make or enter any other order than the one it did in the premises. "No modification of the judgment or decree directed by the appellate tribunal can be made by the trial court, no provision can be ingrafted upon it, nor can any be taken from it." Elliott on Appellate Procedure, § 576. As said in Argenti v. Sawyer, 32 Cal. 415, the lower court "had no authority to enter a different judgment. The duty of that court was simply to enter a judgment in conformity with the order of this court. * * * The judgment of this court concludes the parties, and it is too late now to change it, and certainly the district court has no authority to modify, change, or disregard it in any respect." And in Chafoin v. Rich, 92 Cal. 471, 28 Pac. 488, it is said: "Where the Supreme Court directs a particular judgment to be entered, the court below must not retry the cause, but must enter the judgment directed, and the entry of a different judgment is void." See, further, the recent case of Cowdery v. London, etc., Bank, 139 Cal. 298, 73 Pac. 196, 96 Am. St. Rep. 115, where this rule is fully stated, and a large number of authorities cited in support of the same. The case being thus closed by the former decision of this court, as already stated, the order made and entered by the court below, in pursuance of the direction of this court, is final and conclusive on the parties. It is therefore unnecessary to further consider the matter on the line of the points and authorities made by appellant.

The order appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

Lindley & Eickhoff (Charles W. Slack, of counsel), for appellants. Smith & Pringle (John A. Wright, of counsel), for respondents.

HENSHAW, J. Upon a former appeal in the matter of this estate (Estate of Pichoir, 139 Cal. 682, 73 Pac. 606) it was decided that the trust in the will of the deceased as to the realty was void, while the trust as to personalty was valid. It was decreed by the judgment of this court that the real property should be distributed to the heir at law, while the personalty should be distributed to the trustees under the trust. Upon the going down of the remittitur, application was made by the beneficiaries of the trust for a marshaling of the assets, in order to impose upon the real property its proportionate share of the expenses of administration. The application was refused upon the ground that the accounts of the executor, showing payment of these expenses out of the personal property of the estate, had been settled, and had become a final adjudication of this question between the parties. The view of the court in probate in this regard was upheld in the opinion heretofore rendered on this appeal in Department 1, and to that extent the judgment is here affirmed.

But the court in probate, in attempting to follow the judgment of this court in the distribution of the realty, re-examined the accounts of the executor, and found that of the personal property shown by those accounts, some $3,593.61 represented the net amount of rents collected by the executor from the real property. It held these rents and issues of the realty to be a part of the realty itself, and, accordingly, ordered distribution to the heir at law of the real property and of this sum of $3,593.61. In this the court in probate erred. If the accounts of the executors were settled so as to conclude appellants upon the proposition that the personalty must bear the whole expense of administration, and if the accounts could not be looked into or revised for this purpose, it must equally follow that there could be no revision of them such as was here made. If the personal property shown in the accounts was personal property for one purpose, it was personal property for the other, and the judgment of this court ordering distribution of the realty to the heir at law must be construed as operating upon the estate in its condition at the time of the going down of the remittitur. In other words, there should have been distributed to the heir at law the realty of the estate, and the heir at law, equally with the appellants here, was estopped from reopening the executor's accounts to show that, of the personal property therein contained, some of it represented the rents and issues of the realty. The decree of distribution, therefore, should be modified by striking therefrom, as part of the description of the real property distributed to the heir at law, the following: "And also the sum of $3,593.61 in gold coin of the United States, being the net amount of rents appearing by the accounts of the said executor to have been received by him from the real property during his administration after deducting his expenses in the care and preservation of the said real property." But upon the other hand, there should be allowed to the heir at law, as part of the real estate, the net proceeds of the rents, issues, and profits of the real estate included in said sum of $3,593.61 which may have accrued since the settlement of the executor's accounts rendered prior to the former appeal.

It is therefore ordered that the decree of distribution be modified in accordance with the foregoing, and that upon the rehearing of the matter the court in probate shall allow to the heir at law, as part of the realty, whatever it may find to be the net proceeds of the realty by way of rents, issues, or profits which have accrued since the settlement of the executor's said accounts.

We concur: SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.; LORIGAN, J

146 Cal. 392

VALLEJO FERRY CO. v. CITY OF VALLEJO et al. (Sac. 1,292.)

(Supreme Court of California. March 18, 1905.)

INJUNCTION—FERRY FRANCHISE—CONSTRUCTION OF WHARF—DANGER TO NAVIGATION.

Pol. Code, § 2919, provides, in relation to wharves and piers, that no authority may be granted to interfere with vested rights or grants made by state authority. *Held* that, though a city had authority under its charter to construct a wharf, and the necessity therefor had been determined by ordinance, the construction of the same so as to render navigation by a ferry operating under a franchise from the city dangerous unless the ferry company should expend thousands of dollars to meet the new conditions would be enjoined.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1529.]

Commissioners' Decision. Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Suit by the Vallejo Ferry Company against the city of Vallejo and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

L. G. Harrier and J. M. Gregory, for appellants. F. W. Hall, for respondent.

CHIPMAN, C. This is an action to restrain the board of trustees of the city of Vallejo from constructing a wharf extending from the foot of Virginia street into Mare Island Straits, a navigable body of water lying between said city and Mare Island. The court decreed that defendants might proceed to erect the proposed wharf according to the prepared plans of defendants when modified in the manner designated in the decree, and so as not to interfere with the enjoyment by plaintiff of its ferry franchise. Defendants appeal from the judgment and from the order denying their motion for a new trial.

The action was begun in 1897, and was tried in 1899, but for some unexplained reason was not brought here until in April, 1904. There is but little, if any, controversy concerning the facts as shown by the evidence. The disagreement is rather as to the legal effect of the facts. Georgia and Virginia streets in the city of Vallejo are parallel, and run due east and west, terminating on the west at the water front on Mare Island Straits; Georgia street being next south of Virginia street. Many years ago a wharf was extended from the foot of Virginia street several hundred feet across the flats to deep water, at the end of which was a landing place for vessels. This wharf, however, "had," as stated by defendants in their brief, "for a long time been practically deserted, and at the time of this action was really no wharf at all." On March 18, 1896, the city, after having advertised according to law for bids, sold, and by ordinance granted to one Whitney and his assigns, for the sum of $10,151 and the payment of a license tax of $40 monthly, a franchise to construct, keep, and take tolls upon a public ferry running between the city of Vallejo and Mare Island Navy Yard, for the term of 20 years. On March 28, 1896, Whitney conveyed all his rights under this franchise to plaintiff. The ordinances fixed the ferry landing on the Vallejo side where it had previously been for many years, and particularly described it as it there was and substantially still is, at the end of the wharf which extended out several hundred feet from the foot of Georgia street. The landing was owned by private persons, from whom plaintiff purchased it, and spent considerable money in improving it. The ordinance also described the slip on the Mare Island side established by the United States naval authorities, to which the ferry was to run. In June, 1897, the city decided, by resolution duly passed, to construct a new wharf at the foot of Virginia street in the place of the old wharf. It had plans prepared, which were adopted, and bids were invited to carry out such decision. These plans contemplated a wharf which would extend 150 feet further west into the straits than the old Virginia street wharf, and about 265 feet further west than the ferry slip on the Vallejo side of the straits, and was to terminate in a broad head or pier, one wing of which extended some feet south of the south line of the approach to the pier. The court found that this projecting arm of the pier, if constructed according to the proposed plans for the new wharf, "will extend in front of the entrance of said slip, and will interfere with and prevent free ingress and egress of said ferryboats of plaintiff to and from said ferry slip last mentioned, and will obstruct the use by said plaintiff of said ferry slip, and will daily, when the tide is strongly ebbing or flowing, entirely prevent plaintiff from carrying on said ferry business, and prevent plaintiff from conducting said ferry, and will inflict on plaintiff great and irreparable injury and damage, and plaintiff has no adequate relief or remedy at common law for said injury and damage." The general course of the straits is nearly northwest and southeast, and the current is strongest at flood tide on the Vallejo side. The ferry slip was constructed with its opening northwesterly for greater safety and ease in entering and departing with the ferryboat. The northeasterly side of the slip is 140 feet long, and at its extreme end is only about 125 feet from the southern wing of the proposed wharf on Virginia street. The distance between the Vallejo and Mare Island slips is about 1,500 feet. The evidence was without conflict that the current is strong in the straits because of the narrowness of the deep channel; that with the wind from the north or northwest, and on an ebb tide, or with the customary southerly wind and a flood tide, the ferryboat would collide with the south wing of the proposed wharf if built; that, owing to the prevailing winds and currents which the ferryboat must encounter, and owing to the fact that vessels are frequently anchored along the straits between Mare Island and Vallejo, the ferryboat cannot be confined to, nor can it take, a direct course from slip to slip, but must describe the arc of a circle to reach the Vallejo slip, thus bringing the boat in close proximity to the proposed new wharf, and subjecting it to imminent danger of collision with it. The opinion of witnesses, who are masters of vessels and pilots familiar with existing conditions, was uniformly to the effect that the ferryboat could not be safely operated from the Vallejo slip if the city should build the wharf upon the proposed plan. The evidence was also without conflict that the proposed plans for the Virginia street wharf could be modified to its advantage by omitting the southerly wing or L, and extending the wharf northerly instead. The defendants called but one witness—Mr. Otto Von Geldern, a civil engineer of long and wide experience. He testified: "I have made special examination of the situation with reference to the landing of the ferryboat at Georgia street wharf as it would be affected by the proposed wharf on Virginia street." He was shown a diagram representing the situation as it would be upon the completion of the new wharf, and was asked if the ferryboat could operate under the circumstances shown by the diagram. He testified: "Under these circumstances as existing now, the ferry slip pointed in this way, the wharf [the new wharf] extended 150 feet, making this a defined corner [referring to the south wing], I don't think that ferryboat could manipulate there.

* * * The flood tide and the wind as it generally blows on this coast would drive the ferryboat onto the corner of the extended wharf." He stated that the situation might be improved by changing the direction of the ferry slip so as to point directly across the current. He thought that would be feasible, but he added: "I do not want to make that definite statement. There are tides and winds when it might be different." He further testified that: "There is no apparent reason why the pier head of the proposed wharf should be carried out that way [i. e., by the south wing], when it will be just as well the other way. The conditions are rather crowded anyway." Again: "The crowded condition of affairs could be obviated by diverting the Virginia street wharf over to the northwest, starting at about the terminus of the present wharf. * * * In that case there would be no trouble at all to run the ferry." Plaintiff's is the only ferry crossing to Mare Island from Vallejo. Most of the government employés at the navy yard reside at Vallejo, the number varying from 500 to over 1,700, who cross, at different hours, daily by the ferry. There is, besides this, considerable miscellaneous traffic by the ferry. The service is conceded to be of considerable importance to the people of Vallejo, and also to the government. The evidence is that the service is satisfactory to plaintiff's patrons, and is adequate to the requirements of the traffic. Appellants' contention to the contrary finds no support in the evidence.

It is contended that the finding of the court is not supported by the evidence that the injury to plaintiff would be irreparable if allowed to build its proposed wharf, because, first, plaintiff could extend the northern arm of its slip; second, it could change the direction of its slip; and, third, it could improve its boat. There is no evidence that a different or other boat would change or improve matters. The other two means of avoiding the injury rest upon the testimony of Mr. Von Geldern. They were suggested by him as a possible solution in case the new wharf should be built upon the proposed plans, but he was not willing to testify definitely that it would be feasible to change the direction of the slip, and as to extending its north arm sufficiently to meet the proposed new situation his testimony was not that this was the best or proper thing to do. On the contrary, his opinion was that the problem would be best solved by extending the pier head of the Virginia street wharf north away from the ferry slip, rather than south toward it; and his reasons, as well as those of other experts, seem to have been satisfactory to the court. The evidence was that plaintiff could not, except by the expenditure of several thousand dollars, so change its slip as to make it safe to operate the ferry should defendants' plans be carried out. But appellants claim that the city has the right to build a wharf at the point proposed; that in passing the ordinance in pursuance of this right the city necessarily and conclusively determined that there existed a public necessity for the wharf; and that it was therefore no infringement of any right vested in plaintiff, but that it is plaintiff's duty, and is its only right, to adjust its means of enjoying its franchise to the needs of the city for the new wharf.

It cannot be doubted that the city has the right to construct a wharf at Virginia street water front (section 28, subd. 34, Charter of the City; St. 1899, p. 381), and it may be admitted that the necessity for establishing the wharf was determined by the ordinance authorizing its construction. But this does not mean that the city may, in the exercise of such right, interfere to the extent of destroying rights vested in others by the city, and that, too, without pretense of compensation. The city does not own the water front, and in building a wharf it proceeds under no general municipal powers to erect wharves, for it has none, and has only such as are given by its charter. Low v. Marysville, 5 Cal. 214; San Pedro v. Railroad, 101 Cal. 333, 35 Pac. 993. Section 2919 of the Political Code provides that "no authority must be granted under this chapter to interfere with vested rights, nor to interfere with or infringe grants heretofore made by state authority." It would seem reasonable that, if the city cannot grant wharf privileges which may interfere with vested rights, it could not itself build a wharf so as to interfere with such rights. The court said in San Pedro v. Railroad, supra: "The authority given in this section [a charter provision similar to that in the Vallejo charter] does not, however, clothe the plaintiff with an absolute right to construct a wharf at any point on its water front which it may select, irrespective of the rights of others; but it is intended to confer upon it the same authority to do the acts therein enumerated which a natural person would possess, and to give to its acts a sanction which it would not otherwise have." There is no evidence of any necessity for erecting the proposed wharf so as to interfere with plaintiff's rights. The evidence is that no necessity for such a structure exists. The decree does not prohibit the building of such a wharf as the evidence shows is required and is best for the city. The claim that, if the rights of plaintiff and defendants conflict, the right of the municipality must prevail, cannot be sustained in the present case. The authorities cited to the effect that the owner of a ferry franchise from the Legislature of a state has no property in the flow of a river, and has no claim to compensation for injuries caused to him by an improvement of the river by the United States, do not apply. The doctrine invoked relates to the power of the general government as sovereign over the navigable waters of our country, such as

Mare Island Straits. The city of Vallejo has no such power.

So far as we can discover, the decree was just and equitable, and preserved to the city every right and privilege to which the evidence showed it has any reasonable or just claim.

It is advised that the judgment and order be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

146 Cal. 411

REINER v. SCHRODER. (Sac. 1,105, 1,204.)*

(Supreme Court of California. March 22, 1905.)

QUIETING TITLE—MINING CLAIMS—OWNERSHIP —LOCATION—VALIDITY—QUESTIONS FOR JURY —INJUNCTION—SPECIAL FINDINGS.

1. Under Code Civ. Proc. § 580, providing that the court may grant any relief consistent with the case made by the complaint and embraced in the issues, where plaintiff in a suit to quiet title claimed ownership and right of possession, and prayed that he be adjudged such owner, and defendant denied such ownership, and asserted title in himself, the issue of ownership was presented; and, the jury having found for plaintiff, the court properly rendered judgment accordingly, and the fact that plaintiff made a claim for damages did not affect the issue, especially when no damages were awarded.

2. An owner of land need not necessarily be in possession to enable him to maintain an action to quiet title.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, §§ 8–11, 44, 74, 100.]

3. In a suit to quiet title, presenting an issue of ownership and possession of certain mining claims, evidence considered, and *held* to sustain a finding for the complainant.

4. Where the evidence as to discovery was not confined to what the locator found in the supposed limits of an existing mine, but he testified to having found quartz at different points outside the tunnel in which he was mining, the location was not invalid on the ground that his discovery was made while he was working in such mine, and that the same discovery cannot be used for two locations.

5. In a suit to quiet title to a mining claim, a decree finding that the land was chiefly valuable for its minerals, that defendant had unlawfully taken possession and ousted plaintiff, and removed from the mines gold-bearing earth and minerals, and restraining such interference, is supported by evidence of defendant's interference, though he claimed that whatever ore he mined was left either in the tunnel or on the dump, and instead of causing injury increased the value of the mines.

6. Under Code Civ. Proc. § 592, providing that where the action is for the recovery of specific property an issue of fact must be tried by the jury, where plaintiff alleged ownership and right of possession, and that defendant wrongfully ousted him, and defendant asserted title and right of possession in himself, plaintiff was entitled to a jury to try the issue of ownership, and their general verdict was conclusive on the court, save only the power to set it aside and grant a new trial.

7. The question of ownership having been determined in plaintiff's favor, and the court having so stated in the decree, and the facts sufficient to warrant an injunction appearing in the decree, it was not necessary that they should appear in findings separate from the decree.

Commissioners' Decision. Department 2. Appeals from Superior Court, Siskiyou County; John F. Ellison, Judge.

Action by George J. Reiner against Henry C. Schroder. From a judgment for plaintiff, and from an order denying a motion for a new trial, the defendant appeals. Affirmed.

C. H. Lindley, H. R. Raynes, and John M. Magoffey, for appellant. R. S. Taylor and Gillis & Tapscott, for respondent.

CHIPMAN, C. There are two appeals in this case, taken by defendant at different times on separate transcripts—Sac. No. 1,105, an appeal from the judgment on the judgment roll, and Sac. No. 1,204, an appeal from the order denying the motion for a new trial. Both appeals will be disposed of in this opinion.

Appeal from the Judgment. Plaintiff alleges in his complaint: "(1) That he is now, and ever since July 1, 1899, has been, the owner and entitled to the possession of certain real estate, described as 'Schroder Consolidated Quartz Mining Claim,' consisting of the Mountain Boy, Gold Medal, Wah Up Rosalie and the Windsor lode claims, and also that Mammoth mine and the Snow Flake mine particularly described in the complaint. (2) That all of said property is mining land, and valuable for its gold-bearing rock and earth. (3) That about November 3, 1900, defendant took forcible possession of that portion of said mining lands described as the 'Mammoth' mine and the 'Snow Flake' mine, and ousted and dispossessed plaintiff therefrom, and put up stakes around said lands, and recorded a mining location in the mining records of Siskiyou county, in his own name, under the name of the 'Enterprise' mine, describing the location. (4) That all of said mining land first above described constituted a group of mining claims, and the same were worked together as one mine by plaintiff herein. (5) That plaintiff was at the time deriving large profits from the part of said mine so taken as aforesaid from his possession, to wit, a profit of $50 per day; that there was exposed and available sufficient ore at said place to run said mill for a period of at least one year, and that by reason of said acts of defendant plaintiff has been deprived of the opportunity to mill said ore to his damage of $18,250." There is a second cause of action, consisting of the allegations set forth above, except the last, marked "5." It is further alleged that plaintiff purchased said mine to make a sale thereof, and that he received many offers for the same since defendant's said acts, but that by reason thereof he has been prevented from making any sale to his damage of $20,000; that defendant has been extracting and removing valuable ores and minerals from the said portion of the said mines so held by him, and, though notified and requested to desist from so doing, still continues to extract and remove the same; that said acts of defendant, if continued, will cause plaintiff irreparable damage and injury and render said property valueless. Plaintiff prays that he be adjudged to be the owner of said property, and that defendant has no right therein; that defendant be restrained from interfering with the same, or any part thereof; and for damages in the sum of $38,250, "and for such other or further relief as may be agreeable to equity."

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*Rehearing denied April 21, 1905.

In his answer defendant denies plaintiff's ownership or right of possession of said Schroder mine, or of any of said mining claims embraced therein. As to the said Mammoth mine, defendant denies plaintiff's ownership and right of possession, and alleges that the boundaries of said mine are coincident with the boundaries of said Rosalie quartz mine, which was prior in point of time to said Mammoth, and that the said Schroder Consolidated mine was patented March 2, 1898, and embraced all of said Mammoth location, and whatever title plaintiff has to the said Mammoth mine was merged in said Schroder Consolidated mine. As to the said Snow Flake mine, claimed by plaintiff, it is alleged by defendant that for reasons set forth the location thereof by plaintiff's grantor was not made in conformity to the laws of the United States, and was therefore void, and that prior thereto defendant made a legal and valid location thereof under the name of the "Mountain Treasure," and entered into immediate possession thereof, became and is now the owner and entitled to the exclusive possession. Defendant denies that he entered upon or took possession of the premises mentioned in the complaint as the Mammoth mine, or entered as alleged upon any of the ground described in the complaint except in and upon the said Mountain Treasure mine. Defendant then alleges that he, by a mistake of law, failed to record the notice of his location of said Mountain Treasure mine, and that he thereafter, to wit, November 5, 1900, relocated said ground under the name of the Enterprise mine, and duly recorded his notice of location prior to the recording of the location of said Snow Flake claim by plaintiff's predecessor, and that defendant is the owner and entitled to possession of said ground by virtue of his said locations of the said Mountain Treasure or Enterprise mine. Defendant denies specifically the allegations of damage and the alleged particular acts of trespass, and as a separate defense alleges that on January 18, 1901, plaintiff entered into a written contract with defendant to purchase said Mountain Treasure or Enterprise mine, and is estopped from asserting ownership to the land embraced therein. This defense, however, is not urged in defendant's brief. Defendant's prayer is that plaintiff take nothing by his action, for costs, and "for such other relief as may seem meet and equitable." The point urged by defendant is that "an action of this character cannot be maintained" where there has been "a complete ouster of plaintiff and defendant is in actual adverse possession of the land in dispute at the commencement of the action"; citing Raffeto v. Fiori, 50 Cal. 364; Heilbron v. Heinlen, 72 Cal. 374, 14 Pac. 22. To the point that the decree adjudging the plaintiff to be the owner and entitled to the possession of the land was erroneous and should be stricken out, defendant cites Berry v. Ivanice, 53 Cal. 653. It appears that the cause was tried on the complaint and answer, the issues were submitted to a jury, and a general verdict returned in favor of plaintiff, with "nominal damages assessed at $1."

The cases cited seem to hold to the technical common-law rule, as claimed by defendant, in actions for trespass quare clausum fregit (see Heilbron v. Heinlen, supra), that plaintiff must prove (1) possession at the time of the injury, and this rightly against defendant, and (2) that the injury was committed with force by defendant. We must judge of the case before us by the issues as made by the pleadings and as submitted to the jury. Plaintiff is entitled to any relief where there is an answer that is "consistent with the case made by the complaint and within the issue." Code Civ. Proc. § 580. Plaintiff distinctly claimed ownership and right of possession, and prayed that he be adjudged to be such owner. It is true that he did not, as is usual in complaints to quiet title, allege that defendant claimed some interest in the land, nor did he call upon defendant to set forth his title; but defendant met the complaint by a denial of plaintiff's ownership and an assertion of title in himself, and the issues thus formed were tried, and by the general verdict were decided in plaintiff's favor, and the court properly gave judgment accordingly. The fact that a claim for damages was made in the complaint cannot affect the result of the trial of the issue of ownership, especially as such claim was ignored by the jury, and no damages were awarded. We do not think the cases cited by defendant are applicable. McLaughlin v. Kelly, 22 Cal. 211, more nearly illustrates the principles governing the present case. See, also, Haggin v. Kelly, 136 Cal. 481, 69 Pac. 140. It is not now necessary that the owner of land should be in possession in order to enable him to maintain an action to quiet title. Casey v. Leggett, 125 Cal. 672, 58 Pac. 264. See, also, Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771. The judgment, in our opinion, was proper, and the injunction was authorized.

Appeal from the Order. Appellant contends that the evidence is insufficient to support the verdict and judgment. In this group of mines the five first named in the complaint are patented, and the boundaries undisputed. These five claims and the Mammoth were purchased by plaintiff from defendant. The general direction of the claims was northeast and southwest, the Wah Up being the most westerly claim; the Rosalie adjoining on its easterly side, but extending about 350 feet further southerly. In the angle thus formed by these two claims, southerly from the Wah Up and westerly from the southerly end of the Rosalie, is the ground in dispute. This ground was being worked by plaintiff in the spring of 1900 under the impression that the tunnel in which he was working was covered by the Mammoth location, and there is evidence that while so engaged defendant stated to witness McLean, plaintiff's superintendent in charge, that it was Mammoth ground, and also for some distance beyond the workings, and belonged to plaintiff. Defendant was present and knew that this work was progressing, and knew that much valuable ore was being taken out, but made no claim to the ground. While taking out ore from the lode, and being ignorant of the exact location of the Mammoth lines, McLean became fearful that the pay ore was getting outside of the Mammoth boundaries, and he therefore, on April 15, 1900, located, for the benefit of plaintiff, what is called the Snow Flake, the east end of the claim abutting on the southeasterly side of the Rosalie. His purpose was to include whatever of the ledge might be found to be outside the lines of the Mammoth when ascertained. There was evidence tending to show that the ground taken in by the Snow Flake was ground which defendant had represented to belong to plaintiff. Defendant's contention is that the Mammoth location was substantially the same as the patented Rosalie; that the ground in dispute was outside the Mammoth boundaries, and that he located it as the Mountain Treasure in April, 1899, and relocated it in November, 1900, as the Enterprise; that when the Snow Flake was located, in April, 1900, it was not the subject of location because of defendant's prior said location. The controverted fact in the case relates to the ownership of this ground. The evidence is conflicting in many essential particulars. Defendant's evidence tended to show that the disputed ground was outside the boundaries of the Mammoth; that he made the alleged location of the Mountain Treasure in 1899, but, having failed to record his notice, he relocated the ground as the Enterprise in November, 1900. There was evidence, however, tending to show that his alleged location of the Mountain Treasure was a fiction, and was put forward in order to defeat the Snow Flake location, so as to give validity to the subsequent Enterprise location. Shortly after the location of the Snow Flake, McLean met defendant. McLean testified: "I told him I had located a claim there, and didn't want to record it until I had seen him. I told him where I had located it, and * * * asked him, 'Does the property—the rest of the property or ground—belong to the company?' and he said, 'Yes, it belonged to them clear up on the hill;' and I said, 'That is the reason I didn't record the claim; I didn't want to record it until I had seen you.' He said it was not necessary; that all the ground there belonged to the company." McLean testified that he could find no stakes around the claim, or evidence of any prior location, and defendant said nothing at that time about any prior location by him. It was not until the following November, when defendant took possession under the Enterprise location, that he claimed the property, so far as McLean knew. The jury manifestly disbelieved defendant's evidence and accepted plaintiff's, and with their conclusion we cannot interfere.

Defendant claims that McLean's location was invalid, because, as is contended, the evidence shows that his discovery of ore was made while he was working in the Mammoth mine; that the same discovery cannot be used for two locations; nor can a location be based upon a discovery made within the limits of another existing and valid location. Citing Lindley on Mines, § 337; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Reynolds v. Pascoe (Utah) 66 Pac. 1064. The evidence as to McLean's discovery was not confined to what he found in the supposed limits of the Mammoth mine. He testified to having found quartz at different points on the ledge outside of the tunnel in which he was mining, and on ground not now claimed by defendant to have been in the Mammoth location. Furthermore, if the ground where McLean was mining ore was on the Mammoth, defendant could not consistently urge his Enterprise location to defeat McLean's location, which covered the same ground, for, as we understand the evidence, defendant's point of alleged discovery was in plaintiff's working tunnel. Indeed, it is fairly inferable from the evidence that it was upon information given by McLean to defendant as to the results of his mining in this tunnel and of his having located the ground that defendant afterwards made the Enterprise location. Defendant's contention that the Mammoth did not vary enough from the Rosalie to include the point where plaintiff was mining rests upon conflicting evidence. But conceding the fact, it cannot avail defendant, because the ground, if not in the Mammoth, was included in the Snow Flake, and the question presented to the jury was, is the Snow Flake title superior to that of the Enterprise? and the verdict was for the Snow Flake.

The court recited in the decree that the land was mining land, and chiefly valuable for its minerals, and that on November 3, 1900, defendant with force unlawfully took possession of the mining ground described as the Mammoth and Snow Flake mines, ousted and dispossessed plaintiff, and since said date has made excavations thereon, "and has removed from said mines the gold-bearing earth and minerals therein; that the acts of defendant, unless restrained, will cause plaintiff great and irreparable injury," etc. Defendant contends that he took possession of no ground except his own; that there is no evidence that he removed from the mines any earth or minerals; that whatever ore he mined was left either in the tunnel or on the dump; and such acts, instead of causing plaintiff injury, would increase the value of his mines, and put the ore in a position ready to be transported to plaintiff's mill. The decree has support in the evidence. Defendant cannot escape the consequences of his unauthorized acts by claiming that they resulted in plaintiff's benefit. In severing the ores there was injury to the freehold, and realty was converted into personalty. Whether defendant's acts resulted in actual damage is immaterial except as the result might affect the amount of damage awarded (and in this case none were given). Defendant had no right to interfere, as he was doing, with plaintiff's property, and he was properly restrained by the decree.

It is not necessary to consider the question of estoppel of defendant to which he refers in his brief. Plaintiff does not rely upon estoppel, although there was evidence tending, but perhaps insufficient, to establish it. The issue was squarely made between the relative priority of title under the two locations—the Snow Flake and the Enterprise—and was decided in favor of the former upon the validity of the locations themselves.

Defendant assigns several errors of law committed at the trial in ruling upon objections to testimony. Some of these rest upon defendant's view of the evidence, which is contrary to the verdict and findings of the court recited in the decree. Other objections were to the materiality of evidence, which it is apparent did no injury to defendant, if conceded to be immaterial. Still others related to the question of damages, of which none were awarded, and the evidence, if immaterial, was harmless. We do not deem it necessary to prolong the opinion by noticing these specifications in detail. We are satisfied that there was no prejudicial error in the rulings of the court.

Finally, it is contended that the findings do not support the judgment. There were no separate findings by the court, and findings were not waived. The court adopted the general verdict of the jury, and based its judgment of plaintiff's ownership and right of possession thereon. In a separate decree, two days later, the court recited the verdict, and referred to its judgment already made, and set forth the facts above quoted as to the unlawful acts of defendant in taking possession and removing ores, etc., and adjudged that defendant be enjoined "from entering upon or interfering with any part of the lands of plaintiff described as follows" (describing the Mammoth and Snow Flake mines). The contention is that the action was equitable in its nature, whether considered as an action for trespass coupled with an injunction, or an action to quiet title coupled with an injunction to prevent further claims; and that a general verdict of a jury will not support a judgment; citing Warring v. Freear, 64 Cal. 54, 28 Pac. 115; Learned v. Castle, 67 Cal. 41, 7 Pac. 34; Bell v. Marsh, 80 Cal. 411, 22 Pac. 170. These were cases of equitable cognizance solely, and may be said to fall within the provisions of the last clause of section 592, Code Civ. Proc. In the case of Donahoe v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283, it was decided that where a party was rightfully in possession, and was ousted by another, and wrongfully kept out of possession, upon the trial of those issues such party, whether defendant or plaintiff, is entitled to a jury trial. See, also, Newman v. Duane, 89 Cal. 597, 27 Pac. 66. In the present case plaintiff alleged ownership and right of possession, and that defendant wrongfully ousted him of such possession, and wrongfully withholds possession. Defendant met these issues by denial, and by an assertion of title and right of possession in himself. The Code provides that where the action is "for the recovery of specific real or personal property * * * an issue of fact must be tried by a jury, unless a jury trial is waived." Code Civ. Proc. § 592. Plaintiff was, we think, clearly entitled as of right to a jury to try the issue of ownership. Their general verdict was conclusive on the court, save only the power to set it aside and grant a new trial; and no finding of the court could add to or take from its force, and this question of ownership was the principal issue in the case. See subject of right of jury discussed in Hughes v. Dunlap, 91 Cal. 385, 27 Pac. 642. An injunction might or might not have been granted, and was but ancillary to the main issue. The ownership having been determined to be in plaintiff, and the court having so stated in the decree, there remained only to be found by the court facts sufficient to warrant the injunction. These facts appear in the decree, and it was not necessary that they should appear in findings separate from the decree.

The judgment and order should be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

146 Cal. 421

GRAYBILL v. DE YOUNG. (S. F. 2,896.)

(Supreme Court of California. March 27, 1905.)

JURORS—COMPETENCY—BIAS — REVIEW ON APPEAL.

1. Whether a prospective juror is impartial is to be determined by the trial judge, and his determination will be interfered with on appeal only when the voir dire examination shows as a matter of law that the juror was biased.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3843.]

2. In an action for libel a juror stated that he thought such actions speculative; felt that they were often unwarranted, and had the same opinion of any kind of damage suit; stated that his being a newspaper man and such opinion might create a prejudice, but that he would try the case upon the evidence and the law as declared by the court. *Held*, that the showing of bias was not such as to render the overruling of a challenge for cause reversible error.

Beatty, C. J., and Shaw, J., dissenting.

Commissioners' Decision. In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by George D. Graybill against Michael H. De Young. From a judgment for plaintiff for less than his demand, he appeals. Affirmed.

See 73 Pac. 1067.

Walter H. Linforth and Linforth & Whitaker, for appellant. Lloyd & Wood and P. F. Dunne, for respondent.

GRAY, C. This is an action for libel. The plaintiff had a verdict and judgment in his favor for the sum of $1. The appeal is by the plaintiff from an order denying him a new trial.

The appellant contends that the order should be reversed because his challenge to William V. Bryan on his examination touching his qualifications to act as a juror was denied, and he was therefore compelled to exercise a peremptory challenge on said Bryan, and this is the only point made for a reversal.

The challenge to Bryan was upon the ground "that he is in a state of mind evincing bias against the plaintiff," and was based on subdivisions 1, 7, § 602, Code Civ. Proc. The testimony of the juror was to the effect that he was in the newspaper business—was the editor and proprietor of the Traveler. He associated actions for libel "in somewhat the same character as speculations," and felt that in many instances they were unwarranted by the facts. He seemed to have this same opinion of "any kind of damage suit." He thought the fact of his being a newspaper man and his adverse opinion of damage suits might create a prejudice in his mind and make him unfit to act as a juror. He did, however, say in response to questions that he would try the case upon the evidence and upon the law given by the court; meaning no doubt that he would be guided by the instructions of the court as to the law of the case, and beyond this would consider only the evidence produced in court. He seems to have had no acquaintance with the parties to the suit and no knowledge of the facts involved in the case.

Whether a prospective juror is fair and impartial and should be allowed to sit in the case is a mixed question of law and fact, to be determined in the first instance by the trial judge. This court should interfere with the determination of that question only when the evidence adduced on the voir dire is of such a character that it can be said from it, as a matter of law, that the juror is so prejudiced or biased in the case that he will not be a fair juror. Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; McCarthy v. Cass Av. Ry. Co., 92 Mo. 536, 4 S. W. 516; Baker v. Borello, 136 Cal. 160, 68 Pac. 591. In this connection we should not overlook the fact that the trial judge, with the proposed juror before him, is in a far better position to judge of his fairness, and of the probable effect that any alleged bias may have upon his decision, than this court can be placed in to judge of the same question. The trial judge sees as well as hears the juror; this court can only read what he has said. And while this court will set aside the action of the trial court in accepting an obviously unfair juror, we do not think the case before us is one of that kind. If what the juror evidently meant to say and in effect did say—that he would try the case on the evidence adduced in court uninfluenced by the fact that he was a newspaper man, and disregarding any feeling that this kind of a case was sometimes maintained for purposes of speculation—was true, then he was a fair juror, and if the trial judge believed from what he said, and the way in which he said it that he was not biased or prejudiced, then it was the duty of the trial judge to deny the challenge and there was no error in so doing. Several cases are cited in support of appellant's contention, but most of them are based upon facts entirely different from the present case. The case cited most nearly resembling this one is Quill v. Southern Pacific Co., 140 Cal. 268, 73 Pac. 991. In that case, however, the evidence of the prejudice of the jurors was much stronger than here, and besides the jurors there refused to state that they would be bound by the evidence as in ordinary cases, but thought on the contrary that their prejudice against the class of cases to which that case belonged would color their verdict. Here the answers of the juror tended to show that he would be bound by the evidence, and in that respect the two cases are clearly distinguishable.

We advise that the order appealed from be affirmed.

I concur: CHIPMAN, C.

For the reasons given in the foregoing opinion the order appealed from is affirmed: VAN DYKE, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

ANGELLOTTI, . I concur in the judgment and in the views expressed in the opinion. The only possible ground for the contention that the juror was biased or prejudiced was his testimony relative to his feelings in regard to damage suits. He was a client of one of plaintiff's attorneys, did not know the parties, so far as appears had not heard or read of the case, and knew nothing about it. He gave some testimony tending to show that he had "some sort of prejudice" against not only actions for damages for alleged libels, but against any kind of damage suits. His answers to questions indicated that he believed that such actions were often unwarranted by the facts and "of the same character as speculations." While some of his expressions might be construed as indicating such a state of mind as would render him an unfair juror, taking the whole of his testimony into consideration, I cannot say that the judge of the court below, who saw the juror and heard him testify, was not warranted in finding that his feeling in regard to damage suits was not of such a nature and extent as to interfere at all with the proper discharge of his duties as a juror.

SHAW, J. I dissent. In answer to questions the juror said at the outset of his examination, "I have a sort of prejudice which might be removed by the evidence," and that if he were the plaintiff he would not like to have his cause tried by a jury of 12 men in the same frame of mind he was then in. He never denied or disclaimed the existence of this prejudice. In his subsequent examination he declared that if sworn as a juror he would try the case upon the evidence and upon the law given by the court. The last questions put to him were these: "Would you enter upon the trial of the case with a prejudice against the plaintiff?" Answer: "I think I would." "Would you try the case upon the evidence in court, and decide it according to the instructions of the court?" Answer: "I could not consistently do anything else." "Would you do that?" Answer: "Yes, sir." This closed the examination, and the answers quoted give the strongest statement he could make in favor of the plaintiff. He does not in those answers, wherein he says that he would try the case upon the evidence and the law as given by the court, deny or dispute the existence of the prejudice in his mind. A prejudiced man can and does try the case upon the law and the evidence in the case; for if he has no knowledge of the facts—and this juror had none—there is nothing else upon which his mind can operate. The real inquiry is not whether he will try the case upon the law and the evidence, but whether he can and will do so fairly and impartially; whether he can and will do so without the bias which is made ground for challenge by subdivision 7 of section 602 of the Code of Civil Procedure. The juror repeatedly said he could not do this. Nowhere in his examination does he say, either expressly or in substance, that he can lay aside this bias and try the case impartially. The plaintiff was entitled to exercise four peremptory challenges upon jurors not subject to challenge for cause, and by the denial of this challenge he was deprived of this right. I think the judgment should be reversed.

BEATTY, C. J. I dissent. A juror who goes into the box with a bias against either party, from whatever cause arising, cannot try the case fairly. The evidence of the juror Bryan showed clearly, and without any real qualification, that he was biased against the plaintiff. No distinction in principle can be made between his disqualifying admissions and those of the two jurors held to have been disqualified for bias in Quill v. So. Pac. Co., 140 Cal. 268, 73 Pac. 991. The evidence there may have been a little stronger, but it was the same in kind and proved only the same facts. Those jurors had a prejudice against actions for damages, and they admitted that if the case was their own they would be unwilling to submit the issues to jurors feeling as they did. In this case the examination of the juror Bryan closed with this question and answer: "Q. If you were the plaintiff in this cause, would you be willing to have your cause tried by a jury of twelve men in the same frame of mind you are now in? A. No, sir; I don't think I would." As an honest man he could not deny that he would be unwilling, if the cause was his, to submit it to jurors feeling as he did, and his previous answers only lend force to the admission.

146 Cal. 426

PAYNE v. CUMMINGS, Sheriff, et al. (Sac. 1,100.)

(Supreme Court of California. March 27, 1905.)

HOMESTEADS—AREA—APPURTENANT WATER RIGHTS—ABANDONMENT—CONVEYANCE OF UNDIVIDED INTEREST.

1. Under Civ. Code, §§ 1237, 1260, providing for a homestead not exceeding $5,000 in value, to consist of the dwelling house and land on which it is situated, selected as provided by statute, there is no limit to a homestead except as to value, and a tract containing 524 acres of contiguous land is, if properly selected and of less value than $5,000, exempt, though part of it was acquired by pre-emption and part as a desert claim, and though it was unfenced.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 90.]

2. Under the statute, water rights, ditches, etc., used appurtenant to the homestead, are a part of it and exempt.

3. Under Civ. Code, § 1243, declaring that a homestead can be abandoned only by a declaration of abandonment or a deed by both husband and wife, a deed of part of a homestead by a husband to his wife is no abandonment.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 332.]

4. Under Code Civ. Proc. § 1474, providing that if the homestead is selected from community property it vests absolutely in the survivor on the death of husband or wife, a conveyance of an undivided interest in a homestead, made by a husband after the wife's death, does not destroy the exemption as to a debt contracted before the conveyance and before the death of the wife.

Commissioners' Decision. Department 2. Appeal from Superior Court, Modoc County; J. E. Prewett, Judge.

Action by H. G. Payne against J. W. Cummings and others. From the judgment both parties appeal. Judgment reversed upon plaintiff's appeal, and defendants' appeal dismissed.

J. H. Stewart, E. C. Bonner, and G. F. Harris, for plaintiff. Spencer & Raker and Clarence A. Raker, for defendants.

GRAY, C. This is an action for an injunction to restrain an execution sale of plaintiff's homestead. The homestead was declared upon and covered 523.94 acres of contiguous land situated in Modoc county, of the value of $3,000. Of this land 160 acres constituted what was known as the "Payne Pre-emption," and the rest was known as the "Desert Claim." The declaration of homestead also included certain water rights, reservoirs, and ditches in which plaintiff had a joint interest, and which interest was appurtenant to the lands in question.

The findings and judgment are to the effect that the defendants do not intend to sell and have not advertised for sale the Payne preemption. It is also found and adjudged that there is no homestead upon any portion of the desert claim. It is further adjudged that the water rights, ditches, dams, reservoirs, flumes, etc., are subject to the lien of the judgment, and are not exempt from execution on account of the homestead.

The plaintiff, Payne, on June 7, 1897, by deed conveyed to J. H. Stewart and D. W. Jenks a one-third undivided interest in the desert claim, and the water rights, ditches, etc., appurtenant thereto. It is decreed that whatever right, title, or interest was conveyed by said deed is not affected by the judgment, and that only the interest in said desert claim and the appurtenances thereto remaining in plaintiff be sold under the execution. The plaintiff appeals from the whole judgment, and the defendants appeal from that portion only which declares that the deed to Stewart and Jenks conveyed a one-third interest in the property, and exempts the interest so conveyed from the execution sale.

The Appeal of Plaintiff. The declaration of homestead was in due form and was duly executed and filed by plaintiff on the 2d day of October, 1888. It described and claimed the whole property, including the pre-emption, the desert claim and the water rights, reservoir, reservoir sites, ditches, dams, and flumes, as a homestead, and declared the value of the whole to be $3,000. At that date the plaintiff was, with his family, living in a house on the pre-emption claim, and all the property was the community property of plaintiff and his wife. Plaintiff's title was that of pre-emption and desert land claimant, which claims he afterwards perfected and obtained patents to all the land. Thereafter, and on the 9th day of March, 1890, the plaintiff executed to the Siskiyou County Bank, one of the defendants herein, his promissory note. On the 9th day of November, 1893, the wife of plaintiff died. In December, 1895, the said bank recovered judgment against plaintiff on said note. Thereafter, in January, 1896, the said bank caused execution to issue on said judgment, and caused the same to be levied upon the desert claim, water right, reservoir site, ditches, etc., appurtenant thereto.

The homestead, embracing the desert claim as it did, had the effect to exempt the same from execution. The water rights, ditches, reservoir site, etc., appurtenant to said desert claim, were also part of said homestead and likewise exempt. The findings and conclusions of the court to the contrary are based upon a wrong theory and are erroneous. The land was contiguous, and although it had been obtained from the government by different titles it constituted but one tract of land all resided upon, and in the possession and occupancy of the plaintiff. It was not necessary that it should be inclosed with a fence. Ditches had been built and water conducted by plaintiff upon the desert claim during the year 1888 and a part of 1889, and plaintiff's house where he resided being on the pre-emption claim evidenced a residence upon and occupancy of the entire tract, including the desert claim. He included the whole tract in his declaration and claimed it all as his homestead. The entire property is conceded to be under the $5,000 limit of value allowed by law to the homestead claimant. It was not necessary to show that the desert claim was devoted to any particular or profitable use by plaintiff. Nor was it necessary to show that he devoted it to any use at all other than as a part of his home place or homestead. It was sufficient to show that it was devoted to that purpose, so resided upon, so occupied, so declared upon, and not used in any manner inconsistent with its use as a homestead. Those cases applying to city or other property used altogether or chiefly for business purposes have no application to a case of this character, where the property is situated in a rural district where farming or grazing is the only useful purpose it can be devoted to in addition to making a home of it. Our Code places no limit on the amount of property that may be claimed as a homestead except to confine it to the value of $5,000. "The homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated, selected as in this title provided." Section 1237, Civ. Code. There is nothing to be found in the above section or elsewhere in the Code that can properly be construed into a limitation of the area of the homestead as applied to property here in question. The homestead declared upon may embrace an area even greater in value than the $5,000 homestead exemption allowed by section 1260 of the Civil Code. In such a case the homestead is not void, but proceedings must be had under section 1245 et seq. of the Civil Code for the appraisement and division or sale of the property. Let the area be ever so large, no division, even, can be had in court except for excess in value. A careful examination of all the cases in this state wherein it has been held that the homestead declaration covered property that could not be properly treated as a part of the homestead will disclose that in every such case the property excluded from the homestead was either occupied as the home of some person other than the homestead claimant, or had on it a house in which an independent business was carried on, or was devoted to some other purpose entirely foreign to and inconsistent with its use as a homestead. In many cases in this state hundreds of acres of land in the country, fenced and cross-fenced, have been held to be properly embraced in the homestead. In one case (Ornbaum v. His Creditors, 61 Cal. 455) a homestead was declared upon 1,100 acres of land, 300 acres of which was inclosed with a fence, and the rest, uninclosed, used by the homestead claimant in conjunction with his neighbors as grazing land, the dwelling house being situated on the inclosed part, and it was held that the whole property was impressed with the character of a homestead. It was also held that the fact that title to much of the uninclosed portion of the land was subsequently acquired by the claimant from third parties who had pre-empted the same did not affect the homestead. The court said in that case: "Now it is objected that Ornbaum had no actual residence on the land outside of his inclosure at the time the declaration of homestead was filed. His residence within the inclosure was sufficient upon the facts as found. He had title to and exercised control over all the land. The evidential facts inserted in the findings of fact (we refer to those as to the neighbors grazing the uninclosed portion, and the taking up of pre-emption claims on the land) have no proper place there, but they, with the other facts found, and which follow them in order in the findings, sustain the judgment of the court." The fact that the land here was desert and presumably unfit for agricultural purposes is no good reason why it could not be claimed as and with the pre-emption claim devoted to the uses of a homestead until it could be reclaimed and made fit for grazing or some other agricultural purpose. The question of "use" as applied to the homestead relates always, as will be seen from an examination of the cases, to the use of the property as a home. If it is used as a home or as a part of the home place it is immaterial whether it is farmed, grazed, or devoted to no agricultural use at all. The material thing to be shown is that it is devoted to use as a home for the claimant and his family, and that no part of it is applied to any use inconsistent therewith. It is plain that land may be used to live on solely without being devoted to any other use at all, and still be a homestead.

The interest in the water rights, ditches, etc., though it was but a partial interest in an entire water system held jointly or in common with others, yet as it was obtained specially for use upon the lands claimed as a homestead, and was necessary and appurtenant thereto, it became part and parcel of the homestead. Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198. No part of the entire property can be subjected to execution in the absence of a showing that it exceeds in value the statutory exemption. The homestead was not abandoned as to any portion of the desert claim by the deed of the plaintiff to his wife in her lifetime of the pre-emption claim. For section 1243 of the Civil Code provides: "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged: (1) By the husband and wife if the claimant is married." A deed by the husband alone is not a grant executed and acknowledged by the husband and wife. Freiermuth v. Steigleman, 130 Cal. 392, 62 Pac. 615.

Nor did any subsequent deed of the husband of any moiety or part of any portion or the entire property have the effect to abandon or nullify the homestead exemption as against the execution in question. When the wife died, the homestead, so far as it related to the desert claim, having been selected from the community property, vested absolutely in the surviving husband, the plaintiff herein, and it continued free and exempt from all previous debts, including plaintiff's debt theretofore accrued to the bank. Code Civ. Proc. § 1474. The sale by him of any interest, joint or several, in any part or parcel of the property thereafter, could have no effect upon his right to claim this exemption. He had the right thereafter to deal with the property any way he chose, without regard to his previous debts. So far, at least, as those previous debts were concerned, the property was exempt, and no sale of any mere interest in the property could waive that exemption, and, of course, his grantees took title from him free from all lien or liability against the property on account of such debts. The cases like Carroll v. Ellis, 63 Cal. 440, in which it has been held that a homestead should be treated as abandoned where the husband and wife joined in a deed of an undivided interest in the property to a third person, are not governed by the same principle as this case. In those cases both spouses were living and joined in the deed. Here one of the spouses was dead, and the deed of the undivided interest was made by the surviving spouse alone. As said in Dickey v. Gibson, 113 Cal. 31, 45 Pac. 16, 54 Am. St. Rep. 321: "By the death of the first wife the homestead property vested absolutely in the surviving husband, Samuel Gibson. As far as the legal title is concerned, it vested in him as fully and perfectly as though no homestead had ever been carved out of it. The limitations and immunities which accompanied the enjoyment of the property under such title modified, not the title, but its enjoyment, and were only such as the statute imposed." The interest of plaintiff in the property, after his wife's death, became something different and greater than it was in her lifetime. He had then not only the absolute title, but also the absolute right of exemption in the property from all former debts, as well as the right to dispose of it in any way he saw fit.

By reason of their claims against plaintiff the defendants had no interest whatever in the property, as it was absolutely exempt from such claims. They could not be injured nor could any right of theirs be prejudiced by any disposition that the plaintiff might see fit to make of the property. Therefore there is no good reason for extending the doctrine of those cases which hold that a homestead cannot affect an undivided interest in land, and that a subsequent sale of such interest is an abandonment of the homestead, to a case like this, where the undivided interest has not been conveyed until after the death of one of the spouses, and the whole title to the homestead has "vested absolutely" in the survivor. The facts found are sufficient to warrant a decree as demanded by plaintiff.

The Appeal of Defendants. From what has already been said, it is apparent that the interest in the desert claim conveyed to Jenks was at all times and still is exempt from defendants' judgment.

The appeal of defendants should be dismissed. The judgment should be reversed upon plaintiff's appeal, and the court below should be directed to enter a decree upon the findings forever enjoining and restraining the defendants from selling any portion of the property under the judgment or execution in question.

We concur: CHIPMAN, C.; SMITH, C.

For the reasons given in the foregoing opinion the appeal of defendants is dismissed, the judgment is reversed upon plaintiff's appeal, and the court below directed to enter a decree upon the findings forever enjoining and restraining the defendants from selling any portion of the property under the judgment or execution in question: HENSHAW, J.; LORIGAN, J.; SHAW, J.

(146 Cal. 435)

POGUE v. COLLINS et al. (S. F. 1,328.)

(Supreme Court of California. March 31, 1905.)

WATER RIGHTS — CONVEYANCES—WHAT PASSES —EXECUTION.

Under Civ. Code, § 1104, providing that a transfer of real property passes all easements attached thereto, and section 662, providing that a thing is deemed appurtenant to land when it is by right used with the land for its benefit, and section 801, providing that the right to receive water from or discharge water on another's land is an "easement," a conveyance of a water ditch, with a right to convey water therein, and "all the rights, privileges, immunities, franchises, and easements" thereto belonging, conveys an extension of the ditch made by the grantor for the purpose of using the same as an easement and as an appurtenant to the ditch, and the extension was not subject to levy under an execution against the grantor.

Department 2. Appeal from Superior Court, City and County of San Francisco; W. B. Wallace, Judge.

Action by J. W. C. Pogue against W. W. Collins and others. From a judgment for plaintiff, defendants appeal. Affirmed.

John D. Pope, for appellants. Alfred Daggett, for respondent.

HENSHAW, J. This action was prosecuted against the sheriff and other to enjoin them from enforcing an execution against any part of a certain irrigation ditch which had been constructed by the Kaweah Power & Water Company. Plaintiff obtained judgment, and defendants appeal upon the judgment roll alone.

The findings are voluminous, and from those findings it appears that plaintiff had conveyed a ditch, with certain water rights and rights of way, to the Kaweah Power & Water Company, under contract whereby, for the failure to do certain things, the Kaweah Power & Water Company was to reconvey these properties to the plaintiff in this action. Plaintiff brought an action against the Kaweah Power & Water Company to obtain a specific performance of this agreement, and a reconveyance was decreed by the court. An appeal to this court was taken, and the judgment was affirmed and became absolute on the 23d day of April, 1903. Pogue v. Kaweah Power & Water Company, 138 Cal. 664, 72 Pac. 144. A reconveyance was thus made to Pogue.

Edwin Meredith and William Meredith, as executors of the estate of George Meredith, deceased, brought an action upon the 13th day of May, 1899, and recovered a judgment in the superior court against the Kaweah Power & Water Company. They proceeded to have execution levied upon a portion of the ditch which they here contend was not embraced in the reconveyance by the Kaweah Power & Water Company to Pogue. This forms the sole contention upon this appeal. Upon the other hand, plaintiff insists, and the court found, that this extension of the original ditch constructed by the Kaweah Power & Water Company, while it held the property, was a part of the property necessarily reconveyed to plaintiff herein, and therefore not liable to execution, levy, and sale at the instance of defendants.

The ditch conveyed by plaintiff to the Kaweah Power & Water Company is known and designated in the findings as the "Pogue, Wallace & Crocker Ditch." The court found, referring to the extension here in dispute, as follows: "This last extension of the said Pogue, Wallace & Crocker Ditch across said section 19, last referred to, was made for the express purpose of being used with and attached to said Pogue, Wallace & Crocker Ditch as an easement and as an appurtenance thereto, and the only use that could be made, and the only use that was ever made, of said extension of said Pogue, Wallace & Crocker Ditch, as the same was extended across said section 19, was for the distribution of water for irrigation, which water was diverted from the Kaweah river into and through said Pogue, Wallace & Crocker Ditch down to the south line of said section 18, in township 19 south, range 27 east, Mt. Diablo base and meridian, and from thence carried further on and distributed for the purposes of irrigation through said extension of said Pogue, Wallace & Crocker Ditch, which was made, as above stated, across said section 19, township 19 south, range 27 east, Mt. Diablo base and meridian. That the only source of supply of water to said extension of said Pogue, Wallace & Crocker Ditch, across said section 19, is now, and always has been, from the said Kaweah river through the head of said Pogue, Wallace & Crocker Ditch." Still further, the court found: "That by the deed of grant executed on the 5th day of May, 1903, by said Kaweah Power & Water Company to the said plaintiff, J. W. C. Pogue, under and in pursuance to the commands contained in said judgment rendered in said action No. 4,618, a copy of which said judgment is set out in the fifth paragraph of plaintiff's complaint herein, the said Kaweah Power & Water Company conveyed to the said plaintiff, in fee simple absolute, the said Pogue, Wallace & Crocker Ditch, being the same ditch that was constructed and in existence on the 4th day of May, 1897, when said contract, set out in the second paragraph of plaintiff's complaint, was executed, and also all rights, privileges, immunities, franchises, and easements thereunto belonging, together with eight cubic feet of water per second, being a one-half interest in and to the water appropriated by and flowing, or that may flow, from the Kaweah river into said ditch known as the Pogue, Wallace & Crocker Ditch, and the right to the use and flow thereof in and through that other water ditch which has its head about 100 yards below the said head of the said Pogue, Wallace & Crocker Ditch, and unites with the said Pogue, Wallace & Crocker Ditch below the head gate of said Pogue, Wallace & Crocker Ditch, and the right to the use and flow of one-half of the waters appropriated by means of, or flowing in, either or both of said ditches from the said Kaweah river, which said deed conveyed to said plaintiff, J. W. C. Pogue, in fee simple and absolute, all of the property owned or claimed by said Kaweah Power & Water Company in and to said Pogue, Wallace & Crocker Ditch, the water right belonging thereto, and each and all of the rights, privileges, immunities, franchises, easements, rights of way, and appurtenances belonging to or used in connection with said Pogue, Wallace & Crocker Ditch." The Kaweah Power & Water Company reconveyed to Pogue as follows: "Also all the right, title, and interest of the said defendant Kaweah Power & Water Company in and to the said Pogue, Wallace & Crocker Ditch, the same being the ditch that was constructed and in existence on the 4th day of May, 1897, when the contract between plaintiff and defendant set out in the fourteenth paragraph of the amended complaint was executed, and all extensions thereof on the right of way, described in the deed of plaintiff to the Kaweah Irrigation & Power Company, dated August 15, 1895, and set out in the tenth paragraph of the amended complaint; also in the other ditch leading out of Kaweah river below the original head gate of the said Pogue, Wallace & Crocker Ditch, and leading into said ditch below said head gate; also all the rights, privileges, immunities, franchises, and easements thereunto, or unto either of said ditches, belonging; also all right of way described in said agreement of May 4th."

These findings amply support the judgment which the court rendered. The Kaweah Power & Water Company, in extending the ditch, and in contracting to supply water through this extension, incurred obligations which could never be fulfilled by them or by their successors, except by regarding the extension of the ditch as a necessary right of way incidental to the main ditch. And, this being so, the extension unquestionably passed with the conveyance of the Kaweah Power & Water Company to the plaintiff of "all the rights, privileges, immunities, franchises and easements unto either of the said ditches belonging." A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed. Civ. Code, § 1104. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or water course. Civ. Code, § 662. And the right of receiving water from or discharging water upon another's land is amongst the land burdens and servitudes permitted by law and designated as easements. Civ. Code, § 801.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

146 Cal. 433

SCHINDLER v. SCHROTH et al. (Sac. 368.)

(Supreme Court of California. March 31, 1905.)

PERSONAL INJURIES—OPENINGS IN SIDEWALKS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—MATERIAL ERROR.

1. In an action for personal injuries sustained by plaintiff while removing furniture from a house to his wagon in the street by reason of falling into an opening in the sidewalk, maintained by defendants in front of their premises, it was material error to instruct that, to avoid the imputation of contributory negligence, a higher degree of care is required of one using the sidewalk in front of another's premises for business purposes than is required of him when using such walk for ordinary pedestrianism.

2. The use of a sidewalk by the owner of a lot for purposes of communicating with the street is equally legitimate, and equally an ordinary use, as that of passing longitudinally along it.

Commissioners' Decision. Department 2. Appeal from Superior Court, Sacramento County; A. P. Catlin, Judge.

Action by C. Schindler against George Schroth and another. Judgment for defendants, and plaintiff appeals. Reversed.

A. A. De Ligue, A. L. Shinn, and A. J. runer, for appellant. W. E. Kleinsorge and Albert M. & Hiram W. Johnson, for respondents.

SMITH, C. This is a suit brought for damages suffered by plaintiff from falling into an opening maintained by defendants in the sidewalk of J street in Sacramento. The opening in question was used by defendants for the purpose of communication with their cellar, and was protected at the time of the accident by two iron doors standing erect at the east and west ends of the opening, with connecting rods between them on the north and south sides. The defendants' premises were on the south side of the street, and on the east, and adjacent to them, are the premises of one Gregory. The plaintiff had come to Gregory's place for the purpose of removing a wardrobe therefrom, and, owing to circumstances explained by him, had stopped his horse and wagon in front of the dividing line between the two lots. The wardrobe was of such weight and size that he could move it only by pulling it after him as he walked backward toward the street, and from there westward to a point opposite the tail of the wagon, and in thus moving it he fell over the upright door of the opening, and was thereby injured. He testifies that when he drove up and tied his horse he did not see the opening or the doors in the sidewalk, and did not know of their existence until the accident occurred. The verdict of the jury was for defendant, and the appeal is from the judgment thereon entered. On the trial the court, after instructing the jury as to the doctrine of contributory negligence and other matters, further instructed them that, "if a man is engaged in using the sidewalk in front of another's premises for business purposes, or for purposes other than ordinary pedestrianism, it is incumbent upon him to use a higher degree of care than is required of him if he is a mere pedestrian and he is simply passing over the sidewalk as such." In this instruction the court distinguishes between the use of sidewalk for "ordinary pedestrianism" and its use for other purposes, and instructs the jury that in the latter case, to avoid the imputation of contributory negligence, "a higher degree of care" is required than in the former. But we do not think this distinction can be maintained. The use of a sidewalk by the owner of a lot for purposes of communication with the street is equally legitimate, and equally an ordinary use, as that of passing longitudinally along it. Clifford v. Dam, 81 N. Y. 52; McGuire v. Spence, 91 N. Y. 303, 43 Am. Rep. 668; Shearman & Redfield on Negligence, § 375; Id. § 352, note 4. The only authority cited by the respondent to support the proposition in the instruction is Smith v. City of Leavenworth, 15 Kan. 85, 86. But in that case the language of the court is: "The only legitimate use that can be made of a street or sidewalk by any private person is for passing and repassing upon the same." But this would equally include the case of the plaintiff here as that of any other pedestrian, and accordingly the court adds, "A lot owner or any person under him has a right to use any portion of a street in front of his lot in passing to or from his lot," etc. We also think that the error was material.

We advise that the judgment appealed from be reversed, and the cause remanded for a new trial.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the cause remanded for a new trial: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

146 Cal. 440

POHLMAN v. WILCOX et al. (L. A. 1,672.)

(Supreme Court of California. April 1, 1905.)

CONTRACTS—ACCEPTANCE OF ORDERS—CONDITIONS—PERFORMANCE OF CONTRACT.

1. A promise by a contractor, on acceptance of a subcontractor's order, to pay to a third person a certain sum out of moneys due the subcontractor under his contract for the stone work on a building, when the money is due him, is conditional on the performance of the contract by the subcontractor, and, until the performance, any question as to payments to the subcontractor is immaterial.

2. Where a contractor accepted an order of a subcontractor, and agreed to pay plaintiff a certain sum out of money due the subcontractor on performance of his contract, testimony was immaterial, in an action on the agreement, that the money borrowed by the subcontractor from plaintiff was used in the work under the contract.

Commissioners' Decision. Department 2. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by Phillip Pohlman against W. W. Wilcox and others. From a judgment for defendants, and an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Harris & Swanwick, for appellant. Purrington & Adair, for respondents.

SMITH, C. This is a suit to recover the sum of $500, with interest, alleged to be due from the defendants on a written contract. The defendants had judgment, from which, and from an order denying his motion for new trial, the plaintiff appeals.

The case is: The defendants were under contract to construct a certain building for the government of the United States, and one Craig had contracted with them to furnish the stone for it for the sum of $2,700. Craig assigned to the plaintiff "all of [his] interest in the last payment to be made to [him] under the * * * contract," which was 25 per cent. of the contract price; and thereupon the defendants executed to the plaintiff the written promise sued on, which is as follows: "Los Angeles, August 7, 1901. Phillip Pohlman—Sir: We will pay you the amount of five hundred dollars ($500) on M. Craig's order, out of the moneys due him from us in his contract with us for the stone work on the Sherman Institute, to be built at Riverside, when said money is due him." This promise was repeated by a subsequent letter to the plaintiff, of date September 5, 1901, wherein the defendants say: "We will hold the $500 out of the last payment due Mr. Craig for you, as you request."

It is found by the court, in effect, that Craig abandoned his contract "before there was any money payable on defendants' said promise," and it is claimed by the appellant that this finding is not supported by the evidence. But the only dispute on this point is as to the date of the abandonment; and it is not disputed that this took place, if not before, at least on, the 17th day of May, 1902, at which time, it is also admitted, the contract had not been performed; and it also appears without contradiction that the completion of it cost the defendant $1,500 more than the contract price. But the position of the appellant is that at the time of the abandonment the defendants had paid the full amount of the contract price, and that the defendants' promise to pay had thus become absolute. As to the fact asserted, we are not satisfied that it appears. Craig had, indeed, then received the aggregate sum of $3,653; but it does not appear how much of this was on account of the original contract price, and how much on account of the additional sums of $600 and $500, which, in order to induce him to go on with his contract, the plaintiffs had been compelled to promise him; and on this point, if material, the burden of proof was on the plaintiff. But, however this may be, the fact is, we think, immaterial. The promise of the defendants was conditional upon the performance of the contract by Craig, and we know of no principle that would justify us in substituting for this the condition of payment of the contract price in advance of performance. Had Craig completed his contract, the plaintiff could have recovered, without regard to the payments made by the defendants to Craig and others; and hence such payments were matters that in no way affected him. The evidence of such payments might, indeed, in some cases, be material to an issue as to performance, or as to fraudulent combination between the parties. But here nothing of the kind is pretended; but the payments were made for the purpose of inducing Craig to perform his contract, and were, therefore, equally for the benefit of the plaintiff as for that of the defendants.

Another point urged by the appellant is the alleged error of the court in excluding testimony to prove that the money borrowed by Craig from plaintiff was used by the former, with the knowledge of the latter, in the work under the contract. But the testimony, we think, was immaterial.

We advise that the judgment and order appealed from be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

146 Cal. 449

CREED et ux. v. McCOMBS et al. (L. A. 1,231.)

(Supreme Court of California. April 3, 1905.)

MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — ASSESSMENTS — APPEAL TO COUNCIL—SUFFICIENCY — POWER TO RESCIND ACTION — ATTEMPTED RESCISSION — EFFECT — BONDS — INVALIDITY — EFFECT—STATUTES—CONSTRUCTION.

1. Under St. 1885, p. 156, c. 153, § 11, providing that a ground of appeal to a city council in relation to street improvement is "that the work has not been performed according to the contract in a good and substantial manner," and that an appeal may be taken by briefly stating the objections in writing and filing the same with the clerk of the council, a written protest, signed by property owners affected, and filed with the clerk of the council, simply stating, after setting forth their interest in the matter, that they protest against the acceptance by the council of the work done on the street in question, for the reason that the work has not been performed according to the specifications and terms of the contract, operates as an appeal.

2. Where a city council has sustained an appeal by property owners affected by a street improvement on the ground that the work had not been performed according to the contract under St. 1885, p. 156, c. 153, § 11, authorizing such appeals, and granting the council power to set aside the assessment, to require the work to be completed according to its own directions, and to direct the superintendent of streets either to correct the assessment already made or to make and issue a new one, it is without power to rescind the action; and hence bonds issued on an assessment which was vacated by an appeal, but attempted to be reinstated as of its original date by the council rescinding its action sustaining the appeal, are void.

3. The attempt by a city council to rescind its action sustaining an appeal by property owners from a street improvement assessment under St. 1885, p. 156, c. 153, § 11, being void, leaves the proceeding still pending before the council on the appeal, with power, on completion of the work, to direct a new assessment or the reissuance of the former one with the accompanying diagram and warrant.

4. The invalidity of bonds for street improvements arising from an erroneous act of the city council in attempting, without power so to do, to rescind its action in sustaining on appeal under St. 1885, p. 156, c. 153, § 11, and to reinstate an assessment vacated, in sustaining the appeal, as of its original date, on which the bonds were issued, though depriving the bondholders of an active subsisting lien on the lots affected thereby, does not deprive them of their right to acquire a lien on proper proceedings.

5. Under the amendment of 1899 (St. 1899, p. 41, c. 42) to Street Bond Act (St. 1893, p. 33, c. 21) § 4, providing that as to proceedings thereafter had the issuance of the bonds should be only prima facie evidence of the regularity of the proceedings, instead of conclusive evidence, as theretofore, the effect of the issuance of the bonds is simply to change the burden of proof as to irregularities; and where the record is produced, showing what was actually done, it has no curative effect as to irregularities appearing thereon.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Jeremiah Creed and wife against C. L. McCombs and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Hass & Garrett, for appellants. Dunn & Crutcher, for respondents.

SHAW, J. Action to quiet title. The defendant Security Loan & Trust Company of Southern California filed its separate answer to the complaint, claiming an interest in the property in question as owner and holder by assignment of certain street assessment bonds issued against said property. The other defendants defaulted. The judgment was in favor of the defendant answering, and declares the validity of the bonds, and that they constitute a lien upon the said property. The plaintiffs appeal from the judgment.

The case was tried upon an agreed statement, from which we glean the following: The plaintiffs owned certain lots in the city of Los Angeles fronting on Clanton street. Proceedings were had under the Vrooman act for the improvement of said street, including that portion of it whereon said lots abutted. A contract was let by the said city to defendant McCombs for said street work, and within the agreed time the work was completed to the satisfaction of the street superintendent of said city, who thereupon accepted said work and issued to McCombs an assessment, warrant and diagram in due form under said act. Certain owners of lots benefited by said work and involved in said assessment thereupon filed with the clerk of the council of said city a protest, signed by A. D. Westbrook et al., which reads as follows: "We, the undersigned citizens of the city of Los Angeles, and property owners on Clanton street between the west line of Central avenue west three blocks to east line of Griffith avenue, do hereby protest against the acceptance by your honorable body of the street improvement work done upon said street, for the reason that said work has not been performed according to the specifications and terms of said contract." This protest was treated as an appeal from the action of the street superintendent to the city council, and was duly heard as such on June 4, 1900, and the minutes of the said council in regard thereto recite as follows: "The matter of the appeal of A. D. Westbrook et al., No. 317, from the acts and determinations of the superintendent of streets in accepting the work of the improvement of Clanton street between San Pedro street and Central avenue, and in issuing his assessment warrant therefor, having been continued until this hour, the same was taken up for hearing. G. J. Leovy, Esq., appeared on behalf of the appellants. Mr. Toll moved that said appeal be sustained, and that said acts and determinations of the street superintendent in accepting said work and in issuing said assessment warrant and diagram be reversed and set aside, and that the contractor for said work be required to do such work to the satisfaction of the city council, and in accordance with the plans and specifications; which motion was seconded by Mr. Baker and carried." Between the time of filing the protest and the 18th day of June, 1900, following, the contractor did additional work upon said street in the way of placing more gravel thereon, repairing curbs and the like, and on the last-mentioned date all those who had signed the protest signed and filed with the council a written request that said council should rescind its previous action as to the protest and "deny said protest and said appeal from the said acts and determinations of the said street superintendent." It was recited in said request "that such arrangements have been made and had between your said protestants, and each of them, and the contractor who performed said contract No. 972, as that all disagreements have been amicably adjusted, and to the satisfaction of said protestants." The plaintiffs did not sign either the protest or the written request. It seems, however, to be conceded that the order sustaining the appeal had the same effect upon plaintiffs' rights as it would have had if they also had signed the protest. This written request was referred by the council to its board of public works, and said board reported and recommended that the request be granted. This report was duly adopted by the council, and it then denied, or attempted to deny, the previous appeal, and confirmed the action of the street superintendent in accepting said work and issuing said assessment and warrant. It was upon the theory that this last decision of the council was valid that the trial court refused to quiet plaintiffs' title to their said lots, and adjudged the assessment bond subsequently issued to be a lien on the property. Respondents make two points in support of the action of the court.

1. They say that the protest filed with the council did not constitute an appeal. This contention cannot be upheld. One ground of appeal to the council given by the statute is "that the work has not been performed according to the contract in a good and substantial manner." St. 1885, p. 156, c. 153, § 11. The statute also provides in the same section that the appeal may be taken "by briefly stating their objections in writing and filing the same with the clerk of said council." It was, therefore, sufficient to briefly state in writing that "said work has not been performed according to the specifications and terms of said contract" as a ground of protest, and file the same with the clerk. This would be readily understood as an appeal from the action of the street superintendent, and was in fact so understood and acted upon by the council and all parties concerned, and no one was in any way misled to their prejudice by the form of the appeal. Girvin v. Simon, 127 Cal. 491, 59 Pac. 945; Belser v. Hoffschneider, 104 Cal. 455, 38 Pac. 312. The foregoing is taken from an opinion prepared by Commissioner Gray in this case while it was pending in department, and is now adopted as the opinion of the court.

2. In Williams v. Bergin, 108 Cal. 169, 41 Pac. 287, and Belser v. Hoffschneider, supra, it was held that when in proceedings to improve a street the city council has sustained an appeal taken in pursuance of section 11 of the Vrooman act (St. 1885, p. 156, c. 153), it has no power thereafter to rescind its action in that respect. That portion of the action of the council, upon the request of the property owners, which purports to rescind its previous action in sustaining the appeal, is therefore ineffectual and void. The council had no power to rescind or vacate its previous action in the matter. The only ground of the appeal to the council was that the work had not been performed according to the contract. By section 11 of the Vrooman act the council upon such an appeal has power to set aside the assessment and require the work to be completed according to its own directions, and to direct the superintendent of streets either to correct the assessment already made or to make and issue a new one. The appeal did not attack the assessment in any particular, but, as it appeared that on April 25, 1900, the work had not been fully performed, its issuance on that date was premature, and the council, when it sustained the appeal, very properly set aside the assessment. But, so far as its form and the amounts of the several liens thereby declared are concerned, its accuracy and sufficiency was not, and has not been, questioned. Doubtless, under section 11 aforesaid, at any time after sustaining the appeal, the council, upon ascertaining to its satisfaction that the work was really done according to the contract, and finding the previously prepared assessment ready to its hand and correct in all respects, could have adopted it, and ordered that it be issued as the assessment for the completed work; or it could have ordered that a new assessment be made and issued, and if, in that case, the

street superintendent had redated and reissued the former one, it would have been valid. But it is clear from the record that the council did not take, nor attempt or intend to take, either of these courses. Its intention, as plainly expressed, was to rescind its order sustaining the appeal, and thereupon to deny the appeal, treat the case as if there had been no appeal, and allow the previous act of the street superintendent to stand confirmed and valid from the beginning. Its intention was that the assessment should be effective as of its original date, and as issued on April 25, 1900. That this was the understanding of all the parties concerned, including the respondent, is shown by their subsequent action. It was on June 18, 1900, that the council attempted to confirm the previous assessment. If this could be treated as, in substance, a reissuance of the old assessment in lieu of making a new one, it could not take effect as a valid assessment until the day it was so reissued. Yet we find that the street superintendent, treating the assessment as having been issued on April 25, 1900, and the return made thereon by the contractor on May 23, 1900, as a valid and effectual return, issued to the city treasurer on June 25, 1900, a certified list of all assessments which had remained unpaid for 30 days, including the assessment on the plaintiffs' lots, and on the same day the treasurer issued the bonds to the respondent company for the assessment on these lots. If the assessment had been reissued on June 18th, the owner would have had until and including July 17th to notify the treasurer not to issue the bonds. The council was without power thus to infuse life and validity into the former assessment, and make it effective from its date. The assessment stands vacated, and the bonds of the respondent company are necessarily void. The proceeding is still pending before the council on the appeal, and, if the work is completed, that body still has power to direct a new assessment, or the reissuance of the former one, with the accompanying diagram and warrant. The bondholder, as assignee of the contractor, is possessed of all his rights to receive payments of the assessments when issued, and to demand bonds if payment is not made for 30 days; but until said assessment is issued it has no active subsisting lien on the lots. The plaintiffs were therefore entitled to have their title quieted as against any lien claimed by the respondent company in virtue of the assessment or bonds set forth in the answer. This would not affect its right to acquire a lien upon proper proceedings.

The proceedings here involved took place in the year 1900. By the amendment of 1899 (St. 1899, p. 41, c. 42) to section 4 of the street bond act (St. 1893, p. 33, c. 21) it was provided that as to proceedings thereafter had the issuance of the bond should be only prima facie evidence of the regularity of the proceedings, instead of conclusive evidence, as theretofore. Being prima facie evidence only, its effect is simply to change the burden of proof as to irregularities, and where the record is produced showing what was actually done it has no curative effect as to irregularities appearing thereon.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment for the plaintiffs on the agreed statement of facts, in accordance with this opinion.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J; LORIGAN, J.

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146 Cal. 561

PEOPLE v. CHIN NON. (Cr. 1,163.)

(Supreme Court of California. April 7, 1905.)

CRIMINAL LAW — TRIAL — JURY — READING OF NEWSPAPERS BY JURY — MISCONDUCT—AFFIDAVITS OF JURORS—IMPEACHING VERDICT.

1. The reading by jurors in a criminal case of articles in newspapers insinuating that certain witnesses for the defense had committed perjury, stating that one of them had been arrested for perjury, and that a person interested in the defense had been excluded from the courtroom for signaling a witness, was misconduct.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2050.]

2. On such misconduct being shown, the jurors could not be heard to deny its prejudicial influence.

3. Affidavits based on information and belief are not competent to support charges of misconduct on the part of jurors.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2391.]

4. Where, in a criminal case, the defense charged misconduct on the part of jurors in reading newspapers, affidavits to the effect that they had read the papers, and stating that such conduct had no prejudicial effect, the affidavits being offered by the prosecuting attorney in order to sustain a conviction, were not within the rule that affidavits of jurors cannot be considered to impeach their verdict.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2394.]

Henshaw, J., dissenting.

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Chin Non was convicted of murder, and he appeals. Reversed.

Charles T. Jones and Hiram W. Johnson, for appellant. U. S. Webb, Atty. Gen., C. N. Post, Asst. Atty. Gen., and A. M. Seymour, Dist. Atty., for the People.

BEATTY, C. J. The defendant is one of five Chinamen who were jointly accused of the murder of Jeong Him. One of his codefendants—Sing Yow—was first tried, convicted, and sentenced to death; and the opinion of this court affirming that judgment will be found reported in 78 Pac. 236. This defendant was afterwards convicted on the same charge, and his appeal is based in part upon assignments of error which were held insufficient in the former case. As to those matters nothing further need be said here.

The remaining points, so far as they require discussion, will be made clearer by a preliminary statement of the case in its more general aspects.

The homicide occurred in the town of Walnut Grove, on the Sacramento river, a place containing a population of several hundred Chinese. About 9 o'clock in the morning Jeong Him came out of the Chinese restaurant, where he had been eating breakfast. As soon as he appeared on the street three Chinamen who had been waiting there opened fire upon him with their pistols. He fled, apparently wounded, through a part of Chinatown and down the bank of the river, closely pursued by two or three Chinamen, who soon came up with him at a point where he had fallen and fired five or six shots into his prostrate body. All the witnesses, white and Chinese alike, testify to these facts, making it a clear case of deliberate murder. But as to the identity of the murderers the case is far from clear. Not one of the white witnesses recognized this defendant or either of his codefendants as one of the two or three Chinamen who pursued the deceased to the point where he fell and was shot to death. A number of Chinese witnesses, however, positively identified this defendant and two of his codefendants as those who were in at the death, and two others as among those who fired at deceased as he left the restaurant. On the other hand, about an equal number of Chinese witnesses swore just as positively that only two men joined in the pursuit (on which point they were corroborated by some of the white witnesses), that they knew those men as well as the defendants, and that it was not the defendants, but others, whose names they gave, who followed and killed the deceased. Other Chinese witnesses testified that at the very time of the murder this defendant and some of his codefendants were at places remote from the scene of the homicide. In short, the case presents all the family features of the ordinary Chinese murder case, in which one tong is prosecuting and another defending; features with which the courts of this state have become so painfully familiar. We have one set of witnesses testifying to one state of facts, and another set in about equal numbers contradicting them point blank, under circumstances which prove to a demonstration that deliberate perjury has been committed on one side or the other, but which furnish very insufficient criteria for determining where the truth lies. It is apparent that in such a case any unwarranted action by the court or unauthorized communication to the jury, having a tendency to convince them, or to arouse a violent suspicion, that any of the witnesses for the defense were swearing falsely, must be highly, if not fatally, prejudicial.

It happened in this case that one Lee Bin, a former resident of Fresno, was one of the principal witnesses for the prosecution, to prove the identity of the murderers. For the defense witnesses were called to prove that on and after the day of the homicide Lee Bin was still in Fresno. One of these witnesses was Lee Sam, a Chinaman, and another was E. B. Bradley, a police officer of Fresno. The last-named witness testified to seeing Lee Bin in Fresno subsequent to the date at which he swore he had left that city, and his testimony tended to prove that he was still in Fresno at the date of the homicide. Lee Sam testified even more positively to the same effect. As soon as Lee Sam left the witness stand he was by direction of the district attorney arrested in the hall of the courthouse and just outside of the courtroom. It is not clear that the arrest was witnessed by any of the jurors, but it does appear that they, or some of them, wese informed of the arrest almost immediately after it occurred, and that the arrest was made on a charge of perjury. The next morning, and while the trial was still in progress, the following article appeared in the Record-Union, a daily newspaper published at Sacramento, where the cause was on trial:

"Chinese Witness Arrested.

"Lee Sam Accused of Perjury in Murder Trial.

"The trial of Chin Non, charged with the murder of Jeong Him in Walnut Grove the twenty-first of last month, rises above the dead level of generalities. It is a stupendous battle between rival tongs, and, upon comparing the testimony given by the witnesses of one side with that given by those of the other, it is apparent that somebody has got wrong on facts. The trial is replete with incidents. Last Wednesday one of the bosses interested in the defense was barred from the courtroom and cited to appear to show cause why he should not be punished for contempt. His offense consisted in signaling to witnesses on the stand, apparently coaching them as to their answers to questions, and Judge Hart caught him in the act.

"Lee Sam was a witness for the defense yesterday morning, and his testimony got him into trouble. He now occupies a cell in the county jail with a charge of perjury hanging over him.

"Lee Sam's testimony was intended to impeach Lee Bin, one of the chief witnesses for the prosecution. Bin testified that he was in Walnut Grove at the time of the shooting, and his testimony was considered to be strong. According to his testimony he left Fresno November fifth last for San Francisco, and that he subsequently went to Walnut Grove and was present when the shooting was done. Sam yesterday testified that Bin was in Fresno from the 1st to the 28th of February last, inclusive, and was not in Walnut Grove at all. He was emphatic in his statement, and as the district attorney has evidence that he deems conclusive that shows Bin left Fresno November 5th, and was in Walnut Grove at the time of the shooting, he acted promptly.

"Assistant District Attorney Yell quietly left the courtroom, and when Sam stepped down from the witness chair and walked out into the corridor he was arrested and locked up on a charge of perjury.

"To a Record-Union reporter District Attorney Seymour said: 'We do not desire to do a thing that would influence anybody regarding the trial one way or the other, but they are carrying this thing too far, and it has got to stop.' With the evidence on hand it is the intention of the district attorney's office to prosecute Sam to a finish after the Chinese murder cases shall have been disposed of. * * *"

And while the cause was still on trial the News, a weekly paper published in Sacramento, appeared with the following:

"A Policemen's Peril.

"Policeman John Bradley of Fresno will have to battle to keep out of the penitentiary, if information said to be in possession of District Attorney Seymour is correct. Bradley is a witness for the defense in the trial of a Chinese for murder in the superior court here. He swore that between November 5th and 15th Lee Bin was in Fresno. Bin is a main witness for the people, and declares that he witnessed the murder at Walnut Grove on November 5th, when Bradley claims to have seen him in Fresno.

"The district attorney is understood to have learned that Bin withdrew his deposit in the First National Bank in Fresno before the date named by Bradley, and that the coolie left Fresno on the same day.

"Already one witness for the defense, a Chinese, has been arrested for perjury, and is now in the county jail."

Both of these articles were read during the trial by several of the jurors. Of this fact there can be no doubt, because we have in the record the affidavits of the jurors themselves, admitting that they read one or both of the articles, but claiming that they made no impression on their minds, and did not in the least influence them in arriving at their verdict, etc. The reading of these articles by the jurors was grave misconduct, and, under the peculiar circumstances of this case, must have prejudiced the defense. People v. Stokes, 103 Cal. 196, 37 Pac. 207, 42 Am. St. Rep. 102. And, the misconduct being admitted, the jurors cannot be heard to deny its prejudicial influence. People v. Stokes, supra; People v. Azoff, 105 Cal. 634, 39 Pac. 59.

The only question arising in this connection is one not raised by the Attorney General, but suggested in the discussion here. The sole evidence offered by defendant to prove that the jurors read the newspaper articles consisted of affidavits based on information and belief, and it has been held that such affidavits are not competent evidence to support charges of misconduct. The only positive evidence of the misconduct here alleged is supplied by the affidavits of the jurors themselves, and it has been many times decided upon grounds of public policy that a juror cannot be allowed to impeach his own verdict by evidence of misconduct on the part of himself or his fellows. But these decisions were all made in cases in which the evidence was offered by the party against whom the verdict was given, and the considerations of public policy upon which they were based have no application where the evidence is offered by the party who gained by the verdict and is seeking to sustain it. Such a case is not within the reason of the rule, and does not involve the mischief to be prevented. Especially in a criminal case it is not to be supposed that the district attorney—a sworn public officer charged by law with the duty of protecting the interests of the people—will exert any influence upon jurors to elicit evidence that will impeach a verdict for the people.

And this, also, is to be considered: It is not the duty of the district attorney to sustain a verdict for the people by denying or suppressing any fact which he knows to exist. Here the district attorney seems to have ascertained by inquiry among the jurors that they had read the objectionable publications. Being convinced of the fact, he chose, and in my opinion, properly chose, to waive the technical rule by which he might have excluded the evidence offered on the part of the defendant, and thereby suppress what he knew to be the truth. Instead of this, he produced the affidavits of the jurors themselves, by which he in effect admitted the facts and sought to excuse them, so far as he could. To such a case the rule against allowing jurors to impeach their own verdict ought not to be applied. In Missouri it has been held that the affidavit of a juror impeaching the verdict, if admitted without objection when offered by the losing party, must be considered. Winn v. Reed, 61 Mo. App. 625. A fortiori it must be considered when offered by the prevailing party. For the misconduct of the jurors the judgment and order of the superior court must be reversed.

Of the numerous rulings of the court upon which errors are assigned, we find only two or three requiring comment. We think the court should have allowed a fuller cross-examination of the witnesses for the prosecution on the subject of their relations to and dependence upon the Bing Kong Tong. And we think the circumstances as shown by this record hardly warranted the trial judge in citing the defendant's interpreter in the presence of the jury to answer a charge that he had been signaling to the witnesses for the defense while they were testifying.

Judgment and order reversed, and cause remanded.

We concur: VAN DYKE, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.

I dissent: HENSHAW, J.

146 Cal. 508

DAVENPORT v. CITY OF LOS ANGELES et al. (L. A. 1,686.)

(Supreme Court of California. April 5, 1905.)

MUNICIPAL CORPORATIONS — OFFICERS—RECALL —PROCEDURE—MANDAMUS—SCOPE OF WRIT.

1. Under the "recall" amendment to the Los Angeles city charter, authorizing the removal of elective officers by a procedure instituted by a petition signed by a certain percentage of the electors entitled to vote for a successor to the officer sought to be removed, to be determined by an examination of the great register, the only qualified signers of a petition for removal are those whose names appear on the great register, and their qualifications cannot be determined by comparison of their names as appearing on the petition with affidavits of registration.

2. Where a petitioner's right to an office from which he was illegally ousted is not established until after the expiration of his term of office, the writ of mandate for which he applied to establish such right will direct the payment of his salary from the time of the ouster until the expiration of the term, but will not direct his recognition as an officer.

Beatty, C. J., dissenting.

In Bank. Petition by J. P. Davenport for a writ of mandate against the city council and other city officers of the city of Los Angeles. Writ awarded.

A. B. McCutchen and J. S. Chapman, for petitioner. W. B. Mathews and Herbert J. Goudge, for defendants.

McFARLAND, J. This is an original petition here by the above-named J. P. Davenport for a writ of mandate requiring certain named respondents who are members of the city council of the city of Los Angeles to allow petitioner to take his seat in that body and perform the duties of the office of councilman from the Sixth Ward of said city, and requiring other named respondents, who are auditor and treasurer of said city, to issue and pay a warrant for petitioner's salary as such councilman for the month of September, 1904.

The material facts in the case are these: In the year 1902, and prior thereto, and continuously to the present time, the city of Los Angeles was and is a municipality existing under what is generally known as a "freeholders' charter." Its charter—down to the time of a certain election which took place on December 1, 1902, hereinafter mentioned—provided that the legislative power of the city should be vested in a council consisting of one councilman to be elected in and by the electors of each ward of the city, who should hold his office for the term of two years from the first Monday of January next succeeding his election. An election for city officers was regularly held on December 1, 1902, at which election the petitioner, Davenport, was duly elected a member of the city council from the Sixth Ward, and on the first Monday of January, 1903, having duly qualified, he took his seat as such member of the council, and continued to hold said office and perform its duties until the month of September, 1904, at which latter time the respondents, who are members of the council, refused to further recognize him as a councilman, and installed in his place and stead one Arthur D. Houghton, and from that time the other respondents refused to draw or pay any warrant for petitioner's salary. This, of course, was before the expiration of the two-years term for which petitioner had been elected.

The reasons for the above acts of respondents are based on these facts: At the said election of December 1, 1902, at which petitioner was elected, the electors of the city of Los Angeles voted upon and adopted three certain amendments to the city charter, called, respectively, the "initiative," the "referendum," and the "recall," which amendments were ratified by the Legislature of the state on the 23d day of January, 1903. We are concerned here only with the amendment designated as the "recall"; neither the "initiative" nor "referendum" is here involved. The "recall" amendment, so far as material here, is as follows: "Section 198c. *The Recall.* The holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent. The *procedure* to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least twenty-five per centum of the entire vote for all candidates for the office, the incumbent of which is sought to be removed, cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, shall be filed with the city clerk; *provided*, that the petition sent to the council shall contain a general statement of the grounds for which the removal is sought. * * * Within ten days from the date of filing such petition the city clerk *shall examine and from the great register ascertain* whether or not said petition is signed by the requisite number of qualified electors, and if necessary the council shall allow him extra help for that purpose, and he shall attach to the said petition his certificate *showing the result of said examination.* * * * If the petition shall be found to be sufficient the clerk shall submit the same to the council without delay. If the petition shall be found to be sufficient the city council shall order, and fix a date for holding the said election, not less than thirty days nor more than forty days from the date of the clerk's certificate to the council that a sufficient petition is filed." St. 1903, p. 574. (The italics are ours.) It is further provided in this section that an election shall be called, and if any person other than the incumbent shall have received the highest number of votes for the office "the incumbent shall thereupon be deemed removed from the office upon qualification of his successor." It is further provided that, if the incumbent receive the highest number of votes he shall continue in office.

Pursuant to the amendment above mentioned there was filed with the city clerk on August 1, 1904, a petition purporting to be signed by more than 25 per cent. of the electors of the Sixth Ward entitled to vote for a successor to petitioner, praying for his removal. No cause was assigned in the petition for his removal, except that he had voted for two certain ordinances. It contained no charge of corruption or misdemeanor in office, or any official misconduct. On August 8, 1904, the city clerk delivered the petition to the city council with the following certificate:

"August 8, 1904. To the Honorable Council of the City of Los Angeles—Gentlemen: I beg to report that on the 1st day of August, 1904, a petition was filed with me demanding the recall of J. P. Davenport, a member of the city council for the Sixth Ward. The entire vote cast for all candidates for office of councilman in the Sixth Ward at the last general municipal election was 2864. That I have examined and from the Great Register ascertained whether or not said petition was signed by the requisite number of qualified electors, and as a result of said examination I find that said petition is signed by 784 electors entitled to vote for a successor to said councilman in the Sixth Ward, and I hereby certify that said amended petition is sufficient. The 514 names were compared with the duplicate affidavits of registration and the balance with the originals. Respectfully, H. J. Lelande, City Clerk."

Thereafter the said council ordered an election to be held on September 16, 1904, in the said Sixth Ward, for the purpose of removing petitioner and electing his successor, and such election was held on said date, and at said election said Arthur D. Houghton received the largest number of votes as councilman from said Sixth Ward. On September 20, 1904, the council canvassed the votes cast at such election, and declared said Houghton elected, and since then the council have recognized Houghton as councilman for the Sixth Ward in place of petitioner, and have refused the latter a seat as a member of their body, and defendants the auditor and treasurer have refused to draw a warrant or to pay the same for petitioner's salary for said September. Under the charter the salary of a councilman is $1,200 per annum, payable in monthly installments of $100. The charter provides that the qualifications of an elector for a city office shall be the same as those prescribed by the state laws for electors at a general election, and that the city elections shall be held and conducted in accordance with the provisions of the laws of the state for holding general elections.

Upon the facts and conditions above stated, petitioner, by his counsel, contends on many grounds that his attempted removal from his said office was unauthorized, illegal, and abortive. He attacks the constitutionality of the "recall" amendment, and contends, not only that it has no place in the general system of the American republican form of representative government, and undertakes to give to a part of the people in their primitive capacity the power to make laws, which resides only in the Legislature, but also that it expressly violates certain specific provisions of the state Constitution which he "lays his finger upon." He also contends that the recall, even if valid, is not retroactive, and does not apply to the petitioner, who was elected and installed in office before the amendment went into effect at the date of its ratification by the State Legislature; and that for the reasons stated it cannot, in the nature of things, apply to members of the city council. Other contentions are also made, which need not be here enumerated. But, in our view of the case, it is not necessary to examine the positions taken by petitioner above stated, because, in our opinion, we must sustain his further contention that the proceedings by which he was removed were void—even assuming the recall amendment to be valid—for the reason that the city clerk did not examine the great register, and therefrom ascertain that the petition for removal contained the requisite number of persons authorized to sign such petition, and because it appears that it was not so signed. It appears from the pleadings and a stipulation in the case, as well as from the briefs, that the petition was not signed by the requisite number of persons whose names were on the great register; although it appears that, in addition to 339 of such persons who were on the great register, there were enough of other persons who had made affidavits of registration during the year 1904, which affidavits had been bound together and indexed by the county clerk, to constitute the 25 per cent. of voters. It is contended by respondents that, notwithstanding these facts, the certificate of the city clerk must be taken as conclusive that he did examine the great register and ascertain therefrom, etc.; but it is not necessary to discuss the question whether a clerk's certificate that he did ascertain the necessary facts from the great register should be considered as conclusive, because the clerk's certificate in the case at bar is, on its face, substantially the same as the stipulation. The first part of the certificate is ambiguous, but the subsequent clause, to wit, "The 514 names were compared with the duplicate affidavits of registration and the balance with the originals," shows what he did, and that he did not ascertain the requisite facts from the great register.

The question involved here is not whether persons had properly voted at a certain election without being on the great register if they had made their affidavits of registration. There is no question here as to the right to vote at an election under section 1 of article 2 of the state Constitution, or as to how far the constitutional right might be controlled by a registry law. This is not an election contest involving the qualification of certain persons who had voted at such election. The question here is the sufficiency of a certain procedure leading up to proceedings for the removal of an officer already duly elected and installed in office. In order to inaugurate that procedure so as to give jurisdictional character to the proceedings which are to follow, there must be a compliance with the provision of the law which authorizes the procedure. The provision in the recall amendment, which is the provision of law that governs in the case at bar, is that the petition for removal must be signed by a certain number of electors whose names are ascertained by the city clerk to be on the great register, and the Constitution does not vest in any person the right to sign such petition. There is no room left for ascertaining in any way other than by an inspection of the great register who the petitioners must be. Their names must be on the great register, and ascertained by the clerk to be there, otherwise they are not qualified signers of the petition, no matter what other qualifications they may have. In Huston v. Anderson (Cal.) 78 Pac. 626, and People v. Worswick, 142 Cal. 71, 75 Pac. 663, as well as in other cases, it is definitely settled that the great register is the same now as it was before certain amendments of the Political Code made in 1899, and that affidavits of registration are not a part of said great register. We need not inquire into the purpose of the provision that the signers of the petition must be persons who are on the great register. It may have been intended that newcomers into a district should not be encouraged to try to upset a former election; but, whatever the reason may have been, we must take the provision as it stands, and it clearly provides that the petitioners must be persons whose names are on the great register.

Under the foregoing facts we are of opinion that the said petitioner was not legally removed from his said office; that he should have been recognized by the respondents as a member of the city council until the expiration of the term of office for which he had been elected; and that the respondent the city auditor should have drawn his warrant for petitioner's salary for said month of September, 1904, and respondent, the said treasurer, should have paid the same. However, as petitioner's term of office has expired, a writ of mandate as prayed for to the respondents who are members of the city council could now have no effect, and will not be now ordered. But petitioner is entitled to his salary for the month of September, 1904, and also, of course, for subsequent months until the end of his term; and it is ordered that a writ of mandate issue from this court in this proceeding, requiring and commanding the auditor of said city of Los Angeles to draw his warrant in due form of law in favor of petitioner herein for $100 for his salary as said councilman for the said Sixth Ward in said city for the month of September, 1904, and commanding the treasurer of said city to pay said warrant.

We concur: SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.

BEATTY, C. J. I dissent. None of the constitutional questions affecting the validity of the recall amendment to the Los Angeles charter are decided by the court, and I shall not discuss them. But assuming, as the court does, for the purposes of the decision, that the amendment is valid, I wish merely to point out what I deem to be the error in the conclusion of the court from its own premises. It is held to be essential to the jurisdiction of the council to order an election, that the petition of the electors shall be accompanied by a certificate of the clerk that the petition is sufficient, and that this certificate must show that it is based upon a comparison of the signatures with the entries in the great register (meaning thereby, in this instance, the completed great register of 1902, and ignoring the nearly completed great register of 1904). I do not concur in this view, but, conceding for the present that it is correct, it is plain to my mind that the clerk's certificate, even on the view of the court, is in full compliance with the charter. It is quoted in the opinion of the court, and the criticism upon it is that the first part of it is ambiguous, but that the subsequent clause shows what the clerk did. I think, on the contrary, that nothing could be clearer, more direct or unequivocal, than the first part of the certificate down to and including the words, "and I hereby certify that the amended petition is sufficient." So far it is in exact and literal compliance with the charter, and contains everything that the charter requires. There is no ambiguity and no deficiency. It shows, that is to say, that he has examined the great register, and from that ascertained that the petition is signed by the requisite number of electors entitled to vote for the successor, etc. Where is the ambiguity to which the court refers? I certainly can discover none, and, unless the following clause contains something inconsistent or contradictory, it may and must be treated as mere surplusage. I am equally unable to discover the assumed inconsistency or contradiction. All that appears from the last clause is that the names were compared with the original and duplicate affidavits of registration—a statement not in the slightest degree inconsistent with the first part of the certificate. For every name on the great register there is a corresponding affidavit on file, and a statement that such affidavits have been compared does not, on any known principle of construction, invalidate a certificate that the register has been examined. Both statements may be entirely and literally true, and, if the first satisfies the law, the latter is merely superfluous and harmless. If this view is correct, the certificate was sufficient on its face, and as against this collateral attack upon the order of the council that is conclusive in favor of the jurisdiction. It is of no consequence what may be alleged to the contrary in the pleadings, or stipulated by the parties, or stated in the briefs. If the certificate was sufficient on its face, the jurisdiction of the board cannot be assailed. If the record shows jurisdiction, it cannot be impeached by allegation or proof aliunde. For these reasons it seems clear to me that the opinion of the court fails to sustain itself on the purely technical grounds upon which it is rested.

I am also of the opinion that if the clerk's certificate could be construed to mean what it is held to mean, and what is said to be the fact, viz., that he did not find the requisite number of names of petitioners on the completed great register, and could only find them by resorting to the affidavits of registration from which the register of 1904 was to be made up, the council still had jurisdiction to order the election. The sole qualification of a petitioner is the right to vote for a successor to the incumbent whose removal is demanded, and the council derives its jurisdiction to order the election from the filing of a petition by the requisite number of electors so qualified. This petition must, it is true, go first to the clerk, who, before he submits it to the council, must satisfy himself that it is sufficient. But his decision upon its sufficiency is not final, or binding upon the council, and only determines whether it shall be submitted for their consideration, for, when so submitted, they are empowered, and it is therefore their duty, to determine for themselves whether it is sufficient. St. 1903, p. 575. If this is what the statute means (and it is the construction for which petitioner contends) the clerk's certificate would seem to be of very little practical consequence as affecting the jurisdiction.

But, conceding that the clerk's certificate is essential, and that it must show that he has found the requisite number of names on "the great register," the important question remains: What is the great register to which this charter provision refers? On the 1st of January of every even-numbered year the clerk or registrar commences the registration of voters for the ensuing general election, and the work of registration goes on continuously until 40 days previous to such election. The great register for that year is then completed, and after the general election in November becomes functus officio except for the purpose of determining the right to vote at ensuing local or special elections occurring prior to the close of registration in the next even-numbered year. In case of any such election, inscription in this old register secures to the elector the right to vote, although a new registration may be in progress, and he may not have registered again. People v. Worswick, 142 Cal. 171, 75 Pac. 663. But an elector whose name is not on the old register is also entitled to vote if he has complied with the registration law by filing the proper affidavit, and this right to vote is unaffected by the failure of the clerk —if he has failed—to perform the simple and imperative clerical duty of entering his name in a book of registration. In legal contemplation his name is on the great register when he has complied with the law by doing everything he could do, and when in due performance of official duty it ought to be there. Especially is this so in view of the fact that no delay in inscribing his name in the register affects or impairs his right to vote, or the legality of his vote when cast. His ballot must be received by the election officers if his name is on the precinct register, and the file of affidavits constitutes the precinct register, which is all-sufficient for the purposes of the election, whether the substance of the affidavits has been transcribed in the great register or not.

In view of these conditions it must be assumed that the freeholders of Los Angeles and the members of the Legislature in adopting and ratifying this recall amendment to the charter foresaw, and intended to provide for, the contingency out of which this controversy has arisen; the contingency, that is to say, of a recall petition being filed at a time when the right of some electors to vote for a successor to the incumbent would be shown by the old great register completed in a former year, and the right of others to vote could only be shown by reference to the incomplete great register of the current year. What, then, did they mean by directing the clerk to examine the great register for the purpose of determining the sufficiency of the petition? Did they mean that he was to confine his examination to a book which would afford only partial information, and would not disclose the names of all electors entitled to vote, or that he was to examine everything answering to the description of great register from which the requisite information could be obtained? The sole object of the examination being the ascertainment of the number of qualified electors signing the petition, it is my opinion that not only the old register, but the new register, was intended, and that it was the right and duty of the clerk to take account not only of the names actually inscribed in the new register, but of every name which legally and of right should be there. This is the liberal and beneficial construction which is justly applied to all laws affecting the elective franchise. I do not think we are called upon or justified in construing the law in any other spirit. The people of Los Angeles have chosen to make an experiment in municipal government by applying to municipal business a principle and a practice which obtains universally in the conduct of private business. They propose to appoint their agents not absolutely for a fixed term, but for a term of two years, subject to the condition that their authority may be revoked whenever they have forfeited public confidence by any failure of diligence or lack of capacity in dealing with the matters confided to their discretion.

The success or failure of this experiment is exclusively the affair of the people, who have chosen to make it, and if it is not an infringement of the Constitution it is the business of the courts to let it have a fair trial. It may prove a wise departure or the reverse. If found to involve evil consequences, no doubt it will be repealed; but in the meantime its policy or impolicy is a question with which the courts are not concerned.

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146 Cal. 484

O'CONNOR v. GRAND LODGE A. O. U. W. OF CALIFORNIA. (S. F. 3,835.)

(Supreme Court of California. April 4, 1905.)

MUTUAL BENEFIT INSURANCE — CONTRACT — CONFLICTING PROVISIONS — CONSTRUCTION — APPLICATION — WILLFULLY ERRONEOUS ANSWER — EVIDENCE — SUFFICIENCY — MATERIALITY OF ANSWER—QUESTIONS FOR JURY.

1. The constitution and by-laws of a benefit society are a part of the contract of insurance, where the benefit certificate provides that it is issued subject to the laws of the order, and the use of the term "warranty" in the application for insurance in such society, in relation to the effect to be given the answers of the applicant, is not conclusive that the answers are warranties.

2. The rule that all the provisions of the contract of insurance will be liberally construed in favor of the assured and against the insurer is applicable to the contracts of insurance between a benefit society and its members.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1870.]

3. Where the medical examination on an application for membership in a benefit society made the answers of the applicant warranties, and the constitution of the society provided that the certificate should be void if the applicant should willfully make any erroneous statement, or should intentionally conceal any material fact, the provisions of the contract were conflicting, leaving it in doubt whether it was intended that the answers should be literally true, or only that they should not be willfully erroneous, and, as the doubt was created by the society, the assured was relieved from the obligation of a strict warranty.

4. In an action on a benefit certificate, evidence examined, and *held* to show that insured's answer in his application that he had not been afflicted with rheumatism was willfully false.

5. Where the parties to a contract of insurance have made the matter material as to an applicant, at the time of making application, having been affected by rheumatism, the only question for the jury is whether he had been, in fact, so affected, and, if so, whether his unqualified denial of the fact was a willfully erroneous misstatement.

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Mary J. O'Connor against the Grand Lodge of the Ancient Order of United Workmen of California. From a judgment for plaintiff, defendant appeals. Reversed.

D. D. Hirshberg, for appellant. W. H. Bodfish, for respondent.

LORIGAN, J. This is an action to recover the sum of $1,000 claimed by plaintiff as beneficiary under a certificate issued by the defendant to her son, Richard J. McKeown, on September 3, 1900. The assured died January 1, 1902. Defendant contested the right of plaintiff to recover solely upon the ground that in his examination by the medical examiner of defendant her son gave false answers as to his own health and that of one of his brothers, which false statements it is insisted under the terms of the contract of insurance rendered it void. The case was tried before a jury, a verdict rendered in favor of plaintiff, and from a judgment entered thereon in her favor defendant appeals upon a bill of exceptions.

The answers relied upon as being false are the answer "No" to the question whether he had ever been affected with the disease or condition of rheumatism, and to the question, "Give as accurately as possible the items of family history," to which he responded, under the item "Brother's age," as follows: "31; health good, living; 33, health good, living." At the time these answers were made the evidence conclusively shows that one of his brothers (Thomas) was sick with pulmonary consumption, and died a month later of that disease; but there was evidence from which the jury would be warranted in finding that the assured did not know, at the time he gave his answer relative to this brother's condition of health, that he was afflicted with the disease. There was also evidence to the effect that in January and February, 1900, and prior to August 27th of that year, which was the date when the medical examination took place, the assured had been afflicted with rheumatism. The evidence upon this subject will be discussed later. Upon the trial the contention of appellant was that under the contract of insurance between the defendant corporation and the assured the answers to these questions contained in the medical examination for membership, and which were also attached to the application for a beneficiary certificate as a part thereof, were warranties, and requested the court to instruct the jury that, if it found that these answers, or either of them, to the questions asked, were in fact untrue, it should return a verdict for the defendant; that under the terms of the contract, as the assured warranted the truthfulness of his answers, the jury was only concerned with the question whether such answers were true or untrue; that, if it found they were in fact untrue, it was immaterial whether they were willfully or intentionally so: that, if untrue in fact, plaintiff could not recover. The court refused to take this view of the contract, or to give such instructions, but, on the contrary, instructed them as follows: "The view that I take of the law upon the subject is this: Any erroneous statement made by the applicant, or any matter which he conceals or omits to disclose, does not, if he is otherwise entitled to recover, operate to defeat recovery of the plaintiff, unless said statement was willfully made, or unless said concealment or omission to disclose the facts suppressed was an intentional concealment or omission." Referring to the alleged facts as to the applicant having had rheumatism and his brother consumption, the court further said: "If you are satisfied that such misrepresentation was so made, and willfully made, or intentionally made, then the plaintiff, his mother, is not entitled to recover. But, if you are not satisfied of that fact, then your verdict should be for plaintiff for the amount claimed."

The first question presented for consideration, and the main point on this appeal, is as to the accuracy of these instructions so given, and this must be determined from a consideration of the terms of the contract of insurance entered into between the assured and the defendant corporation. As bearing on this question it appears that the constitution of the defendant grand lodge provided that no member of the order could receive the benefits of the order—a right to participate in the beneficiary fund evidenced by the issuance of a beneficiary certificate —except on taking the workman degree in a subordinate lodge. In applying for membership in such subordinate lodge it was required that the applicant should submit to a medical examination, make answer to certain questions concerning his health and that of members of his family, and enter into certain written agreements. Pursuant to these requirements, in his application for membership in the local lodge (Harmony Lodge, No. 9, of San Francisco) August 27, 1900, the applicant, McKeown, declared in writing that, "having become acquainted with the objects of your order, I hereby make application for membership in your lodge, and do declare upon my honor as a man that the statements by me subscribed herein are each and every one of them true. * * * I do hereby warrant the truthfulness of the statements in this application, and consent and agree that any untrue or fraudulent statement made therein, or to the medical examiner, or any concealment of facts by me in this application, * * * shall forfeit the right of myself and my family, or dependents, or beneficiaries, to all benefits and privileges therein." Accompanying this application to the local lodge, and constituting part of it, were the questions and answers asked and given upon the medical examination (including those in dispute), signed by the applicant, and certified to by the medical examiner of the local lodge; and this application, thus signed, certified, and also approved by the grand medical examiner, formed the basis for an application to the grand lodge for the issuance of a beneficiary certificate after the applicant had received the workman degree in the local lodge. This application for a beneficiary certificate is made to, and, if granted, is issued by, the grand lodge, and with reference to the application therefor it is provided in the constitution of said grand lodge: "Application for Beneficiary Certificate. Each member receiving the junior workman degree, and applying for the workman degree, shall make application for the rights, privileges, and benefits of the order, and in substance as follows, which shall be attested by the recorder of the subordinate lodge, with the seal attached. Such application shall constitute part of the contract of each member with the order, and if the applicant shall willfully make any erroneous statements therein, or shall intentionally conceal, or omit to disclose, any fact material thereto, his beneficiary certificate shall be void." This provision of the constitution also sets forth the form of application to be used in applying for said beneficiary certificate, and was the one used by McKeown in making his application to the grand lodge. In it the applicant agrees "that compliance on his part with all the laws, regulations, and requirements which are or may be enacted by said order is the express condition upon which" he is "to be entitled to participate in the beneficiary fund." It also contains the following: "I certify that the answers made by me to the questions as propounded by the medical examiner of this lodge, which are attached to this application and form a part thereof, are true, and if it should thereafter appear that I have made false statements in any particular, notwithstanding that I may in the meantime pay all my regular assessments, it is hereby agreed on my part that said false statements shall render null and void forever my beneficiary certificate, to be hereafter issued upon the basis of this agreement and the medical examiner's report attached to this application." Under this form of application the only statements which the applicant makes are that he has applied for the workman degree in a local lodge, and that the answers to the questions propounded by the medical examiner of such lodge, and which are attached to the application for the beneficiary certificate and form a part of it, are true. There are no statements of any other facts made or provided for in the application. The beneficiary certificate which is issued upon such application by the grand lodge recites that "this certificate is issued subject to, and is to be construed and controlled by, the laws of the order." In such certificate there is no reference made to the application, or to any of the matters contained in it; nor is reference made to any particular law of the order which is to control it, or under which it is to be construed. These are the only matters pertinent to a consideration of what the contract between the parties was as affecting the question whether the instructions which the court gave to the jury were or were not correct.

It is insisted by the appellant that the contract of insurance consists of the application for membership in the local lodge, which embraced the medical examination as a part thereof, the application for the beneficiary certificate, which is attached to such medical examiner's report, and the beneficiary certificate. So contending, it is claimed that as he "warranted the truthfulness of his statements," which included those that he had never been affected with the disease or condition of rheumatism, and that the health of his brother Thomas was good, he was bound by the literal truth of his answers in those particulars; that his warranty as to the truth of all answers was the essential and agreed basis of the contract of insurance, and that the only matter for consideration by the jury was whether or not the answers to the questions so warranted were true in point of fact; that under the warranty the truth of the facts warranted was a condition precedent to recovery, and that it was a false quantity and wholly unimportant whether such statements were willfully or intentionally untrue when made by the applicant, or not; and that, under the warranty in the contract, inquiry upon this latter point was foreclosed. We make no question but that, if the contract of insurance is to be discovered from an examination solely of the matters referred to by applicant, its contention as to the scope of inquiry proper for the jury might be correct, and that only the question of the truth of the statements could be inquired into. Parties to insurance contracts, as in other contracts, are at liberty to agree to such terms and conditions as they please, and the courts can only give effect to the contracts as they make them; so that where, in a contract of insurance, the applicant warrants the truthfulness of his statements, and such warranty forms the sole basis for the contract, and it is stipulated that any untrue statement shall avoid the policy, his right to recovery will be defeated, should it appear that such statements are in fact untrue. Under such circumstances it is immaterial that the applicant believed his statements to be true, or that they were made in good faith; and it is equally unimportant whether such misrepresentations were either intentionally or accidentally made. He warranted their truthfulness and is bound by the warranty. Bacon on Benefit Societies, vol. 2 (3d Ed.) § 197.

But the contract of insurance in the case at bar is not made up solely of the documents referred to by appellant. There also enter into it, as an important and substantial element, the constitution and by-laws of the order. This is apparent from the language of the beneficiary certificate itself, which provides that it "is issued subject to, and is to be construed and controlled by, the laws of the order." But, even if there were no such express provision, the general rule of law is that, in contracts between benefit societies and their members, such laws enter into and are considered as a part of them. Niblack on Benefit Societies, § 136; Bacon on Benefit Societies (3d Ed.) § 161; Haas v. Mutual Relief Association, 118 Cal. 9, 49 Pac. 1056; Grand Lodge A. O. U. W. v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142; A. O. U. W. v. Jesse, 50 Ill. App. 105; Robson v. United Order of Foresters (Minn.) 100 N. W. 381; Am. & Eng. Ency. of Law, vol. 3, p. 1081. So that, in construing the contract in question, there must be taken into consideration, not only the matters referred to by counsel for appellant as constituting the contract, but also the constitution of the grand lodge as the law of the order and as part of the contract. All these papers are in pari materia, and are to be read together as constituting the entire contract. When so considered, we think it is apparent that, in determining the rights of the assured under the beneficiary certificate, it was not intended that the statements made in the medical examination, and which accompanied his application therefor to the grand lodge, were to be considered as warranties, although so denominated. The use of the term "warranty" in the application in the medical examination, and which constitutes only part of the contract, is not conclusive; and even though the declaration is made therein that the statements shall be deemed warranties, yet, if it appears from other parts of the contract that a strict warranty was not intended, such parts must govern. Warranties, on account of their stringent character, are not favored at law. No construction will be indulged in by courts to support them. On the contrary, where the terms of the contract are conflicting, or inconsistent, or are such as to render it doubtful whether it was intended by the parties that the assured should be bound by the literal truth of his statements, no construction will be indulged in which has that effect. The clearest and most unequivocal language is necessary to create a warranty. As the courts are strongly inclined against forfeitures, all the provisions of the contract will be liberally construed in favor of the assured and against the insurer. As is said in National Bank v. Ins. Co., 95 U. S. 673, 24 L. Ed. 563: "When the policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligation of a warranty. The company cannot justly complain of such a rule. Its officers prepared the policy for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." While this language was used in considering a policy of fire insurance, the same rule of interpretation applies with relation to life insurance contracts. Bacon, Benevolent Societies (3d Ed.) §§ 198, 199; Niblack, Mutual Benevolent Societies, § 143; Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125 (cases cited); Fitch v. Am. Life Ins. Co., 59 N. Y. 566, 17 Am. Rep. 372; Price v. Phœnix M. Ins. Co., 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166; Miller v. Mutual Ben. L. Ins. Co., 31 Iowa, 228, 7 Am. Rep. 122; Jennings v. Supreme Council L. A. B. (Sup.) 81 N. Y. S. 99; Robson v. United Order of Foresters (Minn.) 100 N. W. 381; Mouler v. Am. Life Ins. Co., 111 U. S. 341, 4 Sup. Ct. 466, 28 L. Ed. 447.

Applying this rule to the construction of the contract here involved, it must be held that, taking into consideration all its provisions, it was not intended by the grand lodge that the literal exact truthfulness of the answers of the assured to the medical examination should be a condition precedent to the validity of the beneficiary certificate which it issued. Conceding that the warranty contained in the medical examination which accompanied McKeown's application for membership to the local lodge was carried into the contract with the defendant grand lodge, though it may be mentioned in passing as a somewhat significant fact that the word "warranty" is not found or carried forward in the language employed in the form of application for a beneficiary certificate provided in the constitution of the order, yet this was only a part of the contract. Another part of the contract was the laws of the order. While the warranty stipulated for the literal truth of the statements in the medical examination as part of the application to the grand lodge for a beneficiary certificate, and the applicant agreed that any false statement therein should render such beneficiary certificate void, the constitution of the order provided that such certificate should only be void for erroneous statements willfully made, or for intentional concealment of or omission to declare material facts, and the certificate issued provided that the rights of the parties under it were to be construed and controlled by such laws. Thus we have a contract containing inconsistent provisions, one part stipulating that the answers are literally and absolutely true, and the contract void if they are found to be false, while it is elsewhere stipulated that the contract shall be void only if they are willfully erroneous. The provisions of the contract are, therefore, inconsistent and conflicting, leaving it in doubt as to what the intention of the parties was—whether it was intended that the answers should be literally and exactly true as a condition precedent to recovery upon the certificate, or only that they should not be willfully erroneous. This doubt as to the intention of the parties is created by the defendant company, which prepared the terms of the contract, and, under the familiar rule of construction which is supported by all the authorities, this doubt must be resolved against it, as the party whose language it becomes necessary to interpret, and such a construction must prevail as relieves the assured from the obligation arising from a strict warranty. We are satisfied, from these considerations, that the lower court properly construed the contract between the parties, and that the instructions as given were correct.

It is insisted by appellant that the constitution of the order did not prevent it from entering into a contract requiring and providing for the enforcement of a warranty. This contention could only apply if the constitution of the order did not enter into the contract between the assured and the grand lodge as part of it. But, as we have shown that it does so enter, and that the constitutional provision particularly referred to by its language qualifies the express warranty, which, but for such provision, would otherwise control, there is no force in the point.

We have discussed the proper construction of this contract, and the correctness of the instructions given by the lower court, in view of a new trial which must be ordered. The issue submitted to the jury was whether the assured had given willfully erroneous answers at the medical examination concerning the condition of his brother's health and his own previous condition as to having been affected with rheumatism. The jury by a verdict in favor of plaintiff necessarily found in her favor that the assured had, at least, not willfully made erroneous statements as to either of these matters. As far as the statement concerning the health of his brother is concerned, as we have heretofore said, the jury was warranted, under the evidence on that point, in concluding that the assured, when he answered the question, did not know or believe that his brother was in ill health or afflicted with the disease of which he died, and hence his statement to the contrary was not willfully erroneous. Upon the other matter, as to whether the assured had himself been affected with rheumatism in January and February prior to the date of the medical examination, the evidence presents an entirely different situation. In that regard, it is urged by appellant that the verdict of the jury, in as far as it assumed to find that the assured had not been, in fact, affected with rheumatism, or that his answer that he had not been so affected was not willfully erroneous, was contrary to the evidence. We think this contention must be sustained. Upon the fact that he had been so affected and knew it the evidence is all one way. There is no conflict. The assured lived with his mother, the plaintiff beneficiary, and the evidence shows, both from the admissions of the assured and the statement of his mother, that he had been affected with rheumatism during the period claimed, and that he had gone to Byron Springs for relief. There was also evidence that in January and February, 1900, he received sick benefits for several weeks from another order to which he belonged, and that he informed visiting brothers of such order that he was afflicted with rheumatism. Under these facts, if the verdict of the jury is to be considered as a finding that the assured made truthful answer when he stated that he had not been affected with rheumatism, the verdict of the jury is contrary to the uncontradicted evidence upon this point.

Neither can the verdict be sustained on the theory that the jury found that, notwithstanding he did have rheumatism, his statement to the contrary was not willfully erroneous. There was no warrant in the evidence for such a finding. The burden, it is true, was upon the defendant corporation to show, not only that his statement was erroneously made, but that it was willfully so. Bacon on Ben. Soc. vol. 2 (3d Ed.) § 469; Supreme Lodge K. & L. of H. v. Wollschlager, 22 Colo. 213, 44 Pac. 598; Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446; Ins. Co. v. Ewing, 92 U. S. 377, 23 L. Ed. 610; Clapp v. Mass. Ben. Ass'n, 146 Mass. 526, 16 N. E. 433. In making such proof it was not essential to offer positive and direct evidence upon the subject. Whether a misstatement is willfully made is to be determined from the facts and circumstances surrounding or accompanying the declaration, the directness and clearness of the question, and the knowledge of the declarant upon the subject of the inquiry. The evidence at bar shows that the medical examiner made particular inquiry upon all of the questions contained in the medical examination, and, among others, as to whether the assured had been affected with rheumatism, and that he answered, "No." It shows that as a fact he had been affected with it for some weeks, and within the year prior to the examination, and that he knew that he had been so affected. It was a matter about which, from his positive knowledge upon the subject, he could not be mistaken, and concerning which he was directly interrogated, and to which his attention was particularly drawn. There was nothing in the evidence from which the jury could infer that his statement relative to this matter was not willfully erroneous. On the contrary, the uncontradicted evidence presented a situation where no other reasonable or logical inference could be deduced than that the statement was willfully erroneous. The statement was erroneous in point of fact, and erroneous to the knowledge of the assured, and the evidence offered no warrant for the conclusion that, although the assured knew the fact, and misstated it in the face of such knowledge, he merely unintentionally did so.

The court will not disturb a verdict where there is some evidence to sustain it, but this is not the situation here. Here there is not only no evidence to sustain the verdict, but it is against the uncontradicted evidence on the subject. The verdict was doubtless rendered upon the assumption by the jury that the statement of the assured relative to rheumatism was concerning a matter not material to the risk—that it was unimportant. But with this the jury had nothing to do. The parties to the contract had made it material, and the only question for the jury was whether the assured had been in fact so affected, and, if he had been, was his unqualified and square denial of the fact a willfully erroneous misstatement?

Some errors predicated upon rulings of the court as to the admission and rejection of testimony are also urged by appellant as grounds for a reversal. The rulings were clearly right, and no particular discussion concerning them is necessary.

The judgment is reversed, and a new trial ordered.

We concur: BEATTY, C. J.; HENSHAW, J.

ANGELLOTTI and SHAW, JJ. (concurring). Upon further consideration, we have reached the conclusion that the instructions of the court below as to the effect of erroneous statements made by the insured in his answers to questions of the medical examiner, attached to his application for a beneficiary certificate, were correct. We concur in the opinion and in the judgment.

I concur in the judgment: VAN DYKE, J.

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146 Cal. 549

STORY v. NIDIFFER. (S. F. 3,672.)

(Supreme Court of California. April 7, 1905.)

CROSS-EXAMINATION—ADMISSIONS — COMPARISON—OBJECTION NOT MADE BELOW.

1. Defendant may not, on cross-examination, ask questions as to a matter in regard to which the witnesses did not testify in chief, and the purpose of which is not to test the correctness

of their testimony, but to draw out facts which are matters of defense.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 949-954.]

2. The purpose of the evidence being to show an admission of defendant that his cattle had done the damage to plaintiff's crop, and having gone no further, testimony that defendant had told witness that he had offered plaintiff a certain amount for damages committed by his cattle was properly admitted.

3. Testimony offered by defendant, in an action for the destruction by his cattle of growing Indian corn on plaintiff's land, to institute a comparison between the corn grown on the adjoining land of B. and plaintiff's crop, is properly excluded; B. having, without being contradicted, testified that his land, with the exception of a part on which he had sowed Egyptian corn, was unlike plaintiff's land.

4. Defendant, in an action for destruction of growing corn, not having objected to evidence of the value of a matured crop, and not having excepted to the instruction placing the damages at the value of the crop when matured, less the cost of caring for and harvesting it, and not having asked for any other instruction, may not, on appeal, for the first time, complain that a wrong rule of damages was given.

Commissioners' Decision. Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by T. L. Story against J. M. Nidiffer. Judgment for plaintiff. Defendant appeals. Affirmed.

H. H. Welsh, for appellant. J. O. Traber, for respondent.

CHIPMAN, C. Trespass. The cause was tried to a jury, and plaintiff had a verdict for $325. Judgment passed accordingly, from which defendant appeals, and also from the order refusing his motion for a new trial.

Plaintiff was in possession of 40 acres of land in Fresno county under a contract to purchase. He planted about 35 acres to Indian corn. The complaint charges that the defendant's cattle in the early part of July, 1902, "ran and trespassed upon said land, and ate and entirely destroyed said corn, so that the same will not mature and produce a crop, and the same is now entirely valueless." The complaint was filed July 12, 1902. There was evidence tending to show that plaintiff prepared his land for planting corn, and planted the land in such manner and at such time, its quality considered, as would ordinarily have produced an average crop without further attention. There was much testimony touching this matter, and the evidence of plaintiff that the methods of husbandry adopted by him would have given him a crop was controverted by defendant's witnesses; thus producing a conflict on the vital question—whether or not plaintiff would have had a crop, barring the alleged trespass. There was evidence that defendant's cattle did enter upon, tramp down, and eat off the corn in the early days of July, when it was about 2 or 2½ feet high, and in a thrifty and growing condition, and did so far destroy it as to make it impossible for the corn to revive and mature a crop. This evidence was also strongly controverted and disputed by defendant's witnesses. Under such conditions of the record, this court, as has been frequently held, cannot disturb the implied findings of the jury.

Defendant assigned certain errors of law committed at the trial in ruling upon the admissibility of evidence. The first six exceptions arose on the cross-examination of plaintiff's witnesses. The objection was that the questions were not proper on cross-examination, and, we think, was rightly sustained. The questions related to the kind of land belonging to one Bridges, adjoining plaintiff's land, and the crop grown thereon. Nothing was said in chief about Bridges' land by the witnesses cross-examined. The questions might have had a tendency, by comparison, to prove defendant's defense, but it was not permissible for defendant to establish his defense in this manner, in violation of settled rules governing cross-examinations. Defendant's purpose seems to have been not so much to test the correctness of the witnesses' testimony as to draw out facts which were matters of defense.

Exception No. 7 was taken on defendant's motion to strike out the statement of the witness that in a conversation with defendant he told witness that he had offered plaintiff a hundred dollars for damages committed by his cattle. Defendant's point is that the conversation related to a compromise, and hence was inadmissible. Such was not the purport of the statement made by defendant. The purpose of the evidence was to show an admission that defendant's cattle had done the damage, and the evidence went no further. There was other evidence that defendant's cattle caused the injury. To exception 9 it may be answered that there was sufficient evidence to go to the jury at the close of plaintiff's case in chief, and the motion for a nonsuit was properly denied.

Exceptions 10, 11, 12, and 13 arose out of plaintiff's objection to certain testimony offered by defendant to institute a comparison between the corn grown on Bridges' land, above referred to, and plaintiff's crop. Bridges had testified (which was uncontradicted) that his land was unlike plaintiff's land, except a portion which was similar, but on this land he sowed Egyptian corn—not Indian corn, such as plaintiff planted. The balance of his land was planted in Indian corn, but was a different character of soil, requiring different treatment, as fully appeared. It was not error, therefore, to exclude the evidence, for it furnished no just or fair standard of comparison.

The remaining point urged by the defendant is that the court gave an erroneous instruction to the jury, as follows: "You are instructed that, if you find from the evidence that defendant's cattle destroyed the crop of corn owned by plaintiff, that the value of the corn when it would have matured, less the cost of caring for and harvesting the same, would be the detriment proximately caused by the destruction thereof." It appears from the record that plaintiff was permitted, without objection, to introduce testimony to show, among other facts, the value of the crop when matured, as a guide to the jury in determining the damage. There was no exception taken to this instruction, which seems to have been given pursuant to the theory on which plaintiff was permitted to present his case. And defendant asked for no instruction presenting any different measure of damages. In his specification of errors of law, defendant made no reference to this instruction. In his specifications of the insufficiency of the evidence, the points are that there is no proof that defendant owned or controlled the trespassing cattle, and that the failure of plaintiff's corn to mature was due to his failure to properly plant, cultivate, and care for the corn. There was no specification that there was any failure of proof as to the value of a matured crop, and other facts referred to in the instruction, except as above stated. Instructions must be excepted to in order to enable the appellant to take advantage of errors in them, if such exist. Instructions in civil cases are not deemed to have been excepted to. Code Civ. Proc. § 647. We do not think defendant should be heard now to raise the question for the first time as to the correctness of the instruction, even though plaintiff seems to be willing to meet the point without urging the objection that defendant failed to note an exception to the instruction. Defendant could have saved his point at the trial by objecting to testimony as to the value of a matured crop. Not having done so, and not having excepted to the instruction given in harmony with the theory on which the evidence went to the jury, we do not think the appellate court should now concern itself with the question. To do so would give sanction to a practice which would abrogate well-settled rules of procedure, and make it competent for the parties to cause alleged errors of the lower court, committed at the trial, to be reviewed here, which that court was given no opportunity to correct by timely objection or exception.

It is advised that the judgment and order be affirmed.

We concur: GRAY, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: LORIGAN, J.; HENSHAW, J.; SHAW, J.

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146 Cal. 443

COATS v. COATS. (Sac. 1,373.)

(Supreme Court of California. April 3, 1905.)

APPEALS—RULES OF COURT—FAILURE TO FILE POINTS AND AUTHORITIES—DISMISSAL OF APPEAL.

An appeal will be dismissed where appellant fails without excuse shown to file his points and authorities within thirty days after filing the transcript, as required by Supreme Court Rule 2, subd. 4 (64 Pac. vii).

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3108–3110.

Commissioners' Decision. Department 1. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Anna J. Coats against A. H. Coats. From an order denying defendant's motion for a new trial, he appeals. Appeal dismissed.

E. T. Cosper, for appellant. Dixon L. Phillips, for respondent.

COOPER, C. This is a motion to dismiss the appeal from an order denying the defendant's motion for a new trial, upon the ground that he failed to serve or file his points and authorities within 30 days after filing the transcript in this court.

The transcript was filed January 3, 1905. The service of notice of this motion and of the papers in connection therewith was made upon appellant's attorney on February 4, 1905, and the points and authorities subsequently filed by appellant February 6, 1905. It is provided in rule 2, subd. 4 (64 Pac. vii), of this court that "thirty days after filing of the transcript the appellant shall file with the clerk his printed points and authorities, and with it proof of the service of one copy thereof upon the attorney * * * of each respondent who shall have appeared separately in the Supreme Court"; and subdivision 1 of rule 5 provides: "If the * * * appellant's points and authorities be not filed within the time prescribed the appeal may be dismissed, on motion upon notice given. If * * * the points and authorities though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion." The appellant's points and authorities were not filed within 30 days after filing the transcript, and were not on file when the notice of this motion was given. No order was made, or stipulation given, extending the time. No unavoidable accident or excusable mistake is shown. Not only this, but no answer or points and authorities are filed here in opposition to this motion.

Rules of court are made for the orderly and proper dispatch of business, and must be enforced. Where a party willfully fails to comply with them, his appeal will be dismissed. Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878; McCabe v. Healey, 139 Cal. 30, 32, 72 Pac. 359; Brooks et al. v. Union Trust & Realty Co. (filed Feb. 28, 1905) 79 Pac. 843.

The appeal should be dismissed.

We concur: CHIPMAN, C.; GRAY, C.

For the reasons given in the foregoing opinion, the appeal is dismissed: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

146 Cal. 553

McGLEW v. McDADE. (S. F. 3,901.)

(Supreme Court of California. April 7, 1905.)

VOLUNTARY PAYMENT—RIGHT OF RECOVERY.

One who voluntarily pays the debt of another, without his request or promise of repayment, cannot recover therefor of him.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Money Paid, §§ 1, 13.]

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Action by J. B. McGlew against John J. McDade, administrator of Anastasia McGlew, deceased. Judgment for plaintiff. Defendant appeals. Reversed.

Grant A. Laughlin, for appellant. Chas. H. Hubbs, for respondent.

COOPER, C. Plaintiff brought this action to recover upon a claim against the estate of his deceased sister for $1,234. He recovered the sum of $364, which included the following item: "To amount paid Dr. D. E. Barger by claimant, for professional services rendered to decedent, $325." Defendant prosecutes this appeal from the judgment and order denying his motion for a new trial, and the only dispute is as to the quoted item. It appears from the testimony of Dr. Barger that he performed professional services for deceased from October, 1899, to October 30, 1901, the date of her death, and that $325 was the reasonable value of said services; that he had a claim against the estate for such services, but that it was paid by plaintiff. Plaintiff testified that the doctor wanted some money, and he paid him. Plaintiff did not even require an itemized bill, nor did he have any information as to the correctness of the bill. He paid it without request, and as a mere volunteer. In such case the law will not allow the person making the voluntary payment to recover. The estate was not bound to accept the plaintiff as its creditor without its consent. If a claim existed in favor of Dr. Barger, he should have made it out in proper form, and verified and presented it to the executors of the estate for allowance, or he could have assigned it to plaintiff. In such case the law would not have allowed Dr. Barger to testify as to any matter of fact that occurred before the death of deceased. Code Civ. Proc. subd. 3, § 1880. Here he was permitted to testify in favor of plaintiff. There can be no recovery for the voluntary payment of the debt of a third party without request, and with no promise of repayment by the party whose debt is paid. Parsons on Contracts, vol. 1, p. 471; McGee v. City of San Jose, 68 Cal. 91, 8 Pac. 641; Curtis v. Parks, 55 Cal. 106; Huddleston v. Washington, 136 Cal. 519, 69 Pac. 146.

We advise that the judgment and order be reversed.

We concur: GRAY, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

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146 Cal. 518

GLENN COUNTY v. JONES et al. (Sac. 1,322.)

(Supreme Court of California. April 6, 1905.)

PRINCIPAL AND SURETY—CONTRACTOR'S BOND—RELEASE OF SURETY.

1. Civ. Code, § 2840, provides that a surety is exonerated in like manner with a guarantor. Section 2819 provides that a guarantor is exonerated if by any act of the creditor, without his consent, the original obligation is altered in any respect, etc. Under a contract for the erection of a schoolhouse, the contractor was to be paid one-third of the contract price when all the materials were delivered on the building site. The contractor's bond was conditioned on the performance by him of all things necessary to the erection of the building, according to the contract. *Held*, that the premature payment of the first installment by the county supervisors, without the sureties' consent, before all the materials were delivered, released the latter.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, § 284.]

2. The sureties were entirely released, and not only to the extent of the premature payment.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, § 284.]

Commissioners' Decision. Department 2. Appeal from Superior Court, Glenn County; Oval Pirkey, Judge.

Action by the county of Glenn, in the state of California, against I. A. Jones, Milton French, and H. J. Summers. Judgment for plaintiff, and defendants French and Summers appeal. Reversed.

Frank Moody and Wm. M. Finch, for appellants. R. L. Clifton and Thos. Rutledge, for respondents.

COOPER, C. Action to recover damages against a contractor and his sureties for failure to build a schoolhouse according to contract. Findings were filed, upon which judgment was entered against the sureties for the penal sum of the bond. From the judgment they have appealed on the judgment roll, accompanied by a bill of exceptions.

The facts are in substance as follows: In October, 1902, defendant Jones entered into a written contract with plaintiff, by the terms of which Jones was to furnish all material and construct for plaintiff a high-school building in the town of Willows, in the said county, for the sum of $5,580, to be paid as follows: $1,860 when Jones shall have delivered all material for said building on the building site; $1,860 when the roof is on; and the balance, $1,860, on full completion and acceptance of the building. Plaintiff required and Jones gave a bond in the sum of $2,500, with appellants as sureties. This bond referred to the contract, plans, and specifications, and was conditioned that Jones should "do and perform all things necessary to the erection of said high-school building according to the said plans and specifications above referred to, and according to the contract of even date herewith." In November, 1902, Jones had delivered the rough lumber and a portion of the materials on the building site, and he then applied to plaintiff, through its board of supervisors, and was paid the first payment, $1,860. This payment was prematurely made without the consent of appellants; and, at the time it was made, the materials that had been delivered on the site did not exceed in value $1,900, and the total value of the materials necessary for the construction of the building was about $5,000. The chairman of plaintiff's board of supervisors testified that Jones came before the board and wanted the contract changed. "He asked the board if there could not be some change made, wherein he would not have to place it [the material] there. My recollection is that the board agreed with him, and wanted to assist him along with the work, and agreed with him that they would make a payment when the rough material was all on the ground." After the payment, Jones pocketed the money, abandoned the contract, and left the materials upon the site unpaid for, most of which were afterwards taken and sold under attachment suits by the materialmen. Plaintiff lost the amount paid, and had to again advertise and let the contract, at an increased cost of $1,070 over the original contract.

The only question that need be discussed is, did the premature payment made by plaintiff release the sureties?

The contract of suretyship imports entire good faith and confidence between the parties as to the whole transaction. The creditor is bound to observe good faith with the surety. He must withhold nothing, conceal nothing, release nothing which will possibly benefit the surety. He must not do any act injurious to the surety or inconsistent with his rights. He must not omit to do any act required by the surety which duty enjoins him to do, if such omission injures the surety. The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no farther. He has a right to stand on its very terms. 1 Story, Eq. §§ 324, 325; Tally v. Parsons, 131 Cal. 518, 63 Pac. 833; Carter v. Mulrein, 82 Cal. 169, 22 Pac. 1086, 16 Am. St. Rep. 99. A surety is exonerated in like manner with a guarantor. Civ. Code, § 2840. "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." Civ. Code, § 2819.

In our opinion, the obligation of the principal was altered in a material respect without the consent of the sureties. The contractor was under the obligation of placing all the materials on the building site before he was entitled to any money under the terms of his contract. By the payment to him before he had done so, he secured the money before performing his obligation. The pressure which would have been exerted upon him to continue in the performance of his contract, and place all the materials on the site, was removed when he received the money. He received it before he was entitled to it, without the consent of the sureties. The sureties had bound themselves upon the assumption that the plaintiff would keep its contract in good faith. We can see no difference in principle if the whole of the contract price had been paid before any of the materials were placed on the ground. In such case could any one doubt that the sureties would have been exonerated? The risk of guarantying the construction of a building, to be paid for when completed and accepted, is quite different from the risk of guarantying its construction if the whole contract price should be paid in advance. In the one case the contractor can only get the money by performing his contract, while in the other he would only pay out the money already received, in performing it. In this case the sureties agreed and guarantied that Jones would place all the materials on the building site, on condition that he was to receive no money until he had done so. They did not agree that, if paid in advance, he would place such materials on the site. By the payment, the hope of reward for further performance was lost, and the temptation to act dishonestly was increased.

It is said in Brandt on Suretyship & Guaranty (2d Ed.) vol. 2, § 397: "A surety for the completion of work to be performed by the principal, when, by the terms of the contract, the principal is to be paid by installments, is discharged if the principal is paid faster than the contract provides. The surety is thereby deprived of the inducement which the principal would have to perform the contract in due time."

The leading case, which has since been followed by the courts almost without exception, is Calvert v. The London Dock Co., 2 Keenes, Chan. 639. There the contractor undertook to perform certain work, and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth upon the completion of the whole work. It was held that the sureties were released by reason of payments exceeding three-fourths of the work done having, without the consent of the sureties, been made to the contractor before the completion of the whole work. The opinion was delivered by Lord Langdale, the Master of the Rolls, in which he said: "What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith, but it also took away that particular sort of pressure by which the contract was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and, under the circumstances, I think that their situation with respect to Streather was so far altered that the sureties must be considered to be discharged from their suretyship." The leading case was followed in this country in the early case of Taylor v. Jeter, 23 Mo. 244. There the owner paid to the contractor the contract price before the completion of the building, and it was held that such payment exonerated the sureties. The court said: "The owner, having notice of them [liens], and paying what by the substantial terms of the contract he was entitled to retain until they were removed, voluntarily abandoned a fund which, according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and which the surety had an equal interest with himself. He must therefore bear the loss occasioned by his own negligence or folly." The cases of Calvert v. The London Dock Co. and Taylor v. Jeter were followed and quoted with approval by this court in Bragg v. Shain, 49 Cal. 131, where it was held that a payment of more than 75 per cent. of the contract price, where the contract provided that 25 per cent. should be paid when the work was completed, had the effect to release the sureties; and in the latter and similar case of Kiessig v. Allspaugh, 91 Cal. 231, 27 Pac. 655, 13 L. R. A. 418, the same rule was adhered to. The question is extensively discussed in a case very similar to this (Board of Commissioners v. Branham [C. C.] 57 Fed. 179), and it was held that where a payment not to exceed $7,840 was to be made when a building was half completed, and a payment was made in the sum of $10,046.68, the sureties were released. To the same effect, see Truckee Lodge v. Wood, 14 Nev. 293; Carson Opera House Association v. Miller, 16 Nev. 327; Simonson v. Grant, 36 Minn. 439, 31 N. W. 861; Ryan v. Morton, 65 Tex. 259; Peters et al. v. Mackay et al., 20 Wash. 172, 54 Pac. 1122; Wehrung et al. v. Denham et al., 42 Or. 386, 71 Pac. 133; Mayhew v. Boyd, 5 Md. 102, 59 Am. Dec. 101; General Steam Navigation Co. v. Rolt, 6 J. Scott (N. S.) 549.

Respondent relies upon certain cases which it claims sustains its theory, but, after a careful examination of them, we are of opinion that they are either erroneous or not in point. The principal one is Hand Mfg. Co. v. Marks, 36 Or. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549. In that case the first payment of $2,000 was to be made when the basement was built and the first-story rough floor laid. The owner let the contractor have $500 on his duebill and paid him $300 before the payment was due. The contractor built the basement and laid the first-story floor, and received the architect's certificate, at which time the duebill was surrendered, and the settlement for the first payment made in full. The court, in its opinion, quotes with approval Calvert v. London Dock Co., supra, and said that, while the owner "may have been guilty of a technical breach of his contract in making the advances, yet it did not operate to the impairment of any reserved security, of which the sureties could complain. * * * All the money thus advanced was applied on account for materials furnished and used in the structure." In the present case the materials were never placed upon the site, nor was the money advanced used in the purchase of materials for the structure. The fund which the plaintiff should have held as security was given up without the consent of the sureties. There is an expression in Meyers v. Wood, 26 Tex. Civ. App. 591, 65 S. W. 671, which supports respondent, but the facts of the case are not clearly stated. It does not appear that the question was argued before the court, and the opinion cites no authority in support of the statement therein made. The same may be substantially said as to Fidelity & Deposit Co. of Maryland v. Robertson, 136 Ala. 379, 34 South. 933. No authority is cited, and no reason given for the statement contained in the opinion. The case of Leonard v. County Court, 25 W. Va. 52, is cited, but it does not sustain respondent's position. On the contrary, it is said in the opinion: "A surety is discharged by any dealings by the creditor with the principal which amounts to a departure from the terms and conditions of the contract. Thus, where the contract is for work or improvement to be paid for by installments, if the principal is paid faster than the contract provides, the surety shall be discharged."

Finally respondent contends that, if the rule be applied as we have endeavored to show it should be, the sureties could only be released to the extent of the premature payment. We do not think the facts of this case warrant the application of such rule. The contract might have been fully performed by Jones if the plaintiff had not given him money before it was due. After he had received more money than he could possibly have made as profit by continuing his contract, the pressure that should have continued to keep him honest was entirely removed, and he was left, without compass or rudder, to follow his own dishonest inclinations. We think it the better rule in a case like this to hold that the sureties are entirely released. Where plaintiff willfully departed from its contract, and gave the contractor money not due him, and the damages occurred by reason thereof, we do not feel called upon to enter the field of conjecture as to whether or not the loss should be shared by the parties.

The judgment should be reversed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment is reversed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

(146 Cal. 545)

LAGOMARSINO v. GIANNINI. (S. F. 3,401.)

(Supreme Court of California. April 7, 1905.)

GUARANTY—CONSIDERATION.

Plaintiff applied to defendant's husband for payment of his note, but he was unable to pay it; and, without any agreement in regard to the note, plaintiff then loaned defendant $100. Thereafter, without any release of defendant's liability for the $100, or other consideration, defendant guarantied payment of the note. *Held*, the guaranty was void for want of consideration.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Guiseppe Lagomarsino against Rosa Giannini, formerly Rosa Lagomarsino. Judgment for plaintiff. Defendant appeals. Reversed.

Jas. F. Cavagnaro, for appellant. Devoto & Richardson, for respondent.

GRAY, C. The plaintiff sets forth in his complaint a promissory note for the principal sum of $350, executed by the husband of the defendant in his lifetime to the plaintiff. He alleges, further, that he demanded payment and threatened suit against the maker of said note, and that thereupon the defendant promised that, if the plaintiff would pay to her the sum of $100 and not commence the suit, the defendant would guaranty the payment of the said note of $350 and the further sum of $100; that thereupon the said plaintiff paid to defendant $100, and the defendant wrote her name across the back of said note and placed figures thereon as follows, to wit: "Mrs. Rosa Lagomarsino, $450." The plaintiff demanded judgment for $450 and interest. On a trial before a jury plaintiff obtained a verdict and judgment for $350. The defendant appeals from an order denying her a new trial.

One of the defenses made at the trial was that the signature of the defendant upon the back of the note was made without consideration. We think the undisputed evidence taken at the trial established this defense. The note executed by defendant's husband was dated January 1, 1898, and was due "on demand." The plaintiff visited his cousin, the husband of defendant, about January 1, 1900, finding him sick in bed, and demanded payment of the note. The cousin replied that he had no money, and his wife, the defendant, asked for a further loan of $100. The plaintiff agreed to make the loan and to deliver the money to defendant's brother. Some two or three days thereafter defendant's brother called on plaintiff and received the $100. This must have been either the day before or on the same day that defendant's husband died, for the latter died on January 3, 1900. In none of those conversations does it appear that anything was said or agreed to the effect that the defendant would pay either her husband's note or the $100 that was then loaned. Some time thereafter, the evidence as to the date varying from a month and a half to a year and a half after the death of the husband, the plaintiff came to the defendant and induced her to sign her name on the back of the note and write the figures thereon, "$450." The defendant testifies that the plaintiff "came there so often that at last I signed it to satisfy him, so he would not bother me." She further says: "I didn't get a cent for signing that note." She denies, and says that it is not true, that she promised that, if plaintiff would lend her $100 and would not commence suit, she would pay plaintiff the whole amount. She declares she said nothing of that kind. There is no evidence that she did say anything of that kind at any time.

Conceding that the $100 was loaned to defendant, and not to her deceased husband, still at the time of that loan nothing was said about defendant signing any note or becoming liable on the note in any way. When defendant did place her name on the back of the note, nothing was said about relinquishing any right to the $100 that had been loaned her. If she was ever liable on an implied contract for this $100, she remained liable therefor still, after she placed her name on the note. Wherein did the consideration for her act in placing her name there consist? What did the plaintiff give up, or what did the defendant receive for her signature? There was no talk then concerning it, and no promise ever made that plaintiff would refrain from bringing suit on the note for any length of time, or at all. There was no consideration for this act of the wife in placing her name upon the note. The case is similar to Chaffee v. Browne, 109 Cal. 211, 41 Pac. 1028, wherein it was held that a mortgage given by the wife upon her separate property to secure her husband's antecedent debt, without any new consideration received by either the husband or wife, or moving from the creditor, is not obligatory for want of a consideration. Conceding, without deciding, that this signature on the back of the note was, as respondent contends, a guaranty in writing of the payment of the note, still it was accompanied with no new consideration. "Where a guaranty is entered into at the same time with the original obligation or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation." Civ. Code, § 2792.

The guaranty that the plaintiff seeks here to uphold was of the husband's antecedent debt. "No new consideration was given at the time it was executed. The wife received nothing; the husband received nothing; the creditor parted with nothing. The instrument was, therefore, no more than a collateral security given for an old debt of the husband." Chaffee v. Browne, supra. If it were shown that the wife, by placing her signature upon the note, had secured the cancellation of her indebtedness for the $100 loaned, then there might be some ground for saying that there was a consideration for her act; but this is not shown. Neither is it shown that the signature and the loan of the $100 were parts of the same transaction; but, on the contrary, the evidence shows that they were entirely separate and distinct, and, further, that defendant has in no way been released from any part of the obligation she may have been under to pay the $100 loaned.

The cases of Humboldt Sav., etc., Soc. v. Dowd, 137 Cal. 408, 70 Pac. 274, and Whelan v. Swain, 132 Cal. 390, 64 Pac. 560, are to be distinguished from the case at bar in this: In the first of these cases there was an application in writing to plaintiff "for a renewal loan of $3,500 for the term of two years." This application was granted, and the opinion in the case proceeds upon the theory that the new note and mortgage in effect extinguished the old note and mortgage. The court says: "If the plaintiff had attempted to bring suit upon the original note before the maturity of the note in the suit at bar, the court would have held that the transaction as to the new note and mortgage was an agreement to forbear." Of course, the "renewal" of the note and mortgage consisted in giving a new note and mortgage, and had the effect to extinguish the old note and mortgage. The extinguishment of one obligation is always a good consideration for another obligation. So in the second case (Whelan v. Swain, supra) the old note was surrendered, and this was held to be a good consideration. Nothing was surrendered in the case at bar. No obligation was extinguished, and no right to bring immediate action relinquished.

In the foregoing opinion we have assumed that the $100 was loaned by plaintiff to defendant, but this assumption was only for the purposes of the argument. It is unnecessary to decide appellant's contention that the $100 was loaned to the husband, and not to the wife, and we do not in this opinion mean to intimate what our decision would be if we were forced to decide that question. Nor do we wish to be understood as holding that in law the writing of defendant's name on the back of her husband's note amounted to a guaranty of the note, even if a consideration had been shown. We only assume the law in these respects to be as contended by respondent, and, notwithstanding this assumption, for the other reasons given, advise that the order denying a new trial be reversed.

We concur: COOPER, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the order denying a new trial is reversed: LORIGAN, J.; HENSHAW, J.; SHAW, J.

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146 Cal. 468

COTHRAN v. COOK, Auditor. (Sac. 1,235.)

(Supreme Court of California. April 4, 1905.)

CENSUS—TAKING BY COUNTY SUPERVISORS—JUSTICES OF THE PEACE—SALARY.

1. County Government Act, § 25, subd. 12½ (St. 1897, p. 460, c. 277), authorizing the board of supervisors to cause the census of a township to be taken, and providing that upon compliance with certain conditions such census shall be the official census of the township, does not empower the board of supervisors to declare by ordinance that the population of a township is a certain number, without any previous census or enumeration of the inhabitants of the township, and such an ordinance is not evidence of the population of the township in respect to which it is enacted.

2. Under the County Government Act, § 196, subd. 13 (St. 1901, p. 775, c. 234), fixing the salaries of justices of the peace of counties of the thirty-ninth class in townships having a population of less than 3,500 and over 2,000 at $75 per month, a justice of the peace in a township in a thirty-ninth class county having at the last decennial census a population of about 3,200 is entitled to receive but $75 per month, in the absence of evidence showing an increase in the population of the township subsequent to the census.

Commissioners' Decision. Department 2. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Mandamus proceedings by C. S. Cothran against W. H. Cook, as auditor of Merced county. From a judgment denying the writ, plaintiff appeals. Affirmed.

B. S. Wilson and J. F. McSwain, for appellant. Frank H. Farrar, for respondent.

HARRISON, C. The appellant was the duly elected and acting justice of the peace of Judicial Township No. 3 of the county of Merced from the first Monday after the 1st day of January, 1903, and performed the duties of that office during the month of April of that year. On the 1st day of May he demanded of the respondent, who was the auditor of that county, that he draw his warrant upon the treasurer in his favor for the sum of $100, as payment of his salary during the month of April. Upon the refusal of the auditor to comply with his demand except in the amount of $75, he instituted the present proceeding to compel the issuance of the warrant demanded by him. The superior court denied his application, and he has appealed from its judgment.

Merced county belongs to the thirty-ninth class of counties, and section 196, subd. 13 of the county government act in force during the year 1903 (St. 1901, p. 775, c. 234), provides that justices of the peace of counties of that class in townships having a population of more than 3,500 shall receive a salary, for all services rendered by them in criminal cases, of $100 per month, payable monthly; and in townships having a population of less than 3,500 and more than 2,000, $75 per month. At the hearing in the superior court it was admitted that the census taken by the United States in 1900 showed the population of judicial township No. 3 to be 3,233, and that no census of its population had since been taken; that on June 12, 1901, said township was by an ordinance of the board of supervisors of the county divided, and that out of a portion of its territory another judicial township had been formed, and had since existed as so formed. March 11, 1903, the board of supervisors passed the following ordinance, viz.: "An ordinance fixing and determining the population of Judicial Township No. 3, county of Merced, state of California. The board of supervisors of Merced county do ordain as follows: The population of Judicial Township No. 3 of the county of Merced, state of California, is by the board of supervisors of the county of Merced, state of California, found and declared to have been 3,525 on the 31st day of October, A. D. 1902, and it is further by said board found and declared that the population of said Judicial Township No. 3 ever since said date has been and is now of a greater number than 3,525." It is admitted that prior to the passage of this ordinance no petition had been presented to the board of supervisors for taking the census of said township for the purpose of ascertaining its population, and it was also admitted that the above ordinance was adopted without any census of said township having first been taken, and that the population thereof, as declared by said ordinance, was based solely and alone upon the opinions of the members of said board of supervisors as to what the population of said township then was. The petitioner offered the above ordinance in evidence, and it was excluded by the court upon the objection of the defendant that it was incompetent, irrelevant, and immaterial, and that the board of supervisors had no jurisdiction to pass an ordinance declaring the population of said township, without first causing a census thereof to be taken.

Section 25, subd. 12½, of the county government act then in force (St. 1897, p. 460, c. 277), authorizes a board of supervisors under certain circumstances to cause the census of a township to be taken, and declares that upon compliance with the conditions therein stated such census shall be the "official" census of the township; but we have not been cited to any statutory provision under which a board of supervisors may determine or declare by its ordinance the population of a township without any previous census or enumeration of the inhabitants of such township; and it is very clear that without such authority an ordinance of that nature is entitled to no more consideration as evidence of the population of such township than would be a similar declaration by any other body of individuals. It would have no higher rank as evidence than hearsay. The action of the court in excluding the ordinance from evidence must therefore be sustained.

By the terms of the county government act the appellant was not entitled to receive a salary of $100 a month unless the township for which he was elected had a population of 3,500. It was therefore an essential element, in establishing his right to the relief which he seeks in this proceeding, to show that the population of the township amounted to that number. The only evidence before the court upon this point was that afforded by the census of 1900, which showed that in that year its population was only 3,233. There is no presumption that the population of the township was any greater during the month of April, 1903, or at the date of the aforesaid ordinance, than it was at the time of the census in 1900, and the admission that since that date another judicial township had been carved out of its territory would lead to the inference that the population, as shown by that census, had been diminished. Upon the evidence before the court it could have rendered no other judgment than to deny the plaintiff's application.

The right of the appellant to receive a salary of $75 per month is not involved in this proceeding.

The judgment should be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion the judgment is affirmed: HENSHAW, J.; LORIGAN, J.; SHAW, J.

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146 Cal. 455

In re SEAMAN'S ESTATE. (Sac. 1,302.)

ALBRIGHT et al. v. NORTH et al.

(Supreme Court of California. April 3, 1905.)

WILLS—EXECUTION—SUBSCRIPTION BY TESTATOR—SUBSCRIPTION AT THE END—STATUTES—EVIDENCE—ADMISSIBILITY.

1. For the purpose of determining whether a will has been executed in proper manner, the intention of the testator in executing it is entitled to no consideration.

2. An alleged will was written on a printed form consisting of four pages folded in the middle, as ordinary legal cap. The dispositive parts of the will were written on the blank portion of the first page, and on about one-fourth of the blank portion of the second page. The printed form was prepared to be twice folded

from the top to the bottom, and across the face of the paper, as so folded, and at the top thereof, was testator's signature. *Held*, that the will was invalid, as not fulfilling the requirements of Civ. Code, § 1276, requiring every will, other than nuncupative or olographic, to be subscribed at the end thereof by the testator.

In Bank. Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Proceedings for the probate of a paper purporting to be the last will and testament of Henry Seaman, deceased. From a judgment denying the application for probate, Louisa Albright and others appeal. Affirmed.

N. A. Hawkins and Phil Bruton, for appellants. H. H. North, E. M. North, George R. Lovejoy, G. V. Martin, Geo. Clark, and W. A. Anderson, for respondents.

PER CURIAM. A document purporting to be the last will and testament of Henry Seaman, deceased, was presented to the superior court, and an application for its probate was denied upon the ground that it had not been properly executed, in that the name of the testator was not subscribed at the end thereof. From the judgment thus entered, the present appeal has been taken.

The instrument was written upon a printed form or blank consisting of four pages folded in the middle, like ordinary legal cap. Upon the upper portion of the first page was a printed heading and introduction, occupying about one-fourth of the page. In the printed form the remainder of that page and the entire second page were left blank. The dispositive parts of the will were written upon the blank portion of the first page and about one-fourth of the blank portion of the second page, and at the close thereof a line was drawn in red ink transversely to the bottom of the second page. At the top of the third page there was printed a form for the appointment of an executor, and a clause revoking all former wills, and immediately after this a testimonium clause, underneath which, and extending to a little below the middle of the page, was printed an attestation clause. The blanks left for the name of an executor and for the attestation of the will were left unfilled. The remainder of the third page and the first or upper half of the fourth page are blank. The printed form was prepared to be twice folded from the bottom to the top, and across the face of the paper as thus folded, and at the top thereof, were the printed words: "The Last Will And Testament of," under which the scrivener had written, "Henry Seaman." Blank forms for a date and for filing the instrument with the clerk were printed underneath this, the whole occupying the upper half of this outside face of the paper when folded. Underneath this printed matter was written, "Henry Seaman," and underneath his name the word "witness," and underneath that the names, "M. O. Wyatt, J. H. Wright." The remainder of the fourth page was blank. It was shown at the hearing that the decedent had written his name at that place in intended execution of his will, and that at his request Messrs. Wyatt and Wright had signed their names as witnesses thereto. It was also shown that, with the exception of these signatures, the instrument is in the same condition as it was when the decedent signed his name thereto.

The right to make a testamentary disposition of one's property is purely of statutory creation, and is available only upon a compliance with the requirements of the statute. The formalities which the Legislature has prescribed for the execution of a will are essential to its validity, and cannot be disregarded. The mode so prescribed is the measure for the exercise of the right, and the heir can be deprived of his inheritance only by a compliance with this mode. For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose only the intention of the Legislature, as expressed in the language of the statute, can be considered by the court, and whether the will, as presented, shows a compliance with the statute. Estate of Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.

Section 1276, Civ. Code, requires every will, other than nuncupative or olographic, to be "subscribed at the end thereof" by the testator, in the presence of two attesting witnesses, each of whom must, in his presence and at his request, sign his name as a witness "at the end of the will." This section is from the Revised Statutes of New York, adopted by that state in 1830. These provisions are incorporated into the Civil Code prepared for adoption by that state by David Dudley Field, and, in their report of a Civil Code to the Legislature of 1871, the code commissioners of this state refer to this Code as the source of the section. In considering the section the decisions of that state upon the same question are therefore entitled to great consideration. A similar statute was enacted in England in 1837 (St. 1 Vic. c. 26), but the decisions under that statute as to what constitutes the "end" of a will are inconsistent and contradictory. In the earlier cases the statute received a very liberal construction in reference to the amount or extent of blank space that might be left between the termination of the will and the signature of the testator, but afterwards the same judge who gave this construction, as did also the Privy Council in affirming his judgment, stated that he felt it necessary to construe the act more strictly, on the ground that the provision was intended to prevent any addition being made to the will after the deceased had executed it (Smee v. Bryer, 1 Robt. Eccl. 616; Williams on Executors, *67); and the statute was construed as requiring the name to be written immediately after the termination of the testamentary provisions, without any space whatever between them. It was in view of these different constructions of the statute that in 1852 Parliament passed an explanatory act (St. 15 Vic. c. 24) known as "Lord St. Leonard's Act," which provided that the will should be valid "if the signature be so placed at or after or following or under or beside or opposite to the end of the will, that it should be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will," and that no such will should be affected by the circumstance that "a blank space shall intervene between the concluding end of the will and the signature," etc.; thus permitting an inquiry into the intention of the testator, contrary to the rule on that subject in this state. The provisions of this act are so directly opposed to section 1276, Civ. Code, that the decisions thereunder are not entitled to any consideration in interpreting the section. Estate of Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104. See, also, Matter of Conway's Will, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796.

The provision that the will must be subscribed at the end thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The "will" at whose end the name is to be subscribed is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary disposition, and the "end thereof" is not the foot or physical end of the sheet of paper upon which the "will" is written, but is the physical termination of the testamentary provisions which constitute the will. "The act of authentication must take place at the termination of the testamentary disposition." McGuire v. Kerr, 2 Bradf. Sur. 244. "To say that, where the name is, there is the end of the will, is not to observe the statute. That requires that, where the end of the will is, there shall be the name. It is to make a new law to say that, when we find the name, there is the end of the will. The instrument offered is to be scanned to learn where is the end of it, as a completed whole, and at the end thus found must the name of the testator be subscribed." Sisters of Charity v. Kelly, 67 N. Y. 409; Matter of O'Neil's Will, 91 N. Y. 522; Matter of Andrews, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294.

The requirement that the name shall be subscribed "at" the end of the will is not satisfied by having that name written at any place "after" the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will. This provision does not, however, of necessity, require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute. While a slight space, such as a single line, or even more, might be left blank between the written matter and the name, without impairing the validity of the will, yet to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention, which would prevent its admission to probate. See Soward v. Soward, 1 Duv. (Ky.) 126.

Appellants have cited the case of Gilman's Will, 38 Barb. 364, in which the written matter of the will terminated four lines above the bottom of the page where the testator signed his name, and in which the court said: "An instrument is signed at the end when nothing intervenes between the instrument and the subscription. The place named in the statute is the end. The end of an instrument in writing commences and continues until something else or some other writing occurs." This language may have been appropriate to the will then before the court, but, as a construction to be given to the statute, it does not meet with our approval, and is, moreover, inconsistent with the construction given in the above cases cited from the Court of Appeals of that state. Particularly do we dissent from the definition of "end" as given in the last sentence of the quotation.

The formalities which the Legislature has prescribed for the execution of wills are to provide against false and fraudulent wills, and to afford means of determining their authenticity. A very evident purpose of requiring the testator's name to be subscribed at the end of the will is not only that it may thereby appear upon the face of the instrument that the testamentary purpose which is expressed therein is a completed act, but also to prevent any opportunity for fraudulent or other interpolations between the written matter and the signature. McGuire v. Kerr, 2 Bradf. Sur. 244; Matter of O'Neil's Will, 91 N. Y. 516; Matter of Andrews' Will, 43 App. Div. 394, 60 N. Y. Supp. 141; s. c., affirmed, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294; Matter of Hewitt's Will, 91 N. Y. 261; Matter of Conway's Will, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796; Soward v. Soward, 1 Duv. (Ky.) 126; Ramsey v. Ramsey, 13 Grat. 664, 70 Am. Dec. 438; Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; Wineland's Appeal, 118 Pa. 37, 12 Atl. 301, 4 Am. St. Rep. 571.

"The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions" (Sisters of Charity v. Kelly, 67 N. Y. 409) "or by judicial construction" (Matter of Whitney, 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616), "or defeated by lax interpretation" (Glancy v. Glancy, 17 Ohio St. 134). "The purpose of the law which requires the subscription to be at the end of the will is to prevent fraudulent additions to a will before or after its execution, and the statute should be so construed as to accomplish this purpose." Younger v. Duffie, 94 N. Y. 535, 46 Am. Rep. 156.

It is immaterial that there is no charge of fraud in any particular case. A failure to comply with the formalities required by a statute enacted for the prevention of fraud is not excused by showing that in the particular case under consideration there was no fraud. The statute in question was enacted to protect the wills of the dead from alteration. If opportunity for such alteration is permitted, the fraud may be so deftly accomplished as to prevent its discovery, and for this reason the construction to be given the statute should be such as will control the execution of all wills. "The legislative intent was doubtless to guard against fraud and uncertainty in the testamentary disposition of property by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons." Matter of the Will of O'Neil, 91 N. Y. 516.

It is true, as suggested by the appellants, that there is the same opportunity for fraudulent interpolations in the will if the testator should leave sufficient space therefor between the several items of his will. But it is a sufficient answer to this suggestion that the form in which the provisions of a will are drafted is no part of its execution, and that the Legislature has not attempted to prescribed the form in which the testator shall express his testamentary purpose, or in which the will shall be drafted, but only the form in which it is to be "executed and attested." See Heady's Will, 15 Abb. Prac. (N. S.) 211; Matter of Collins, 5 Redf. Sur. 20. In Estate of Blake, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135, the testator left a blank space of several lines between the items in which he disposed of his property and the items appointing an executor and revoking his former will. These last items were, however, testamentary provisions (Sisters of Charity v. Kelly, 67 N. Y. 415); and, as they constituted a part of his will, the end thereof was not reached until they had been written upon the paper, and, as his name was subscribed to the testamentary clause, which immediately followed these items, it was held that it was subscribed at the end of the will.

A question similar to the one involved herein was presented in Soward v. Soward, 1 Duv. 126. The statute of Kentucky required the witnesses, as well as the testator, to "subscribe" the will with their names, which the courts of that state construed to mean that they should write their names at the close of the will. In the will then before the court the witnesses wrote their names, as did the testator in the present case, on the outside or fourth page of the sheet after it had been folded, and across it as so folded. The court held that this was not a compliance with the statute, saying: "So far from subscribing their names to the will, it may be said with much more propriety and accuracy of speech that they merely indorsed the paper enveloping and inclosing the will, without any accompanying writing or memorandum to indicate the purpose of the indorsement, or showing any connection whatever between the indorsement and the will." In Roy v. Roy's Ex'r, 16 Grat. 418, 84 Am. Dec. 696, the sheet of paper upon which the will was written was folded in the form of a letter, and the words, "David M. Roy's Will," were indorsed upon the back in the handwriting of the deceased at about the middle of the third page when the paper was unfolded. His name was not signed at the end of the writing. The court held that it was not entitled to probate, saying: "It is an unusual mode of signing or authenticating a paper as a concluded act by indorsing the name of the person executing it on the back. Such indorsement is usually made as a label or mark to distinguish it from other papers, and probably it never occurred to the deceased that it was to have any other function in this case." The same rule was followed in Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; Patterson v. Ransom, 55 Ind. 402.

Whether the deceased intended to execute his will in conformity with the requirements of the statute cannot be shown by parol or extrinsic evidence. Parol evidence cannot be admitted to show that the testator intended the space signed by him to be the end of the will, if, upon an inspection of the instrument, it appears that it is not in fact at the end. Evidence will not be received for the purpose of showing that he intended to comply with the requirements of the statute if it appears upon the face of the instrument that he had not in fact so complied. It must appear upon the face of the will itself that its physical execution is in accordance with these requirements. Matter of Hewitt's Will, 91 N. Y. 261; Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; Patterson v. Ransom, 55 Ind. 402.

Under these considerations, it must be held that the testator did not comply with the requirements of the statute in the execution of his will, and the judgment of the superior court is therefore affirmed.

BEATTY, C. J. I concur, and desire only to note a point strongly urged in the argument of counsel for appellants, but not specially adverted to in the opinion of the court. He insists that section 1276 of the Civil Code, like the rest of its provisions, must be liberally construed, "with a view to effect its objects and promote justice." Civ. Code, § 4. I fully agree with him on this proposition; but I apply it differently. His argument is, in effect, that we should give a liberal construction to wills which deviate from the statute in the mode of their execution, for the purpose of sustaining them, whereas a proper application of the principle requires us to give a liberal construction and full effect to every provision of the statute designed to prevent the probate of spurious wills, although in so doing we may in a particular instance defeat an honest attempt on the part of a decedent to make a testamentary disposition of his estate. The evil of occasionally defeating such an attempt is far less serious than the establishment of a precedent which would open the door to the frauds which the statute was designed to prevent. Every statute of frauds is designed to promote justice by requiring wills and contracts to be executed with such formalities and indicia of genuineness as to make simulated and fraudulent writings of the classes defined impossible, or at least very difficult. Such statutes, in the long run, promote justice—which is their sole object—by shutting out opportunities of fraud. Where they defeat one honest purpose, they prevent unnumbered frauds which in their absence would be feasible and measurably safe. It would not, therefore, be a proper application of the principle invoked to weaken by construction the requirements of our statute prescribing the requisities of a valid will. By so doing we should, no doubt, be dealing most liberally with the efforts of decedents who have disregarded the law, but we should not be construing the law liberally to effect its objects. And unless we are to set ourselves up as better judges of the true policy of the law than the Legislature, we should not be promoting justice.

As our law now stands, two witnesses are sufficient, so far as witnesses are concerned, for the due authentication of a will. Suppose that the law should be so changed as to require three witnesses, and suppose a will offered for probate attested only by two. If they were perfectly trustworthy witnesses, every one might be entirely satisfied of the genuineness of the instrument, but could any court admit it to probate? Our law does not require three witnesses, but, in place of a third witness, it requires something else, which itself is a test of authenticity, viz., the signature of the alleged testator at the end of the will, and this can no more be dispensed with than the third witness, if three witnesses were required.

In determining what is the end of a particular will, no doubt, the principle of liberal construction may be applied, but even liberality has its limits. Counsel for appellants is, it is true, able to cite us to a number of cases which sustain his contention that a signature is at the end of a will, no matter how far from the end of the writing, if it is not followed by any dispositive clause. I think, however, that the cases which hold otherwise, and especially the New York cases, are supported by the better reason. The true test to determine whether a decedent has subscribed his name at the end of a will is to take the document as it left his hand, and then, disregarding the signatures of the witnesses, and all evidence aliunde, to see whether it is apparent that his name was placed where it appears for the purpose of execution. Applying that test in the present instance, it is very far from being apparent to me that the name of Henry Seaman was indorsed on the back of this will for the purpose of executing it. In the course of my experience, I have seen hundreds of wills, deeds, and other written contracts. I have frequently seen the names of the parties indorsed on the back of such papers before execution, and I cannot recall a single instance in which any of such documents was so indorsed for the purpose of executing it. The testimony in this case shows that in fact Henry Seaman attempted to execute his will in that way, but this testimony cannot be considered for the purpose of determining whether the statute has been complied with. And, indeed, what the testimony shows is that he wrote his name on the back of the paper because of his opinion that his signature at the end of the will was not necessary. It is unfortunate to the intended objects of his bounty that he was not better informed, but it would be more unfortunate if the courts, out of sympathy for them, should relax the wholesome stringency of the law governing the authentication of wills.

ANGELLOTTI, J. I concur. I am of the opinion that the true test by which to determine whether the requirement of our law that the testator shall subscribe his name at the end of the will has been complied with, and the will, therefore, in that respect, executed, is as stated in the concurring opinion of the Chief Justice. To comply with the statute, the name must, of course, be subscribed after the termination of the testamentary provisions; and, where it is so placed, the mere extent of space between such termination and the subscription ought not to affect the question as to whether the statute has been complied with, if the document, on its face, disregarding the signatures of the witnesses and all evidence aliunde, fairly indicates that the name was so placed by the testator as a subscription, and for the purpose of execution. The extent of space is, of course, material upon the question as to what the document does indicate upon its face. The document in question does not measure up to this requirement.

I concur: SHAW, J.

146 Cal. 444

WILHOIT v. SALMON et al. (Sac. 1,097.)

(Supreme Court of California. April 3, 1905.)

DEEDS—DELIVERY IN ESCROW—TITLE OF GRANTEE—RIGHT TO GROWING CROP.

1. The delivery of a deed in escrow, to be delivered to the grantee on the grantor's death, immediately vests the title in the grantee, qualified only by the life estate of the grantor.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 140, 141.]

2. A deed conveying land, and the "rents, issues, and profits thereof," was deposited with a third person in escrow, to be delivered to the grantee on the grantor's death. The grantor leased the land for a share of the crops. *Held* that, on the grantor's death while the crops were growing on the land, the grantee was entitled to the share agreed on as rent.

Department 2. Appeal from Superior Court, San Joaquin County; Edward I. Jones, Judge.

Action by George Wilhoit, executor of Jane Salmon, deceased, against George Salmon and others. From a judgment for plaintiff, defendants appeal. Reversed.

Nicol, Orr & Nutter, for appellants. A. H. Ashley, for respondent.

LORIGAN, J. This action is brought to recover certain wheat and barley, or its value. The case was tried below upon an agreed statement of facts, from which it appears that on November 21, 1895, Jane Salmon, plaintiff's testatrix, owned certain farming lands in San Joaquin county, and on that day made, executed, and acknowledged a deed of said lands in favor of two of the defendants, her son and daughter. This deed was delivered to and deposited with one W. B. Nutter in escrow, to be by him delivered to her grantees therein upon her death. This deed conveyed to each of said grantees a one-half interest in said land, and, following the description therein, contained the usual words, "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof." On August 24, 1898, said Jane Salmon leased said farming land, described in said escrow deed, to one of the defendants, George Salmon, for one year, the lease providing that he should deliver to her one-half of the crops to be raised on said land as rental therefor. The lessee took possession under said lease, and in due season sowed the premises to wheat and barley. On January 20, 1899, while the crops so sown were standing and growing on the premises, Jane Salmon died testate. On the next day W. B. Nutter delivered the said deed held by him in escrow to the grantees therein, who immediately recorded it. The crops were harvested by the tenant in August, 1899, and thereupon the plaintiff, who had been duly appointed executor of the last will of said Jane Salmon, deceased, demanded of the tenant as the agreed rental of said land, and as belonging to the estate of decedent, one-half of the grain raised on said premises. The grantees in said deed likewise demanded said grain as rental of said premises, and as belonging to them under the terms of their conveyance from the testatrix, and the tenant, acceding to the latter demand, turned said grain over to them. The plaintiff, as such executor, then brought this action against the grantees under the deed, to recover possession of the grain, or its value, and, the court having rendered judgment in his favor, said grantees appeal from said judgment.

The only question on this appeal is, who became entitled to the one-half of the grain —rental of said premises—upon the demise of Jane Salmon? Did it go to her executor, as emblements at common law, which, by reason of her tenancy for life of the premises, he was entitled, as her legal representative, to control as part of her estate, or did it pass to her grantees, under her deed to them wherein she conveyed the premises, "together with the rents, issues and profits thereof"? There is no question made in the case as to the validity of the conveyance from Jane Salmon to the appellants. The effect of the making and absolute delivery of that deed to Nutter, to be given to the grantees upon her death, vested the title immediately in them, qualified only by a life tenancy in the grantor, which, from the nature of the transaction, was reserved. Bury v. Young, 98 Cal. 451, 452, 33 Pac. 338, 35 Am. St. Rep. 186; Wittenbrock v. Cass, 110 Cal. 6, 42 Pac. 300. It is therefore insisted by the respondent that as an incident to this reserved life estate was the common-law right of her legal representatives to take her share of the rental of the premises, upon her death, as part of her estate. It is the rule of centuries, which, as part of the common law, and in the absence of any change or modification by our statute, must be applied in this state (Pol. Code, § 4468), that where a tenant for life sows land he is entitled, through his legal representatives, to the growing crops, in case the estate determines by his death before the produce can be gathered. These profits are termed "emblements," and the right to them is given on obvious principles of justice and policy, as the time for the determination of the estate is uncertain. He who rightfully sows ought to reap the profits of his labor, and the emblements are confined to the profits rightfully arising from the annual labor of the tenant. This right to such emblements is not confined to such crops as the tenant for life himself may sow, but applies also to such as he may have an interest in, as rental, under lease of the life estate premises. Tenants for life have the power to make underleases, and, if the original estate determines by the death of the tenant for life before the date of payment of rent by the undertenant, the personal representatives of the tenant for life are entitled to recover from the undertenant the rent in arrear. 4 Kent Com. (14th Ed.) p. 79; 1 Cooley's Blackstone (4th Ed.) pp. 122, 124; 1 Warner, Law of Adm. § 298. So that if, in the present instance, we had to deal with a life estate, such as was usually and technically created at common law, and to which the common-law right of emblements particularly applied, the question would be free from embarrassment. But we have not. Such a life estate as was reserved here by Jane Salmon by virtue of her conveyance to the appellants, and its deposit in escrow, to be delivered to them upon her death, was unknown at common law, and, in fact, could not be so created. Hawes v. Stebbins, 49 Cal. 372. The effect of such a conveyance would be to attempt to create a freehold to commence in futuro, and at common law would be void, though now, under the Code, the creation of such freehold is authorized. Civ. Code, § 767. When, therefore, we speak of estates for life, and the application of the common-law right to emblements as incident to their creation and existence, there is naturally presented to the mind those life estates which were created as at common law by some third person in favor of the life tenant, with remainder over. To such estates the right of emblements always applied. But here we have no such created tenancy. The life tenancy of Jane Salmon was not created by a third person, but was reserved to her by virtue of her conveyance in escrow in favor of the grantees, and the extent to which she reserved such life estate, with its incidents, is to be determined from a consideration of the terms of such conveyance. We must look to it to ascertain whether, by its terms, she intended to divest the life estate she reserved of its common-law incident as to emblements. If she did, that is the end of the inquiry, because the common-law rule cannot be invoked by her legal representatives to defeat the intention of the life tenant, expressed in her deed, as to the extent to which her grantees therein should take the premises conveyed, upon the termination of her life estate.

When Jane Salmon made her conveyance to the appellants, it was for her to determine the extent to which she should transfer her property to them. In reserving her life estate in the premises, it was perfectly competent for her to determine to what extent she should circumscribe her reserved estate as to any of its incidents, and correspondingly enlarge the rights of her grantees. If she saw fit by the terms of her deed to cut off the common-law incidents of a life estate —the right to emblements—by words clearly having that effect and operation, that was her right. And this is what, by the express terms of her deed, she did. To the fullest extent possible, she conveyed to her grantees all her interest in the land, "together with the rents, issues and profits thereof." She divested herself of all existing and future rights in the property, except solely the right to retain the use and occupancy of the premises, and take and receive the rents and profits, during her lifetime. Included in those divested rights was that of the common-law incident to an estate for life—the emblements. Under her reserved life estate the right only of the grantees to possession of the premises was postponed until her death. When she died, eo instante, all her interest in the reserved estate ceased, and, by the terms of her conveyance, what might otherwise have gone to her legal representatives as emblements at common law immediately passed under the terms of her conveyance to her grantees. In her grant to them the language was broad and comprehensive enough to deprive her of all common-law incidents of a life estate, and we see no room for contention that it did not.

The clause in her deed granting to the appellants the premises, with the "rents, issues and profits thereof," is entirely incompatible with any construction which would support the contention of respondent that the right to the "rents" of the premises was reserved to the grantor as a common-law incident to her life estate. To so hold would be to render such clause meaningless and inoperative. It would be idle to suggest that by it the grantor intended to convey only such crops to her grantees as the latter might sow after obtaining possession on her death. They would take those by virtue of their ownership of the land, and independent of any such provision in the deed. They could, however, only take the crops which were sown by her while life tenant, or to which she would be entitled as such, by virtue of such clause in their deed, and it was undoubtedly the intention of the grantor to effect that purpose—the only one which the provision would be pertinent to accomplish, and which we think it did.

While not presenting exactly the same features as in the case at bar, much of the reasoning of the court in Waugh's Executors v. Waugh, 84 Pa. 350, 24 Am. Rep. 191, sustains the conclusion we reach.

The judgment is reversed, with directions to the lower court to enter a judgment in favor of appellants.

We concur: HENSHAW, J.; McFARLAND, J.

146 Cal. 525

BASHORE v. PARKER et al. (Sac. 1,124.)

(Supreme Court of California. April 6, 1905.)

HUSBAND AND WIFE—COMMUNITY PROPERTY—USE BY WIFE—ESTOPPEL AGAINST HUSBAND—PLEADING—EVIDENCE—DECLARATIONS OF WIFE—INSTRUCTIONS—APPEAL—DEFECT IN PLEADINGS.

1. An appeal from an order denying a new trial brings up for review only alleged errors of law and the question of the sufficiency of the evidence to support the verdict, and does not admit of technical objections, which might have been raised by special demurrer to the pleadings, but they may be referred to only in considering whether they are sufficient to authorize the introduction of evidence in their support.

2. In claim and delivery to recover property levied on at the instance of defendant, a creditor of plaintiff's wife, an answer alleging that the wife was engaged in business upon her own account; that she and plaintiff represented to the community and to the business world generally, and to defendant in particular, that the wife was the owner in her own right and name of property of great value, and that plaintiff had no interest whatsoever therein; and that defendant, relying upon the conduct and representations of plaintiff and his wife, and believing the same to be true, made advances to the wife to the knowledge of plaintiff—sufficiently set up an estoppel against plaintiff to claim the property as community property.

3. Representations of plaintiff's wife and of his stepson that the wife was the owner of certain property, not communicated to defendant, and which could not, therefore, have influenced it in extending credit to the wife, cannot be relied on by defendant to estop plaintiff from claiming the property as belonging to the community.

4. Under Code Civ. Proc. § 1848, providing that the rights of a party cannot be prejudiced by the declarations of another, except by virtue of some particular relation existing between them, declarations of plaintiff's wife and of his stepson, made in his absence and without his knowledge, to the effect that certain property is the separate property of the wife, cannot estop plaintiff to claim the property as belonging to the community.

5. Where a married woman engages in trade, it is presumed to be with the funds of the community, and the fact that the husband permits her to use his money or property as her own, upon the faith of which she obtains credit, does not estop the husband from claiming the property as against her creditors.

6. An instruction that if the husband permits his wife to use his money or property as her own, and she obtains credit upon the faith of such property, the husband will be estopped from claiming the property against her creditors, is defective in that it neglects the necessary limits of estoppel prescribed by Code Civ. Proc. § 1962, subd. 3, providing that when a party has by his own declaration intentionally led another to believe a particular thing, and to act upon such belief, he cannot be permitted to falsify it.

7. In claim and delivery, a charge that if any of the property was bought by the profits of any real property owned by plaintiff's wife the jury should find for defendants, was erroneous in requiring the jury to find for defendants generally, instead of as to the particular property which the jury might find was acquired from the profits of the wife's real property.

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by John Bashore against B. B. Parker and another. From an order denying a new trial, plaintiff appeals. Reversed.

Charles G. Lamberson and Bradley & Farnsworth, for appellant. Maurice E. Powley, Hannah & Miller, and Nicol, Orr & Nutter, for respondents.

HENSHAW, J. This action is in claim and delivery to recover personal property levied upon by the defendant Parker, as sheriff of the county, in certain actions brought by the defendant Farmers' Union & Milling Company against Rachel D. Bashore, wife of plaintiff, and James H. Stufflebeem, a son of said Rachel by a former marriage. Plaintiff claimed the property as community property. Defendants, in answer, averred that the property was the copartnership property of Rachel Bashore and Stufflebeem, and for a separate answer pleaded an estoppel in pais against the plaintiff. Trial was had before a jury, and judgment rendered for defendants. This appeal is from the order denying plaintiff's motion for a new trial.

Appellant first insists that there was no sufficient pleading of an estoppel, and that, therefore, the court erred in admitting any testimony upon the question. But as the appeal here is only from the order denying a new trial, the inquiry is limited to a consideration of alleged errors at law and to the sufficiency of the evidence to support the verdict. Technical objections to the sufficiency of the pleading, which might have been raised by special demurrer, may not be considered upon this appeal. Reference may be made to the pleadings only to learn whether an estoppel was sufficiently well pleaded to justify the taking of evidence upon the matter. We think this defense was set forth with sufficient particularity.

It is alleged that Rachel Bashore became indebted to the Farmers' Union & Milling Company for goods sold and moneys advanced to her; that during all the time of these transactions she was engaged in the business of farming, stock raising, and wood cutting, in her own right, upon her own account and in her own name, in the community where she now resides, and that during all this period she owned and held in her own right, upon her own account, and in her own name real and personal property of great value; that during all of this time she and her husband, John Bashore, represented, stated, and caused to be known to the community, and in the cities of Visalia and Tulare, and in the vicinity of said cities, and to the people residing therein and thereabout, and to the business world generally, that the said Rachel was the owner, in her own right and name, of real and personal property of great value, and of the real and personal property set forth and described, and, further, that John Bashore had no interest whatsoever in or to the property, or in or to the business, or in or to the proceeds thereof; still further, that Rachel Bashore and John Bashore represented, stated, and caused to be known to the community generally, and to the defendant the Farmers' Union & Milling Company in particular, that Rachel was the owner in her own right and name of all this property, and that John Bashore had no interest whatsoever in or to it or any part of it, or to the business so conducted by her; that defendant Farmers' Union & Milling Company, relying upon the conduct, representations, and statements of the plaintiff and the said Rachel, his wife, as above set forth, and believing the same to be true, and not otherwise, made advances to Rachel Bashore; that John Bashore had full knowledge and notice of all the facts and circumstances above alleged, and full knowledge and notice of the fact that the Farmers' Union & Milling Company was extending credit and selling goods and wares and advancing money to Rachel upon the faith of the representations and statements and conduct of himself and Rachel; and that, if these statements and representations of John Bashore and Rachel were untrue, and if his conduct was contrary to the fact, he should not be permitted to allege or maintain the contrary thereof, and is estopped from so doing.

We need not, as has been intimated, enter into any particular discussion of the necessary averments of an estoppel in pais. The oft-cited cases of Biddle Boggs v. Merced Mining Company, 14 Cal. 367, and Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157, together with the provisions of subdivision 3 of section 1962 of the Code of Civil Procedure, sufficiently set them forth. While the pleading of an estoppel in pais, or estoppel by conduct, may be regarded as sufficient, upon the introduction of evidence under the plea the court fell into error. It admitted the testimony of numerous witnesses touching business transactions which they had had with Mrs. Bashore and Stufflebeem covering a period of nearly 20 years prior to the transactions here called in question to show the declarations of Mrs. Bashore and her son, Stufflebeem. The contention of plaintiff—and to the support of this contention he brought evidence—was that the property was community property, and that, he being an invalid, by arrangement with his wife she was to transact the business, and he was to do such work as he could about the home ranch; that he never made any representations contrary to this. Upon the part of the defense, as pleaded, it was undertaken to show that the Bashores, husband and wife, had both represented to the community generally that all of the property was the separate property of the wife, and that the husband had no interest therein, and that these representations were made specifically to the defendant the Farmers' Union & Milling Company, and that the representations made to individual members of the community were communicated to the Farmers' Union. When, however, the witnesses for the defense were called, they proved individual business transactions had with Mrs. Bashore and Stufflebeem, and their representations and declarations in regard to the property. These declarations did not at all concern the personal property involved in this action. It was not shown that the plaintiff knew anything about them. It was not even shown that they were in any instance communicated to the defendant the Farmers' Union. Here, then, to the plaintiff's prejudice, were introduced in evidence declarations, not of himself, but of his wife, not made in his presence, not made with his knowledge, and not even communicated to the defendant. By no possibility, therefore, could these representations, whether true or false, have influenced the conduct of the defendant in making the advancements to Mrs. Bashore, and still less could they have tended to raise an estoppel against the husband to prevent him from proving the truth as to his title. As is said in Goodale v. Scannell, 8 Cal. 27: "To estop the plaintiff it should appear that his declarations were communicated to the creditor, and that he parted with some right or advantage on the faith of the information. Not only is this fact not shown, but the defendant has failed to show that the plaintiff ever made any statement on the subject." See, also, Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; The President, etc., v. N. Y. R. R. Co., 13 N. Y. 638; People v. Bank of North America, 75 N. Y. 561. It is too plain to permit of discussion that there can be no estoppel unless the party who alleges it relied upon the representations, and was induced to act by these, and, thus relying and induced, did take some action to his detriment. 2 Pomeroy, Eq. Jur. § 812. Still graver becomes the error when it is considered that in this testimony the witnesses were allowed to repeat the declarations of Stufflebeem; so that the effect was that the plaintiff was to be injured and bound by the declaration of one a stranger in interest and occupying no relation to him which could give binding effect to his word. The Code of Civil Procedure itself succinctly declares (section 1848) that the rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of some particular relation existing between them. As to the declarations of the wife made in the absence and without the knowledge of her husband, those declarations, of course, cannot be held to raise an estoppel where his title to the community property is involved. Rowe v. Hibernia S. & L. Soc., 134 Cal. 403, 66 Pac. 569; Paden v. Goldbaum (Cal.) 37 Pac. 759.

The court instructed the jury: "If a husband permit his wife to use his money or property, real or personal, as her own, for a considerable period of time, she incurring obligations and obtaining credit upon the faith and upon the belief on the part of those from whom she obtained such credit that the property is her own, the husband will be estopped from claiming such property as his own against those extending such credit to his wife." The instruction is erroneous. Even where a married woman engages in trade it is presumed to be with the funds of the community, and the burden of proof is on the person asserting the property to be her separate property. Manning v. Burke (La.) 31 So. 862; Jacobs & Co. v. Scott, 53 Cal. 74; Chaffee v. Browne, 109 Cal. 211, 41 Pac. 1028. The instruction, moreover, eliminates from consideration the necessary elements of an estoppel as laid down by subdivision 3 of section 1962, Code of Civil Procedure.

The court further instructed the jury: "If you believe from the evidence that any of the property involved in this action grew out of, or was bought by the rents, issues, or profits of any real property owned by Mrs. Bashore, it is your duty to find for the defendants." The instruction is manifestly erroneous. It was their duty to find for the defendants, not generally, as the instruction declares, but only as to that particular property which the jury might find was so acquired by Mrs. Bashore.

In contemplation of a new trial and of the modifications of the rulings which will be made under this decision, we do not think it necessary to consider any of the other points raised by appellant.

For the foregoing reasons, the order is reversed, and the cause remanded for a new trial.

We concur: LORIGAN, J.; McFARLAND, J.

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146 Cal. 502

PEOPLE v. MURPHY. (Cr. 1,192.)

(Supreme Court of California. April 5, 1905.)

MURDER—REASONABLE DOUBT—INSTRUCTIONS—JURORS—COMPETENCY—IMPEACHING VERDICT.

1. On a prosecution for murder alleged to have been committed in pursuance of a conspiracy between accused and other convicts to escape from the penitentiary, a venireman stated that he had an opinion that there must have been a conspiracy, and that the killing was done while carrying it out; that it would take evidence to remove the opinion; but that he had no opinion as to the guilt of defendant, or as to whether he was engaged in the conspiracy, and that he could act impartially; and that, while he would take the testimony of a convict with distrust, he had no prejudice toward him, and would judge of his testimony from his manner of giving it and the surrounding circumstances. *Held*, that he was not incompetent to serve as a juror.

2. Where, on a prosecution for murder, it appeared that defendant was one of several convicts who escaped from the penitentiary, and that during the attempt to escape one of the guards was killed by a fellow convict, and the theory of the prosecution was that there had been a conspiracy to escape, it was not error to permit a witness to testify that after deceased had received the wound a certain convict joined the procession of convicts, and that he had dynamite in his possession.

3. It was not error to sustain an objection to a question asking a witness as to whether defendant was a good prisoner, and what his conduct had been in the prison.

4. Where a defendant is permitted to prove his character for peace and quiet, it must be done by proving general reputation in the community or communities where he has lived.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 844.]

5. Where, on a prosecution for murder, the theory of the state was that the crime had been committed in pursuance of a conspiracy on the part of defendant and others to escape from the penitentiary, it was not error to sustain an objection to a question asked by defendant's attorney of a witness on cross-examination whether, if he had been a "stool pigeon," he would not have been in the good graces of the officers.

6. A juror cannot be allowed by his own testimony or declarations to impeach his verdict, except in a case authorized by statute.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2392-2395.]

7. On a prosecution for murder the court charged that if the testimony convinced the jury, as reasonable men, beyond a reasonable doubt, that defendant committed the act charged, although the fact might be surrounded in a degree "by a doubt," then a conviction should be had. *Held* that, while the instruction was not clear, it could not have misled the jury, the doubt referred to in the latter part of the instruction not being a reasonable doubt, and the court in other instructions having fully and properly charged on the doctrine of reasonable doubt.

8. On a prosecution for murder the court charged that if any one or any number of the jury, after deliberating on all the evidence, should be of the opinion that defendant had not been proven guilty by the evidence to a moral certainty and beyond every reasonable doubt, those entertaining such opinion should vote for an acquittal, and should adhere to their opinion until convinced of their error beyond all reasonable doubt; that mere probabilities were not sufficient to warrant a conviction, and that it was not sufficient that the greater weight of the evidence support the allegations of the information, or sufficient that on the doctrine of reasonable chances it was more probable that defendant was guilty than innocent. *Held*, that the instruction was proper.

Commissioners' Decision. In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Joseph Murphy was convicted of murder, and he appeals. Affirmed.

Charles B. Harris and John D. Moynahan, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

COOPER, C. Defendant was convicted of murder, and prosecutes this appeal from the judgment and order denying his motion for a new trial.

He was one of several convicts who escaped from the state prison at Folsom on the morning of July 27, 1903. Most of the convicts engaged in the escape were armed either with knives, razors, or dynamite. In the very beginning of the outbreak, and during the first attack or rush into the captain's office, Cotter, one of the guards, was stabbed by one Andy Myers, a fellow convict, and died from the wounds so received. Defendant was convicted upon the theory that he was engaged in a conspiracy to unlawfully escape from the prison, and that the life of Cotter was taken by a fellow conspirator while all were engaged in the unlawful attempt to consummate and carry out such conspiracy. It is not claimed that the evidence was insufficient to justify the verdict, but certain errors are claimed in denying challenges to jurors, in sustaining or overruling objections to evidence, and in giving or refusing instructions. We will discuss those deemed most plausible.

1. The claim is made that the court erred in denying defendant's challenges to the jurors Herzog and Kimball, made upon the ground of the existence of a state of mind on the part of the said jurors in reference to the case which would prevent them from acting with entire impartiality, and without prejudice to the substantial rights of the defendant. The jurors each testified in his examination to the effect that he had an opinion that there must have been an agreement or conspiracy in regard to the escape, that the killing was done while carrying out such conspiracy, and that it would take evidence to remove such opinion. It appeared from their examination that the opinions of the jurors were founded upon common rumor and statements in the public journals. They had no opinion as to the guilt or innocence of the defendant, nor as to whether or not he was engaged in the conspiracy. Each testified that he could and would, notwithstanding such opinion, act impartially and fairly in the case. Such opinions did not disqualify the jurors. Any man of sufficient intelligence to be a juror would, after reading in the newspapers of the break and escape, be of the opinion that there was some agreement or concert of action among the convicts engaged in the escape. This would no more disqualify a juror than the belief or opinion that Cotter had been killed by some one, or that there was such a state prison as Folsom. The juror Kimball testified that he would take the testimony of a convict with distrust, that he did not believe that convicts are as apt to tell the truth as free men. He said that he had no feeling of prejudice toward a convict, that he would believe some of them under oath, that he would judge of the value of the testimony of such convict by his manner of giving his evidence and the surrounding circumstances, and would weigh it as he would that of a free man. This would not disqualify the juror. The fact that the circumstances and surroundings of a witness would to a greater or less degree affect his credibility is well known to every man of sufficient intelligence to act as a juror. The Code provides that a witness may be impeached by showing that he has been convicted of a felony. If the fact that a witness has been convicted of a felony would not tend to cause his testimony to be distrusted, then the provision of the Code as to impeaching a witness by the record of such conviction would be to no purpose. The court should be careful to see that all a defendant's rights are protected, and that he should not be tried by a juror who is biased or prejudiced against him, or who has a positive opinion as to his guilt, based upon the statement of eyewitnesses or facts within the knowledge of the juror; but a general opinion upon some abstract proposition, in accordance with reason and experience, is not sufficient ground to justify the court in excusing a juror.

2. The next claim is that it was error for the court to allow the witness Klenzendorf to testify that after the convicts came out of the captain's office, and after Cotter had received the wound, that one Roberts joined the procession of convicts, and that Roberts had dynamite in his possession. We think the evidence was properly admitted as a part of the res gestæ. The break at the captain's office, the stabbing of Cotter, the movement through the back gate and on to the armory, occupied only a few seconds. It was a desperate and daring attempt, and all the acts done on the prison grounds were done very quickly. The conspiracy had not been ended and completed. It was then and there being actively executed by defendant and his fellow convicts. During the existence of the conspiracy, and while it was being executed, the acts and declarations of each conspirator were admissible as evidence against his coconspirator. Of course, the questions as to whether or not there was a conspiracy, and whether or not Roberts was one of the conspirators, was for the jury, under the evidence and instructions of the court.

3. It was not error for the court to sustain the objection of the district attorney to the question asked of the witness Klenzendorf as to whether defendant was a good prisoner, and what his conduct had been in the prison. Defendant could not, as a matter of defense, call to his assistance the fact that he had been good at certain times, or while in prison. Many convicts have been good while in prison who were very bad out of prison. In all cases where a defendant is allowed to prove his character for peace and quiet it must be done by proving general reputation in the community or communities where he has lived.

4. It was not error to sustain the objection to the question asked by defendant's attorney of the witness Harris in cross-examination, "Well, if you were a 'stool pigeon,' you would be in the very good graces of the officers, would you not?" It asked for the conclusion of the witness predicated upon the fact that he was a stool pigeon. It had not been proven that the witness was a stool pigeon, and, if it had been, the question was wholly irrelevant, and called for the opinion of the witness as to the effect of being a stool

pigeon. It would serve no useful purpose to discuss the various other rulings as to questions and answers of witnesses. They nearly all relate to conversations, acts, and declarations made by the convicts engaged in the escape, and the court confined the testimony to what was said and done on the prison grounds and while the escape was being carried out.

5. The court did not err in refusing to consider the affidavits offered as to declarations made after the verdict by certain jurors. It has long been the rule in this state that a juror cannot be allowed by his own testimony or declarations to impeach and defeat his verdict, except in a case authorized by statute. People v. Baker, 1 Cal. 404; People v. Gray, 61 Cal. 183, 44 Am. Rep. 549; People v. Holmes, 118 Cal. 448, 50 Pac. 675. If he cannot do so directly, he cannot do so indirectly by declarations to others, who in turn make affidavit as to such declarations. Siemsen v. Oakland S. L. & H. Elec. Ry., 134 Cal. 494, 66 Pac. 672; People v. Dobbins, 138 Cal. 698, 72 Pac 339.

6. It is earnestly urged that the court erred in giving the following portion of instruction 16 offered by the prosecution: "If, under the foregoing rules, the testimony in this case is sufficient to convince you, as reasonable men, beyond a reasonable doubt, that the defendant did commit the act charged, although the fact may be surrounded in a degree by a doubt, then I charge you that it is your duty to convict." The instruction is not very clear, but we do not think it could have misled the jury. The doubt referred to in the latter part of the instruction was not a reasonable doubt. The court in other parts of its charge fully instructed the jury as to the doctrine of reasonable doubt in the language of Chief Justice Shaw in the Webster Case. The court elsewhere instructed the jury: "If, therefore, any one or any number of you, after deliberating upon all the evidence in this case, shall be of the opinion that the defendant has not been proven to be guilty, by the evidence in this case, to a moral certainty, and beyond every reasonable doubt, those entertaining that opinion should vote in favor of a verdict of not guilty, and should so adhere to their opinion until convinced beyond all reasonable doubt that they are wrong." And again: "You are instructed that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the information, nor is it sufficient that upon the doctrine of chances it is more probable that the defendant is guilty than that he is innocent to warrant a conviction. The defendant must be proven to be guilty so clearly and conclusively that there is no reasonable theory upon which he is innocent when all the evidence is considered together." The instruction, in the identical language here, was given in People v. Anthony, and approved by this court. People v. Anthony, 56 Cal. 400. We find no error as to other instructions complained of. The court appears to have fully and fairly instructed the jury upon every phase of the case.

It follows that the judgment and order must be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed: BEATTY, C. J.; HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

(146 Cal. 555)

STONE et al. v. HARRIS. (S. F. 3,996.)*

(Supreme Court of California. April 7, 1905.)

CONTRACTS—CREATION OF LIEN—CONSTRUCTION OF AGREEMENT.

Civ. Code, § 2881, provides that a lien may be created by contract. Section 1698 provides that a contract in writing may be altered by a written contract or by an executed oral agreement. Section 2875 provides that a special lien is one which the holder can enforce only as security for the performance of a particular act, and of such obligations as may be incidental thereto. The owners of lands, being desirous of reclaiming them, made a written agreement whereby trustees were appointed to build a levee and to join it to an old levee and repair the latter. They were given power "to act as herein provided, or as may be hereinafter directed by a majority of the owners," and authority to assess the cost of the new levee and the cost of repairing the old one on the parties, and it was provided that the debt of any party to the contract under its provisions should be a lien on his lands. After completion of the work it was found that surface water gathered on the land, and all the owners passed a resolution authorizing the construction of a ditch and the erection of a pumping plant, which ditch and plant were to be under the control of the trustees. *Held*, that there was no lien for expenses incurred under the resolutions.

Commissioners' Decision. Department 2. Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Action by M. Stone and others, as trustees representing the landowners of San Mound Reclamation District No. 1, Contra Costa county, against Mary E. Harris. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

John T. Carey, for appellant. Hudson Grant and E. A. Bridgford, for respondents.

CHIPMAN, C. This is an action to recover judgment for the sum of $434.40, being defendant's proportion of an assessment levied by plaintiffs, as trustees, upon the land embraced in San Mound Reclamation District No. 1, Contra Costa county, and to have the same declared to be a lien on defendant's land, and for the sale thereof "in the usual way according to the practice of this court in such cases made and provided to satisfy said lien," and "for such other relief as may seem meet," etc. A demurrer was overruled, and, defendant refusing to answer, plaintiffs had judgment "for the sum of $275.40, which sum is, by virtue of the agreement set forth in said amended complaint, a valid lien upon the lands and premises." The usual foreclosure sale was adjudged. Defendant appeals from the judgment.

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*Rehearing denied May 5, 1905.

It appears from the amended complaint that certain landowners in Contra Costa county, including defendant, being desirous of reclaiming their lands from the tide overflow, on April 23, 1894, entered into an agreement in writing, fully set forth in the complaint. There was an old levee then in existence, and what is referred to as the new levee also partly constructed, and the agreement contemplated the extension and completion of this new levee so as to join the old levee; also the "building up and repairing a certain old levee and thereafter maintaining the entire levee system, reclaiming and inclosing the lands hereinbefore designated." In consideration of the benefits to accrue to each of the parties and of their mutual covenants contained in the agreement, it was agreed that "three trustees shall be appointed by a majority of the owners in acreage of said lands, who shall hold their office during the life of such majority." It was made the duty of the trustees (any two of whom might act) "to execute the objects and purposes of this contract, and when they shall have accepted their appointment they shall, by virtue of their office, become and be the agents and attorneys in fact of all the parties to this agreement, with power to act as herein provided, or as may be hereinafter directed by a majority of the owners in acreage of said lands." The trustees were given power to "select, appoint, and control a superintendent of the work herein provided to be done." The trustees were to serve without compensation. It was agreed that the "new levee shall be fully completed and built up where necessary along that portion which has been partially constructed, and shall then be extended to and built from the point to which the same is now built," thence to intersect the old levee. Flood gates in the new levee were provided for, and it was agreed that the trustees should "ascertain the cost of the work already done upon said new levee, and what it will cost to complete the same to the point of the terminus of said route, with necessary and proper flood gates." Then follows a description of the old levee, with which the new levee was to form a junction. The trustees were given authority "to assess the whole cost of the new levee, both the part completed and the extension to be built as aforesaid, and also the cost of repairing the old levee and of maintaining all levees necessary to protect the entire body of land from overflow, upon each of the parties," etc., and each party agreed to pay said amount upon the notice provided to be given. The trustees were granted further power to make contracts for said work, "and all the future expenditures and outlays paid out or incurred for the purpose of keeping up the whole system of said levee and every part thereof so as to protect the entire body of swamp and overflowed land mentioned herein, and every tract or parcel thereof, from overflow, shall be borne and paid for by all the parties hereto and by their successors in interest in said lands. * * * And it is further agreed that when so built up and completed the said levee system, ditches, and flood gates shall be under the control and management of said trustees." The covenants were to run with the land. "The debt of any party to this contract accruing under and by virtue of its provisions shall be a lien upon the lands owned by him within the reclaimed districts, and shall continue to be so until such debt is paid," and foreclosure of such lien is authorized, "but without further liability" than for his assessment. There are other provisions of the agreement, but, as they do not bear upon any question raised, they need not be stated. The complaint shows that some changes of ownership of land by the trustees occurred, and that plaintiffs became owners and legally elected trustees. It is then set forth that, notwithstanding the maintenance of the levee system above mentioned, it was found that in the rainy season water gathered upon the lands, and prevented successful cultivation thereof, and that it became necessary to erect a pumping plant and to construct a large ditch across the district into which the water could be collected and drained to the site of said pumping plant; that, realizing the necessity for said ditch, all the owners, including defendant, being present, on July 6, 1901, unanimously passed a resolution at a regular meeting authorizing the construction of said ditch by "the trustees together with Mr. Franks, superintendent." "After the ditch is located the right of way of the same is to be conveyed to the district, and thereafter to be under the control of the trustees of said district." The ditch was dug and the right of way conveyed to the district at a cost of $3,550. On November 12, 1901, all the owners, including defendant, unanimously passed a resolution at a regular meeting authorizing the trustees to "procure a good and sufficient pumping plant for the discharge of water to be collected in the ditch now in the course of construction in the district." The trustees erected the pumping plant at the cost of $5,000, and expended $645 for coal to operate the same. It is alleged that defendant was fully advised of these expenditures, and made no objection thereto, but encouraged the same. It is also set forth that large expenses were incurred in protecting the levees; that during the fall of 1901 and the spring of 1902 a large amount of dredger work became necessary, and additional work in the fall of 1902, "upon said levees to protect the lands of said district against the flood waters which came against said lands." It is then alleged that to pay all the said expenses an assessment of $2 per acre was levied on December 11, 1901, and on March 24, 1902, another assessment of $1 per acre, and that the sum due from defendant upon such assessments was $540, and that she has paid the sum of $105.60 thereof, and no more, leaving due and unpaid the sum of $434.40.

The grounds of demurrer are manifold: (1) That the complaint does not state facts sufficient to constitute a cause of action. (2) That the court is without jurisdiction. (3) That the plaintiffs have not legal capacity to sue: (a) Because it does not appear that they are doing business under the name of plaintiffs or an associate name, or have an associate name; (b) because there are a large number of persons other than plaintiff interested in the remedy, and are not made parties, and it does not appear that plaintiffs are suing for the joint benefit of all parties interested; (c) because all interested parties are not joined as plaintiffs; (d) it does not appear that plaintiffs, as trustees of the landowners, were authorized to sue for or collect money for the construction of said ditch or the purchase of said pumping plant. (4) That there is a defect of parties plaintiff for much the same reasons as stated in the preceding paragraph. (5) That several causes of action are attempted to be set forth, but are not separately stated: In substance, because the assessment for the work on the levees is by the agreement payable to the trustees, with which is united a cause of action for defendant's pro rata of the cost of the ditch and pumping plant, and this latter is due, if due at all, only to the landowners; that the agreement confers no authority on the trustees to levy an assessment for these latter expenditures, nor does the agreement make them a lien on the land. (6) For much the same reason several causes of action have been improperly united. (7) and (8) present no new points. (9) Because of uncertainty in this: that it cannot be ascertained from the complaint what amount is due for work on the levees and what amount for the cost of the ditch and the pumping plant and operating expenses, and for like reasons the complaint is ambiguous.

We do not think there can be any doubt that the agreement covered all expenditures for building and maintaining the levee system. But appellant insists that the resolutions, treating them as establishing contractual relations between the parties, formed no part of the agreement of 1894 by which the trustees were appointed, and that the obligations entered into by virtue of these resolutions created no lien on the land, and did not authorize an assessment to be levied by the trustees, and enforced as such under the original agreement. In this view we concur. It is manifest from a reading of the instrument that the parties thereto were of the belief, and so provided, that the levee system would effect the purpose in view, which was the prevention of overflow of the land by tide waters. Ample provision was made for a levee system and its care and maintenance, but for nothing more. The necessity for a main draining ditch across the district and the erection of a pumping plant seems not to have arisen—at least was not provided for—until in 1901, six or seven years after the trust agreement was entered into. No reference to the original agreement was made in the resolutions, nor is there in them the slightest indication that the cost of the main drainage ditch or of the pumping plant or of operating the pump was to become a lien on the land, or that the trustees should have power to assess the owners or the land for this cost. There was an implied obligation to pay the cost, but no agreement that a lien existed to secure its payment. The lien created by contract of the parties (Civ. Code, § 2881) does not of itself exist "for the performance of any other obligation than that which the lien originally secured" (Id. § 2891). The original agreement was not altered by any contract in writing nor by any executed oral agreement having reference to it. Id. § 1698. As a special lien it could be enforced only "for the performance of the particular act or obligation" for which it was held, "and of such obligations as may be incidental thereto." Id. § 2875. If the owners had deemed the drainage ditch and pumping plant as incidental, they would not have otherwise construed the agreement as may be inferred from their having subsequently, when the necessity arose, passed the resolutions creating the new obligation. Nor do we think the cost of this latter work can be regarded as incidental to the levee system, which was the specific and only work mentioned in the trust agreement. Respondents contend, however, that in the clause giving the trustees the "power to act as herein provided, or as may be hereinafter directed by a majority of the owners in acreage of the land," the word "hereinafter" is meaningless, and should be either rejected or construed to mean "hereafter," so as to effectuate the purpose contemplated, which was reclamation. Such a construction, if made to include expenditures other than such as pertain to the levee systems, would remove all limitations from the agreement, and subject the lands to whatever lien burdens a majority of the landowners might decide was necessary for the reclamation of the land, and this, too, in disregard of what manifestly was deemed by the owners to be the only means necessary to be adopted when they made the agreement. This instrument bears the impress of careful and intelligent preparation, and seemingly was intended, as its terms indicate, to limit the reclamation work to the levee system and such work as might properly be said to be incidental. The means and method being thus clearly pointed out, would, upon familiar principles, exclude other means and methods. We are clearly of the opinion that no authority is shown for levying an assessment upon the land to meet the cost of the pumping plant and the main ditch connected with it, nor is any authority shown for making such assessment a lien on the land and foreclosing it, as the decree does. It does not appear just what the expenditures were, other than the cost of digging the main ditch, the cost of the pumping plant, and some cost in operating it. Manifestly, however, the principal items of expenditures included in the decree, and the only ones specified, relate to the pumping plant and the main ditch. This, we think, was error, and requires a reversal of the judgment.

The other questions presented by the demurrer may or may not arise in the subsequent proceedings, and we therefore express no opinion upon them.

It is advised that the judgment be reversed, with directions to sustain the demurrer, with leave to plaintiffs to amend the complaint if so advised.

We concur: HARRISON, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment is reversed, with directions to sustain the demurrer, with leave to plaintiffs to amend the complaint if so advised: LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.

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146 Cal. 537

YOULE v. THOMAS (CLARKE, Intervener).
(S. F. 4,026.)*

(Supreme Court of California. April 6, 1905.)

PUBLIC LANDS—RIGHT TO PURCHASE—CONTEST—SCOPE OF INQUIRY—APPEAL—AGGRIEVED PARTIES.

1. Pol. Code, § 3414, provides that, when a contest arises between applicants to purchase land, the surveyor general must, if a question of law is involved, or on demand, refer the contest to the court. Section 3415 authorizes either party to thereupon bring an action in the superior court to determine the conflict, and provides that the production of a certified copy of the entry by the surveyor general gives the court jurisdiction. Section 3416 provides that the surveyor general must sell the land to the successful party in the action. Section 3495 makes the provisions applicable to school lands. *Held*, that the jurisdiction of the court in such an action is limited to a determination of the rights of the parties to the reference, and it cannot consider and pass upon the rights of other applicants to purchase the land, who are not included within the order of reference, and who unauthorizedly intervene or attempt to intervene in the action after it is referred.

2. Consequently an applicant to purchase land, who is not included within the order of reference entered by the surveyor general, but who succeeds in intervening in the action instituted in the superior court, is not aggrieved, in such sense as to give him a right to appeal, by a judgment determining that one of the proper parties to the action is entitled to purchase the land, and altogether ignoring him and his claims by making no reference thereto.

3. An applicant to purchase state land, whose application is rejected, is not in privity with the state, in such sense as to entitle him to object that the parties to a contest referred to the superior court to determine their right to purchase the land have agreed to divide the land, in order to evade the provision of Const. art. 17, providing that land suitable for cultivation shall be granted only to actual settlers in quantities not exceeding 320 acres to each settler.

In Bank. Appeal from Superior Court, Kern County; M. L. Short, Judge.

Action by W. E. Youle against Mary J. Thomas. Edward Clarke intervened. From the judgment rendered, and from an order denying a new trial, intervener appeals. Dismissed.

Charles G. Lamberson, for appellant. Galpin, Thomas & Bolton, for respondent. James F. Peck, Solinsky & Wehe, and Chas. C. Boynton, amici curiæ.

SHAW, J. The defendant, Mary J. Thomas, moves to dismiss the appeal of the intervener, Edward Clarke, from the judgment in favor of Mary J. Thomas and from the order denying his motion for a new trial. The motion is made upon the ground that the intervener is not a party aggrieved by the judgment and order appealed from. For the hearing of this motion the cause was put upon the San Francisco calendar, and was numbered as case No. 4,026, on that calendar. The case on appeal is on the Los Angeles calendar, and is numbered on that calendar as No. 1,543. The case is as follows:

On August 22, 1899, the defendant, Mary J. Thomas, filed in the office of the state surveyor general her application to purchase some 620 acres of section 36, township 32 south, range 23 east, Mt. Diablo meridian, situated in Kern county, stating that the land was unoccupied and unsuitable for cultivation. Her application was approved by the surveyor general, and she thereafter received a certificate of purchase from the register of the state land office, declaring her entitled to a patent upon payment of the balance of the purchase money. On August 8, 1900, W. E. Youle, claiming to be an actual settler on the north half of said section and that the same was suitable for cultivation, filed with the surveyor general his application to purchase said half section, and his protest against the purchase thereof by Mary J. Thomas, under her application, and demanded that the respective rights to purchase the land be referred to the superior court of Kern county for trial. Thereupon the surveyor general duly made an order referring said contest to the superior court of

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*Rehearing denied May 6, 1905. Beatty, C. J., dissenting.

Kern county for trial and determination, and in pursuance thereof the plaintiff, on September 25, 1900, produced in said court a certified copy of said order, and filed the complaint in this action against Mary J. Thomas, John Doe, and Richard Roe, setting forth the respective claims and proceedings in the surveyor general's office, and asking an adjudication as to the rights of the two claimants. On November 24, 1900, Edward Clarke entered upon the half section in question and built thereon a small one-roomed house, and thereupon took up his residence therein, and on February 20, 1901, he presented to the surveyor general for filing his application in due form to purchase the said half section as land suitable for cultivation, together with his protest against further proceedings in the respective applications of Youle and Thomas, and demanded that the contest thus sought to be made between him and the other applicants be referred to the same court for trial. The surveyor general refused to receive or file the said application or protest, or to make any order in regard thereto.

Thereupon, on February 21, 1901, Edward Clarke presented to the court, and by leave of court filed, a complaint in intervention in the action between Youle and Mrs. Thomas, alleging the facts with relation to his settlement upon the land and his application to the surveyor general, averring that the land was suitable for cultivation, and stating upon information and belief that plaintiff and defendant had agreed to divide the land between them, in consideration whereof plaintiff was to dismiss the action and allow the defendant to procure a patent under her application. On June 15th the defendant filed her answer to the complaint, a separate answer to the complaint in intervention, and a cross-complaint, praying for a judgment against the plaintiff and a decree declaring that she was entitled to a patent under her purchase. Thereafter eight other persons by leave of court filed complaints in intervention, each claiming as an applicant for the purchase of a particular 40-acre tract of the half section, whose application and protest the surveyor general had refused to receive and file, and alleging that the land was not fit for cultivation. When the case came on for trial, the court, on motion of plaintiff and defendant and intervener Clarke, dismissed these eight complaints in intervention and set aside the order allowing the same to be filed. When the cause came on for trial the plaintiff offered no evidence, and stated that he abandoned the case. The intervener and the defendant Thomas appeared, and evidence was thereupon introduced, upon which the court made findings upon the allegations of the complaint, the cross-complaint of Mary J. Thomas, and the complaint in intervention of Clarke. Judgment was then given and entered to the effect that the action be dismissed as to the defendants Doe and Roe, that the plaintiff had no right to purchase the land described in his complaint, and that Mary J. Thomas was entitled to a patent for the land described in her certificate on full payment of the price. The intervener was not mentioned in the judgment, nor was any reference made therein to his right or claim. He moved for a new trial, over the objection of the defendant Thomas, who claimed that the court had no jurisdiction either of his complaint in intervention or of his motion for a new trial. His motion was denied, and he appeals from the judgment and from the order denying the motion.

We are of the opinion that the intervener is not aggrieved by the judgment entered in the action, and hence that the motion to dismiss the appeal should be granted. It will be observed that although the court first allowed the filing of the complaint in intervention, and followed it up by taking evidence and making findings thereon, yet that it refused to go any further with the unauthorized contest, and gave judgment solely with regard to the respective rights of the original parties, entirely ignoring the intervener. The jurisdiction of the superior court in actions begun in pursuance of a reference to it of a contest arising in the surveyor general's office over the right to purchase state land is special and limited. It is derived solely from the provisions of the Political Code relating to such contests. The sole object to be achieved by the trial before the superior court is a determination of the question of the rights of the two parties between whom the contest arose in the surveyor general's office to purchase the particular tract of land in question. When the judgment of the superior court is given, the state has, by its legislative action embodied in the statute, declared that its officers are bound by the judgment of the court, and that the patent must issue to the particular one of the persons who made the original contest in the surveyor general's office adjudged to have the right. It is not a case where the court has before it a certain fund, or a certain piece of property, to determine what shall ultimately be done with it. In such a case the court, having general jurisdiction in equity, would be entitled to entertain the application of any person claiming a right thereto, and could give judgment awarding the property to any one who might be able to show his right. But in a question of the sort here involved there is no such general power. It is a mere method by which the state determines to whom it will sell its lands, and the parties concerned are the parties who have made the respective applications, and whose rights have been referred to the court for adjudication.

Section 3414 of the Political Code provides that, when a contest arises between two or more applicants to purchase a particular tract of land, the surveyor general or register, whenever a question of law is involved, or when either party demands a trial in the courts of the state, must make an order referring the contest to the proper court of the county in which the land is situated. Section 3415 declares that, after such order is made, either party may bring an action in the superior court of the county in which the land is situated "to determine the conflict, and the production of a certified copy of the entry, made by either the surveyor general or the register, gives the court full and complete jurisdiction to hear and determine the action." By section 3416 it is provided that, upon the filing of a copy of the final judgment of the court, the surveyor general or register must proceed with the sale of the land to the party who by the judgment is determined to have the right thereto. These provisions apply to school lands (Pol. Code, § 3495), and they clearly show that the state is merely referring a single question to the court for decision, and that there is no intention to authorize a general inquiry concerning the land, or the determination of rights under applications to purchase made after proceedings are begun upon the order of reference. It would require a special provision of the statute to authorize such an enlargement of the inquiry, and no such provision appears.

It may be conceded that if the court had stepped aside from the decision of the controversy submitted to it by the state, and had determined the rights of the intervener with respect to some independent or collateral matter, the intervener would have the right to appeal to have such unauthorized judgment declared void by this court. No such question is before us. It is the judgment, not the findings, which controls. There was here no attempt to adjudicate anything, except the single question whether W. E. Youle or Mary J. Thomas had the right to make the purchase. This was the only question the court had authority to determine, and the only question it did determine. By virtue of his attempt, after the reference and after the action was begun, to settle upon and purchase the land, Clarke had, and could have, no interest whatever in the question before the court. His attempt to thrust himself and his claims into the controversy accomplished nothing but a judgment ignoring him, and determining only the original contest, declaring that Mary J. Thomas was entitled to make the purchase. By that judgment the state is bound, and it is the only party interested. The only effect of his appeal, if decided on the merits, must be a decision that he has no interest in the question and is not affected by the judgment. He is not in privity with the state, and cannot raise the point that the parties had agreed to divide the land in order to evade the provision of the Constitution (article 17) that land suitable for cultivation shall be granted only to actual settlers, in quantities not exceeding 320 acres to each settler. The state has submitted its rights in that regard to the determination of its own officers and courts, and citizens in their private capacity have no right to intervene. It is only when a citizen is in privity with the state that he can be allowed to question the sale made or about to be made by the state. He does not put himself in such privity by making an application to purchase which is rejected. Kentfield v. Hayes, 57 Cal. 411; Burling v. Thompkins, 77 Cal. 261, 19 Pac. 429; Dreyfus v. Badger, 108 Cal. 63, 41 Pac. 279.

These conclusions are supported by previous decisions of this court. A similar question arose in Vance v. Evans, 52 Cal. 94. A second application by one of the parties had been filed after the order of reference was made. The court said: "The only contests in respect to the right to purchase lands of which the district courts have jurisdiction are those which arise in the surveyor general's or register's office, and none had arisen in either of those offices concerning the defendant's second application." In Berry v. Cammet, 44 Cal. 351, the court said: "The sale of the lands of the state is committed to the executive department of the government; and the judicial department has no jurisdiction of controversies arising between applicants for the purchase of the lands, except in such matters as are expressly provided for by the statute." In McFaul v. Pfankuch, 98 Cal. 402, 33 Pac. 398, it is said: "It is not a question that the plaintiff may litigate of his own mere volition. A preliminary step must be taken by invoking the action of the surveyor general, and the order of that officer referring the rights of the parties to the determination of the superior court is not only necessary to enable the plaintiff to invoke the action of the court, but without such order the court has no jurisdiction to hear or determine the rights of the parties." In Byrd v. Reichert, 74 Cal. 582, 16 Pac. 499, the court says, with reference to this class of actions: "When a court has acquired jurisdiction to hear and determine an action of the kind above referred to, it is evident that it can determine only such questions as are involved in the contest on which the action is based. It cannot determine as to other contests or other asserted rights, and in so far as it attempts to do so its action, being beyond its jurisdiction, is void." In Mont Blanc C. G. M. Co. v. Debour, 61 Cal. 364, the court, speaking of similar provisions of the federal statute with relation to contests over the right to purchase lands from the United States, said: "The action is one in which those only who have filed claims to the land in the United States land office could properly be made parties to the action, which was brought for the sole purpose of determining the rights of possession between such adverse claimants." It has been held that after a contest has been referred to the courts for determination, and an action has been begun, the officers of the state are divested of further power with reference to the proposed sale, and cannot receive subsequent applications. Laugenour v. Shanklin, 57 Cal. 70; Cunningham v. Shanklin, 60 Cal. 125; Wrinkle v. Wright, 136 Cal. 496, 69 Pac. 148.

The conclusion necessarily follows that the intervener has not been aggrieved by the judgment and order from which he appeals. Under no circumstances was he entitled to obtain in that action a valid or effectual judgment with respect to his rights. The state is the owner of the property, and it has declared by statute the manner in which and the persons to whom a sale may be made. No person other than those between whom it authorizes an action to be begun to determine this question has any right to interfere in the proceedings, nor can gain any right when he attempts to interfere. Not being an aggrieved party, he has no right of appeal.

The appeals from the judgment and order are dismissed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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146 Cal. 496

DE LA BECKWITH v. SUPERIOR COURT OF COLUSA COUNTY et al. (S. F. 4,105.)

(Supreme Court of California. April 4, 1905.)

PARTIES—ADDITIONAL PARTIES—JURISDICTION OF COURT — PLEADINGS—DEMURRERS—EFFECT OF ORDERS—MANDATE—DIRECTION TO COURT —WHEN ISSUED.

1. Under Code Civ. Proc. § 389, requiring the court to order the bringing in of parties without whom a complete determination of the controversy cannot be had, the court should pass upon the merits of a motion, made after certain defendants have answered, to vacate a previous order sustaining demurrers to the complaint interposed by other defendants, and to bring said defendants into court and overrule their demurrers, on the ground that their presence is necessary to a complete determination of the controversy, and that the demurrers were not well taken, where no final judgment has been entered in favor of such defendants, although the time has elapsed within which plaintiff might have amended his complaint under the order sustaining the demurrers, and he has failed to do so, and although he has made no showing of mistake, inadvertence, or excusable neglect, prescribed by Code Civ. Proc. § 473, as a condition of relief from a judgment or order.

2. A writ of mandate will not be granted where it appears that the relator has no right to the relief which it is his ultimate object to attain, and that the writ will serve no purpose except that of enforcing a mere abstract right, unattended by any substantial benefit.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 48.]

3. A ruling of the court sustaining demurrers to the complaint is not the law of the case in any such sense as to preclude the court from vacating such ruling at any time during the progress of the trial, if it deems the same erroneous.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 340.]

4. An order sustaining a demurrer to a complaint is not a judgment, and does not have the effect of finally and irrevocably dismissing the demurrant from the action.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 568.]

5. Mandate will lie to compel the trial court to hear and pass upon the merits of a motion which it has jurisdiction to entertain, and which it declined to entertain on the sole ground that it had no such jurisdiction.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 87.]

In Bank. Application by B. De La Beckwith, as administrator, etc., for a writ of mandate against the superior court of the county of Colusa and Hon. H. M. Albery, judge thereof. Writ awarded.

A. L. Shinn (Ernest Weyand, S. C. Denson, J. W. Dorsey, and R. M. F. Soto, of counsel), for petitioner. Frank H. Gould, for respondent.

ANGELLOTTI, J. This is an application for a peremptory writ of mandate. There is no controversy as to the material facts, which are as follows, viz.: An action wherein this plaintiff was plaintiff and various persons and corporations were defendants was pending in the superior court of Colusa county, the object thereof being to have it determined that the plaintiff's intestate was the owner of certain water locations and water rights and rights of way, that whatever right, title, or interest was held by defendants therein was held by defendants in trust for plaintiff, and to require defendants to convey all of the same to plaintiff. Demurrers to the amended complaint had been interposed by the defendants, and the demurrers of some defendants had been overruled, while the demurrers of others had been, by order made and entered, sustained, with leave to plaintiff to amend his complaint within 10 days. Plaintiff had failed to amend, but no final judgment in favor of the defendants whose demurrers had been sustained had been ordered or entered. The defendants whose demurrers had been overruled served and filed their answer to the amended complaint. Under these circumstances plaintiff moved in the court below, upon notice to the defendants whose demurrers had been sustained, "for an order vacating the order of said court sustaining the demurrers of said defendants, and bringing the said defendants into court, and overruling the demurrers of said defendants," upon the ground, first, that a complete determination of the controversy cannot be had without said defendants, and their presence will prevent a multiplicity of suits, and, second that the orders sustaining the demurrers were inadvertently made, for the reason that they were not well taken. The said defendants objected to the hearing or consideration of the motion upon various grounds, amounting substantially to this, viz.: that the orders sustaining the demurrers were in effect res judicata, and the court had no power to set aside or vacate the same, directly or indirectly; that by reason thereof said defendants had been dismissed from the action, and the court had lost jurisdiction over them; and that so long as such orders remained in force the court had no power or jurisdiction to bring said defendants back into the action. It was further objected that no showing was made to the effect that the orders were made through any inadvertence, surprise, or excusable neglect, as provided in section 473, Code of Civil Procedure, relative to relief from orders and judgments. The ruling of the court upon the objections was as follows, viz.: "The court, having duly considered the same, ruled that the objection to entertain such motion be sustained upon the ground that the court had no power to hear the motion without a showing." Thereupon the plaintiff applied to this court for a peremptory writ of mandate requiring said superior court and the judge thereof simply to take jurisdiction of said motion and hear the same upon its merits.

We are satisfied that the superior court had the power to entertain the motion, and that no showing of "mistake, inadvertence, surprise, or excusable neglect," which was evidently the "showing" referred to by the superior court, was essential as a prerequisite to the exercise of such power. The motion was, in part, for an order bringing said defendants in as parties, upon the ground that a complete determination of the controversy could not be had without their presence. The statute expressly authorizes such an order, providing that, when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint, to be filed, and summons thereon to be issued and served. Section 389, Code Civ. Proc. The court, having jurisdiction of the cause, necessarily has jurisdiction to entertain an application for an order bringing in such parties at any time prior to judgment, and, where such an application is made, the court ought to hear the same upon its merits, in order that such parties may be brought in, if their presence is essential to a complete determination of the controversy. So far as the jurisdiction of the court to hear such an application is concerned, it can make no material difference whether the parties sought to be brought in were or were not originally named as parties to the action. The prior proceedings in the action in relation to them, where they were once parties, may have been such as to finally dispose of the issues in their favor; but this is a matter that goes to the merits, and not to the jurisdiction of the court to hear the application upon the merits and rule upon the same.

As, however, a writ of mandate will not be granted where it appears that the relator has no right to the relief which it is his ultimate object to attain, and that the writ will serve no purpose except that of enforcing a mere abstract right, unattended by any substantial benefit (see Gay v. Torrance, 78 Pac. 540, and cases there cited; Kerr v. Superior Court, 130 Cal. 183, 62 Pac. 479), it would appear to follow that the writ should not issue here, if the facts shown are such that the superior court must, of necessity, have denied the application. But no such facts appear. The mere fact that an order had been made sustaining the demurrers of these parties to the amended complaint, with leave to plaintiff to amend, and that plaintiff had failed to amend within the time allowed, did not necessitate a denial of the application. The ruling of the court upon the demurrers had not in any proper sense of the term become the law of the case. It is a most common occurrence for a trial court to change its rulings during the progress of a trial upon questions of law, and no one would contend that it is not within its power to do so, or that it should not do so when satisfied that the former ruling was erroneous. A ruling on demurrer occupies no better position, in this regard, than any other ruling from which an appeal could not be taken, and has frequently been disregarded when the same point subsequently arose in the same case in another way. In Lawrence v. Ballou, 37 Cal. 518, a demurrer to a complaint in ejectment was sustained, and, the complaint having been amended and the action having come on for trial, a motion for a nonsuit was made upon an opening statement of plaintiff's counsel, upon the ground that the statement showed only such title in plaintiff as had been held insufficient by the court in ruling on the demurrer. The motion was granted, and, in reversing the judgment, this court said: "The doctrine that a previous ruling has become the law of the case has no application, except as to the decisions of appellate courts. * * * If, at the trial of a cause at nisi prius, the court makes a ruling upon a certain point, the court is not bound by it, if the same point arises again. On the contrary, the court may and should change its ruling, if in the meantime it has become satisfied that it was erroneous." In Sherburne v. Strawn, 52 Kan. 39, 34 Pac. 405, a motion of defendant for judgment on the pleadings was granted, notwithstanding a prior order overruling the demurrer to the complaint; the Supreme Court of Kansas saying: "The court retained complete jurisdiction over the case until final judgment, and had ample power to correct its former ruling on the demurrer, if erroneous." In Richman v. Board, 77 Iowa, 513, 524, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. Rep. 308, where the trial court had practically reconsidered its ruling on demurrer, the Supreme Court of Iowa said: "We are not prepared to hold that if, during the trial of the issues of an action, a court becomes convinced of error, he may not correct it. It would be a serious impediment to a fair and speedy disposition of causes if such a rule was to obtain." See, also, Perry v. Baker (Neb.) 86 N. W. 692, and First Nat. Bank v. Williams, 126 Ind. 423, 26 N. E. 75.

An order sustaining a demurrer is not a judgment, and does not have the effect of finally and irrevocably dismissing the demurring party from the action. "It may form the basis for rendering a judgment, but it is not itself a judgment" (Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571), is not appealable, and can be reveiewed by an appellate court only on appeal from a final judgment subsequently given. Upon such an order being made without leave to amend, or where it is made with leave to amend and no amendment is made, the party whose demurrer has been sustained may become entitled to a judgment which may effectually bar further proceedings against him in the matter from which he has been dismissed. In the absence of such a judgment, however, the mere order constitutes no bar, and if, at any time prior to judgment, it is made to appear to the court that a complete determination of the controversy cannot be had without the presence of such party, we can conceive of no good reason why the court may not make such orders as will have the effect of bringing such party into the action again. He has never really been effectually dismissed from the action, and technically speaking is not a new party at all; but the order sustaining his demurrer has the effect of relieving him from the necessity of further defending, in the absence of subsequent action by the court. Until final judgment in his favor, he is, however, within the jurisdiction of a court in that action, and the statute, which authorizes the court to bring in any parties whose presence is essential, is broad enough to include all persons not then actively before the court in the action. We entertain no doubt as to the power of the court, at any time prior to final judgment in favor of a party, to reconsider a ruling sustaining his demurrer to a pleading. Where it is made to appear to the trial court, prior to final judgment, that the presence of the party whose demurrer has been sustained is essential to a complete determination of the controversy, and that its prior ruling on demurrer was erroneous, we have no doubt that it ought to reconsider such ruling. Its jurisdiction, under the circumstances, to make any and all such orders as may be necessary to so place such party that the controversy may be finally and speedily determined, is ample.

The plaintiff was entitled to have the trial court entertain and consider his motion on its merits. It is not intimated that the records, files, and papers in the action, including the answers of certain defendants filed subsequent to the ruling on demurrer, did not show a case which would justify the court in bringing in the parties named, and in concluding that it had erred in sustaining their demurrers to the amended complaint. We cannot say, therefore, that the petitioner is here seeking to enforce a mere abstract right, unattended by any substantial benefit. Under these circumstances there can be no serious doubt as to the right of plaintiff to a writ of mandate, compelling the trial court to exercise its jurisdiction by hearing and disposing of the motion. This, clearly, it has not done. The order made by it upon the disposition of the motion was precisely the same in effect as the order considered by this court in Cahill v. Superior Court, 78 Pac. 467, viz., a dismissal of the motion for lack of jurisdiction. In this case, as in that, there was no question of fact to be determined by the trial court as a prerequisite to assuming jurisdiction of the motion, and such court decided "as matter of law purely" that it could not in any case entertain a motion of the character here made, in the absence of a showing of mistake, inadvertence, surprise, or excusable neglect on the part of the one making the motion. As was said of a similar case in Cahill v. Superior Court: "This was a proposition, not dependent on any facts whatever, but wholly upon a consideration of the powers of the court as defined by the Constitution and statutes." That mandamus will lie to compel a court having jurisdiction to act under such circumstances, in the absence of other plain, speedy, and adequate remedy, is fully established by the opinion in Cahill v. Superior Court, supra, and the cases therein cited. In this case there is no other plain, speedy, and adequate remedy.

Let a peremptory writ of mandate issue as prayed for.

We concur: BEATTY, C. J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

146 Cal. 571

JOHNSON v. PHENIX INS. CO. OF BROOKLYN, N. Y., et al. (S. F. 4,047.)*

(Supreme Court of California. April 8, 1905.)

APPEAL—DENIAL OF NEW TRIAL — PARTIES — SERVICE OF NOTICE—APPEAL FROM JUDGMENT—JURISDICTION.

1. Where notice of appeal from an order denying a new trial is served on the adverse parties to the motion, the service is sufficient to give jurisdiction on appeal, though a codefendant was not served.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2137, 2138.]

2. The question whether other parties should have been made parties to the motion for a new trial is not involved on a motion to dismiss an appeal from an order denying the motion.

3. Though a failure to serve an adverse party with notice of intention to move for a new trial

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*Rehearing denied May 8, 1905.

may be cause for denying the motion, it is not ground for dismissal of the appeal from the order for want of jurisdiction of the Supreme Court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3125.]

4. Under a policy of fire insurance sued on, loss, if any, was made payable to a mortgagee. The mortgagee was made a party defendant, because it refused to be made a party plaintiff, as alleged in the complaint, in which plaintiff asked for judgment for the full amount due on the policy and that out of the judgment the amount due the mortgagee be paid. The judgment was in favor of the plaintiff for the amount of the policy and interest, and "that out of such judgment the mortgagee be paid $400." *Held*, that under Code Civ. Proc. § 578, providing that judgment may be given for one or more of several plaintiffs, the judgment rendered was within the jurisdiction of the court, though the mortgagee never answered or appeared, within section 1014.

5. Though it never answered or appeared in the action, within Code Civ. Proc. § 1014, providing that after appearance a defendant is entitled to notice of all subsequent proceedings of which notice is required to be given, the mortgagee was an adverse party to an appeal by the insurance company, within section 940, requiring notice of appeal from a judgment to be served on the adverse party; and an appeal by the insurance company from the judgment without notice to the mortgagee did not confer jurisdiction on the Supreme Court.

Department 1. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Elizabeth D. Johnson against the Phenix Insurance Company of Brooklyn, N. Y., and others. From a judgment in favor of plaintiff and one of defendants, and from an order denying a motion for a new trial, the insurance company appeals. On motion to dismiss. Motion granted in part.

Carbet & Goodwin and Lawrence T. Wagner, for appellant. R. H. McGowan (Galpin & Bolton, of counsel), for respondent.

ANGELLOTTI, J. Motion to dismiss appeals from a judgment and an order denying the motion for a new trial made by the Phenix Insurance Company, one of the defendants. The ground of the motion is that the notice of appeal was not addressed to or served upon the codefendant of appellant, the Bank of San Mateo County, alleged to be a necessary party to said appeals.

1. So far as the appeal from the order denying the motion for a new trial is concerned, it is only necessary to say that the Bank of San Mateo County was not a party to the proceedings on motion for a new trial. The notice of intention to move for a new trial was addressed to the plaintiff and her attorneys only. If the notice of appeal from an order on motion for a new trial be served upon the adverse parties to the motion in the court below, such service is sufficient to give this court jurisdiction to entertain the appeal from such order, at least in cases where the motion has been denied in such court. Watson v. Sutro, 77 Cal. 609, 20 Pac. 88. The question as to whether other parties should have been made parties to the motion in the court below is not involved upon a motion to dismiss the appeal from such an order. Id. A failure to serve an adverse party with notice of intention to move for a new trial may be a reason for denying the motion for a new trial, and for affirming such order on appeal; but it does not constitute a reason for the dismissal of the appeal upon the ground that the court has not acquired jurisdiction to hear it. In re Ryer, 110 Cal. 556, 559, 42 Pac. 1082. See, also, Barnhart v. Fulkerth et al., 92 Cal. 155, 28 Pac. 221.

2. The notice of appeal from the judgment was not addressed to or served upon the defendant Bank of San Mateo County. The action was brought by plaintiff to recover the amount of $1,000 and interest, alleged to be due upon a fire insurance policy for $1,000, made and delivered by the Phenix Insurance Company to plaintiff, covering her dwelling house. By the terms of the policy, the loss, if any, was made payable to the Bank of San Mateo County, a mortgagee of plaintiff's property. The amount due such bank on said mortgage, as appears from the judgment, is $400. The bank was made a party defendant for the reason, as alleged in the complaint, that it "is a necessary party * * * and refuses to be made a party plaintiff herein." In her complaint, plaintiff asked for judgment for the full amount due on the policy, and "that out of said judgment the amount due and owing to the defendant Bank of San Mateo County on said mortgage be paid." It does not appear that the bank ever answered, demurred, or gave written notice of appearance. Section 1014, Code Civ. Proc. The judgment recites that on the trial George C. Ross, Esq., appeared for said defendant bank, and "announced that they did not desire to answer the complaint, and wished to remain neutral in the matter." The judgment also recites that the case was tried by a jury, which found a verdict for plaintiff in the sum of $1,000, with interest. The judgment proper is as follows: "It is ordered, adjudged, and decreed that the plaintiff have and recover of and from the defendant Phenix Insurance Company of Brooklyn, N. Y., a corporation, the sum of $1,050.15, together with her costs and disbursements incurred herein, amounting to the sum of $81.40, with interest thereon at 7 per cent. per annum from date hereof until paid, and that out of said judgment there be paid to the defendant Bank of San Mateo County, a corporation, the sum of $400.00." The notice of appeal states that the appeal is taken "from the judgment * * * in favor of the plaintiff in said action and against the said Phenix Insurance Company of Brooklyn, one of the defendants, and from the whole of said judgment." Upon these

facts the question is presented as to whether the bank is an "adverse party," to whom notice of defendant's appeal was required to be given, in order to confer jurisdiction upon this court to entertain such appeal.

It is apparent that under the terms of this judgment the right of the bank to the $400 thereby ordered paid to it is dependent upon the maintenance of the judgment given in favor of the plaintiff. It is the plaintiff alone who is adjudged to recover from the insurance company, and it is "out of said judgment" in favor of plaintiff that the bank is to be paid. The appeal is from the judgment "in favor of the plaintiff in said action" against the insurance company, and from the whole thereof. This, under the language of the judgment, necessarily includes the whole amount found due on the policy. If, on the appeal, the judgment be reversed, the judgment, in so far as it requires the payment of any money by the insurance company, is vacated, and there is no fund against which the bank may enforce its adjudged right. It does not, however, follow that there is no judgment in favor of the bank. There may be no judgment in its favor directly enforceable by it against the insurance company, but the bank is adjudged to have an interest, to the extent of $400, in the judgment recovered by plaintiff, and it is, in terms, ordered that from the same said sum of $400 shall be paid to the bank. The plain effect of this provision is that, to the extent of $400 of the amount given by the judgment to the plaintiff, the plaintiff is practically adjudged to be only a trustee for the bank. The bank is, to that extent, beneficially interested in the fund adjudged to be recovered from the insurance company by the plaintiff. So far as the bank is concerned, the judgment determines, as against the insurance company, the right to the recovery by the plaintiff of a certain amount of money, in a portion of which the bank has a beneficial interest, and, as between the plaintiff and the bank, the extent of the bank's interest in the amount so recovered. The judgment establishes a fund, to be collected from the insurance company, from which the bank is, under the terms of the judgment, to be paid. This is a judgment in favor of the bank, that would be absolutely nullified if defendant's appeal were sustained and the judgment in her favor reversed.

We cannot say that the superior court was without jurisdiction to so adjudge the rights of the bank. Section 578, Code Civ. Proc. The complaint states facts upon which a judgment may be based, and practically asks for the very judgment that was given. Under these circumstances it seems impossible to escape the conclusion that the bank is an "adverse party," within the meaning of section 940 of the Code of Civil Procedure. An adverse party is one "whose rights may be affected by a reversal of the judgment." Williams v. S. C. Mining Ass'n, 66 Cal. 193, 5 Pac. 85. In Senter v. De Bernal, 38 Cal. 637-640, it was said: "The question is as to the meaning of the words 'adverse party' as here used, and as to that we think there can be no rational doubt. Every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken is, we think, an 'adverse party,' within the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener." And in Terry v. Superior Court, 110 Cal. 85, 42 Pac. 464, it was said that "adverse parties are those who, by the record, appear to be interested in the judgment, so that they will be affected by its reversal or modification." It is apparent from the record that the judgment here cannot be reversed without depriving the bank, a party to the action, of an apparent legal advantage. See In re Castle Dome Mining & Smelting Company, 79 Cal. 246, 248, 249, 21 Pac. 746. The effect of the judgment was to provide for the payment of a debt due to it from money recovered by plaintiff from the insurance company, and the reversal of the judgment would be to deprive it of such fund. It is no answer to this to say that the insurance company has, in fact, no defense against the bank, and that the bank may ultimately recover the money due it, by another judgment in this action directly against the insurance company, or that it may collect its debt from the mortgagor. The question is whether the judgment gives it something which will be taken away by a reversal. The judgment, which it is here sought to reverse, provides for the immediate payment of the money due the bank from a fund to be collected from the insurance company, and this gives the bank an apparent legal advantage. The relief which the insurance company seeks upon this appeal cannot be granted as to the plaintiff, without also being granted as to the bank.

It is suggested that the interest of the bank in the judgment is not a direct interest, but only a collateral or remote interest, and that only those who are directly interested in the judgment or order appealed from can be held to be adverse parties. We are of the opinion that it is apparent from the record that the defendant bank has a direct and immediate interest in the subject-matter of the appeal that would be affected by a reversal of the judgment.

It is urged that the bank did not plead or appear in the action, and Clarke v. Mohr et al., 125 Cal. 540, 58 Pac. 176, is cited in support of the contention that it was therefore unnecessary to serve it with a notice of appeal. That was a case where the notice of appeal had not been served upon certain defendants, who recovered nothing under the judgment, and as to whom the judgment dismissed the action. On the appeal of a defendant, against whom the judgment ran in favor of an intervener, who claimed some interest in the fund in dispute, it was held that, as the record did not show that such defendants who had been dismissed from the action were served with summons or had appeared, service of the notice of appeal on them was not requisite. It was said: "Unless they had been brought before the superior court, they would not be affected by its judgment, or by the reversal thereof by this court." What is there decided can have no application to a case where the judgment has been given in favor of one who is shown by the record to have been in fact a party to the action.

The appeal from the judgment is dismissed. As to the appeal from the order denying the motion for a new trial, the motion to dismiss is denied.

We concur: SHAW, J.; VAN DYKE, J.

146 Cal. 471

POWLEY et al. v. SWENSEN et al. (L. A. 1,230.)

(Supreme Court of California. April 4, 1905.)

MASTER AND SERVANT—SERVANT'S INJURIES—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—JURY—TAKING PAPERS TO JURY ROOM—TAKING PLEADINGS.

1. In an action by minors for the death of their father through the alleged negligence of defendant, it was proper to permit the mother and guardian of plaintiffs to testify as to deceased's average monthly contribution to plaintiffs' support at the time of his death.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 83, 88.]

2. A tunnel was being driven through a hill, and a retaining wall was built near the face of the hill, for the purpose of holding the earth in place and preventing it coming down at the end of the tunnel. The wall stood a little distance from the face of the hill, and a sewer which passed through the hill above the tunnel leaked so that water permeated through the earth. A body of earth slipped from the hill and, moving toward the retaining wall, passed downward along the inner side of the wall, carrying with it timbers and materials, and causing the death of a servant. In an action for the death, the city engineer testified to the condition and stratification of the earth above the tunnel, to the pitch of certain rock formations toward the wall, to the loosening effect of water permeating a body of earth, and to the additional pressure and force of a moving body of earth. *Held*, that a motion to strike his testimony on the ground that it had not been shown that the retaining wall was built in accordance with plans prepared in his office, as claimed by defendant, was properly denied; the motion being too general, and some of the testimony being admissible, irrespective of the point made by the motion.

3. In an action for the death of a servant, defendant testified that he paid deceased $3 a day and other men about $1.75, and he was then asked why he paid deceased $3, for the purpose of showing that deceased had extra responsibility. *Held*, that there was no error in sustaining an objection to the question; the witness having testified to deceased's duties.

4. Where, in an action for the death of a servant, defendant set up as a special defense that deceased was employed as a foreman to direct and supervise the work, and was charged with the duty of providing for his own safety in securing a safe place to work, and that the accident was due to his own violation of duty, the issues presented were sufficient to admit full proof as to what duties devolved on deceased and what instructions were given him.

5. Where, in an action for the death of a servant, killed by the giving way of the supporting work of a tunnel, defendant testified that he gave deceased no instructions about the tunnel, but that deceased was to "take care of the whole tunnel," and other witnesses testified as to deceased's employment, any error in excluding questions as to the scope of deceased's duties was harmless.

6. Where there is conflicting evidence as to material facts, the question is one for the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 342, 343.]

7. In an action for the death of a servant, the court instructed that it was the duty of a master to furnish the servant a safe place to work and to make provision for the safety of his employés or servants. Subsequently the court instructed that defendants were not obliged to furnish deceased with an absolutely safe place, or to make the supports of the tunnel in which he was killed absolutely safe, but were only required to use ordinary care. *Held*, that the jury could not have been misled, so as to accept the first instruction as meaning that defendants were required to furnish an absolutely safe place.

8. In an action for the death of a servant, the court instructed that it is no part of the duty of a servant to inquire into the sufficiency of the provisions made by the master to furnish the servant with a safe place to work, and that the servant has a right to rely on the master in such regard; and the court instructed, on defendant's theory of the case, that if deceased was employed to take charge of timbering the tunnel in which he was killed, so that the same should be safe, and his death would not have occurred, but for defects of the timbering put in by him or under his direction, plaintiffs could not recover. *Held*, that the former instruction was not erroneous, when taken in connection with the other, as ignoring the defense.

9. Where, in an action for the death of a servant, killed in a tunnel being driven by contractors, owing to the caving of earth, defendants interposed a special defense tending to fix the responsibility for the injury on the city, in that the work was being done in accordance with plans made by the city, an instruction that, where two or more persons jointly contribute to an injury, the injured party may sue one or all, was not harmful, even if not strictly justified.

10. Code Civ. Proc. § 612, provides that, on retiring for deliberation, the jury may take with them all the papers which have been received as evidence, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them. *Held* that, where papers have been read in evidence, it is discretionary with the court whether to allow the jury to take them or not.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 732, 735, 736.]

11. The practice of allowing pleadings to be taken to the jury room, whether read in evidence or not, is not a safe one; but its indulgence is not reversible error, in the absence of a showing of prejudice or injury.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Edith Z. Powley and another, by Lida Colburn, their guardian ad litem, against Anton Swensen and another, doing business as Swensen & Hill. From a judgment in favor of plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Herbert Cutler Brown, for appellants. W. C. Petchner and Anderson & Anderson, for respondents.

CHIPMAN, C. Action for damages resulting from the death of plaintiffs' father, W. F. Powley, who, it is alleged, lost his life while in the employment of defendants through their fault. The cause was tried with a jury, and plaintiffs had the verdict, upon which the court entered judgment. Defendants appeal from the judgment and from the order denying their motion for a new trial, and bring the appeal here on bill of exceptions.

Defendants were contractors who had undertaken to construct a tunnel in the city of Los Angeles through a hill lying between Hill and Figueroa streets, being a projection of Third street, and known as "Third Street Tunnel." Work was begun on both sides of the hill, extending toward the center. The accident in question occurred within and near the westerly end or section of the tunnel. The plans for the tunnel included the construction of a strong retaining wall against the face of the hill, whose purpose was to hold the earth in place and prevent it coming down into the street at the end of the tunnel. This retaining wall extended entirely across Third street, and to a height of about 43 feet, and, to give it greater resistance, was built so as to lean slightly toward the hill. An opening through this wall formed the portal or entrance to the tunnel. It is in evidence that when this wall was completed it rested against the hill on the south side of Third street, and stood out from the hill 7 or 8 feet on the north side, and about 4 feet or 4½ feet at the top of the tunnel, and diminishing in width to some 20 inches at the floor of the tunnel—making a wedge-shaped opening between the wall and the hill. The mixing of cement for the arch brick work in the tunnel was done inside of this portal. Some trouble had arisen from earth falling down from the hillside to the place where the cement was being mixed, and to prevent this boards and timbers of different sizes had been placed against the wall and the hillside to catch this loosening earth, but not for the purpose and not at all adequate in strength to hold the earth in place, should a slide from the hill occur toward the wall. These boards and timbers were close enough together to accomplish the purpose intended of catching loose pieces of falling earth, but did not entirely shut out the light from above. The width of the tunnel in the clear was 42 feet, and at the time of the accident had been excavated toward the center of the hill some distance, 100 feet of which had received its brick roofing, leaving next to the portal about 20 feet of an undisturbed core and about 12 feet of tunnel, not yet completed, next to the completed portion. The work in the tunnel was carried on by means of a drift on each side of this core, and when the accident occurred the work on the tunnel was, as we understand the evidence, being done at the westerly end, through this core, toward the portal. Deceased was employed as foreman of the work in the tunnel, and was an experienced man in tunnel and timbering work in mines. There is evidence that he had nothing to do with building the portal or putting in the boards above referred to, and did not commence work until about two months after the retaining wall was built. His was the night shift; but, as it happened, he had taken the place of the other foreman on the Sunday of the accident, because this man declined to work that day. It appears that there was a city sewer crossing Third street above the tunnel and back of the portal 50 or 60 feet, from which sewage water escaped into the soil and penetrated the earth above the tunnel, into which latter the water seeped to some extent, which facts were known to defendants and to deceased. This water-saturated earth rested on or was intermixed with layers of shale having a 60-degree pitch toward the portal, and on the day of the accident a body of earth slipped from the westerly side of this sewer and moved toward the portal, and there was evidence that by its momentum and weight it crowded the earth against the portal, and downward along its inner side, carrying with it the timbers and material at the tunnel where the deceased was working, thus causing his death and the death of two others. The retaining wall stood the shock and weight without injury to it, and there is evidence tending to show that if this open space between the hill and the wall had been filled in with earth, or if sufficient bracing timbers of suitable strength had been placed against the wall and hill, it would have prevented the earth above the tunnel from moving and acquiring additional force by its momentum, and the timbering where the men were working would not have given way, and the accident would not have happened. There is evidence, also, that inside the tunnel the completed work some distance back from where the men were working did not collapse, and that no timbering or bracing inside the tunnel where the accident happened would have withstood the pressure.

The complaint alleged that the accident occurred "by the neglect and failure of defendants to exercise ordinary care to properly brace and strengthen said tunnel at the point where the same caved," and "to take proper or ordinary precautions in prosecuting said work as to render said westerly end of said tunnel safe, and thereby and by such negligence defendants failed to furnish said W. F. Powley with a safe place in which to work"; that "the said tunnel at the point where the same caved in as aforesaid, and the work therein, were of a dangerous character, and defendants did not exercise ordinary care and diligence to ascertain and apprehend the dangers thereof; and defendants negligently and carelessly failed to take measures for the protection of said Powley, while he was working within said tunnel as aforesaid, commensurate with the dangerous character of said tunnel and the work therein."

In addition to specific denials of the averments of the verified complaint, defendants set up three special defenses, in effect: First, that Powley was employed as foreman, "to direct and supervise the work of excavation, direct the laborers engaged upon such work, and to superintend and direct the placing of timbers and supports at the places and in that portion of the tunnel where the accident occurred," and he was charged with the duty of providing for his own safety, as well as that of other employés, and in securing to them a safe place to work, and that the accident was due to his own violation of duties expressly imposed upon him, and that his death was caused proximately by his own negligence. Second, that all said workmen, including plaintiffs' intestate, were engaged in a common employment, and, if he was injured, it occurred through the negligence of fellow servants of deceased. Third, that the work, including the construction of the retaining wall, was done in accordance with plans made by the city of Los Angeles and under the direction of its proper officers; that in the city sewer above referred to there was a manhole through which the city flushed said sewer, and that a large volume of water was carried into said sewer to flush the same, causing the sewer to break and said waters to impregnate the earth, and thus causing it to slide upon the strata of shale which, it is alleged, interlaid the earth at an angle toward said portal of 60 degrees; that said wall was ordered to be constructed for the purpose of preventing just such a slide of earth as happened, but that said wall was imperfectly constructed for the purposes for which it was intended. It is alleged, however, that defendants constructed the same under the directions of the city engineer, and relied wholly upon such directions and upon his skill and knowledge, and that the accident was the result of a combination of circumstances over which defendants had no control, and without their fault.

The errors complained of will be noticed in the order presented in defendants' brief.

1. Mrs. Colburn, mother and guardian ad litem of plaintiffs, was asked the question, "Did you know what was his [Powley's] average monthly contribution to their [the plaintiffs'] support at the time of his death?" to which she answered, "Thirty a month." Counsel thereupon objected as irrelevant and incompetent. Waiving the rule of practice which would have required a motion to strike out the answer, where made without objection, we think it was competent to learn from the witness, if she knew, to what extent plaintiffs were supported from their father's earnings, which was in effect the answer. It appeared elsewhere that he earned about $3 per day, and no other source of income was attempted to be shown.

2. At the close of plaintiffs' evidence defendants moved to strike out all the testimony of City Engineer Dockweiler, on the ground that it had not been shown that the retaining wall was built in accordance with the plans and specifications prepared in his office. The court denied the motion. It was in evidence that the plans and specifications for this wall were prepared in the city engineer's office, and that it was erected under the direct supervision of an engineer officer of the city in the performance of official duty. Nothing at this point in the case tended to show that this wall was not constructed in accordance with plans and specifications, and presumably it was so constructed. In fact the wall stood the pressure and was not defective, save that it was not built against the earth. Whether built in accordance with the original plans seems not to be material, as the lower court held. But the ruling was correct on other grounds. Witness Dockweiler had testified to the condition and stratification of the earth above the tunnel, to the pitch of the shale toward the wall, to the loosening effect of water permeating this body of earth and shale, to the additional pressure and force of a moving body of earth, and other facts. The motion was too general; for some of the testimony was clearly admissible, regardless of the point made by defendants. The motion should have been directed with precision to the objectionable testimony, if there were such. Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659.

3. When on the witness stand defendant Hill was asked why he paid Powley $3 per day, instead of $1.50 or $1.75, to which question plaintiffs objected. The court sustained the objection. The purpose of the question, as claimed by defendants, was to show that, because Powley received more pay than other men, it tended to show that he had "extra responsibility." The witness had testified to the fact that Powley was paid $3, and other men $1.50 and $1.75, per day. It was competent for the witness to testify to Powley's duties, in addition to showing this difference in pay, and the witness did testify as to Powley's duties. The reason why he was paid higher wages than other men would not necessarily tend to fix the extent of his responsibility.

4. Toward the close of the trial defendants asked leave to amend their answer "to the

effect that Mr. Powley had entire charge of the timbering in and about the tunnel." Defendants in their answer allege that Powley was employed as foreman to supervise the work of excavation, to direct the laborers on such work, and to superintend the placing of timbers at that part of the tunnel where the accident occurred. The issues presented in the pleadings were quite sufficient to admit of full proof as to what duties devolved upon Powley and what instructions were given him. Defendant Hill testified on the subject, and although some questions put to him by counsel for defendants after the refusal of the court to allow the amendment were objected to and refused, and exceptions taken, they were, owing to their form, within the discretion of the court to allow or refuse. These questions were in leading form, and were intended to bring out the scope of Powley's duties. The witness, however, had full opportunity to state the facts as to Powley's employment, as did other witnesses, and, among other answers, defendant Hill stated that he gave Powley no instructions about the tunnel, and that Powley "was to take care of the whole tunnel." Defendants were not prejudiced by the ruling of the court, if error be conceded.

5. A motion for nonsuit was made at the close of plaintiffs' evidence, and it is urged should have been granted, first, because there was then no direct proof of Powley's death; second, that, although there was evidence tending to show that the space behind the retaining wall was an element of danger, there is no evidence going to show that deceased was killed; third, that the evidence showed that the moving cause of the accident was the leakage of the sewer above the tunnel, but that "there was no testimony tending to show that defendants were responsible for that condition, or that any act of omission of defendants was responsible for the sliding of the earth and its precipitation into the tunnel." The testimony later on in the trial brought out quite fully the facts on these points. We think, however, when the motion was made, there was sufficient shown by the admissions of the pleadings and by the testimony before the jury to justify the court in refusing a nonsuit on the grounds stated.

6. Defendants asked an instruction that the verdict must be for defendants, which the court refused to give. To show that this was error defendants now present in their brief a review of the entire evidence in the case. As we have already seen, the evidence given in favor of the plaintiffs was sufficient to justify the denial of the motion for a nonsuit. Our attention has not been called to any evidence on behalf of the defendants which has the effect of explaining or modifying the evidence of the plaintiffs, so as to destroy its effect. On the contrary, as stated, the evidence given later tended to supply the defects, such as they were, in the plaintiffs' proof, and fully justified the refusal to direct a verdict for the defendants. If it is urged on the ground that the verdict is against law, the instruction cannot be upheld, because there was conflicting evidence as to material facts, which the jury had the right to pass upon. O'Connor v. Witherby, 111 Cal. 528, 44 Pac. 227.

7. Appellants object to instructions 4, 5, 6, 8, and 12. It is claimed that one special defense was that Powley was engaged by defendants as a timber man to take entire charge of the timbering, to take such steps as might be necessary to properly protect the work against just such an accident as did occur, and that defendants relied absolutely on his judgment and ability. The objection is that these instructions ignored this issue, and, furthermore, that they were given on the theory that it was the duty of defendant to furnish a safe place for the employés to work in. Instructions 4 and 5 are particularly pointed out as open to the objection made. Instruction 4 was: "It is the duty of a master or employer to furnish his servant or employé with a safe place to work, and to make provisions for the safety of his employés or servants as will protect them against the dangers incident to their employment." Further along the court instructed the jury: "You are instructed that Swenson and Hill were not obliged to furnish the said Powley with an absolutely safe place to work in, or to make supports of the tunnel absolutely safe, but they were only required to use ordinary care to protect their employés against accident," etc. We do not think the jury could have been misled to accept the first instruction above given as meaning that defendants were required to furnish an absolutely safe place in which deceased was to work. In view of all the instructions, the jury could not as reasonable men have acted upon the supposition that the court had told them the place must have been absolutely safe. Instruction 5 was as follows: "You are instructed that it is no part of the duty of a servant to inquire into the sufficiency of the provisions made by the master to furnish the servant with a safe place to work. The servant has a right to rely on the master in this regard, because it is the master's duty to provide a safe place in which to perform his work, and the servant may justly assume that the master has performed this duty." It is claimed that, under the pleadings, these were questions for the jury to determine, which were taken away from them by the instructions. The jury were fully instructed as to defendants' theory of the case, and they were told that if they should "find, from the evidence, that Powley was employed to take charge of the timbering of the tunnel, and that it was his duty to timber the tunnel and the spaces behind the retaining wall, so that the same should be safe and secure from accident, and if you find, from the evidence, that there were materials and means pro-

vided for the proper timbering of the tunnel, and if you find, from the evidence, that the death of Powley would not have occurred, but for defects or insufficiency in the timbering put in by him or under his direction, * * * the plaintiffs cannot recover. * * *" Other instructions pointing with equal directness to the defenses set up were given. We cannot see that the court invaded the functions of the jury, or took from them any questions which the law committed to them.

8. There was an instruction to the effect that, where two or more persons jointly contribute to the injury, the injured party may sue one or all. It is objected that no question of joint liability arose in the case. There was a special defense interposed by defendants tending to fix the responsibility for the injury upon the city of Los Angeles. It is not claimed that the instruction stated an unsound rule of law. In view of the pleadings and the evidence given tending to fix the responsibility on the corporation, the instruction was not harmful, even if not strictly justified.

9. The court instructed the jury that they might take with them for their "consideration the exhibits introduced in evidence and the pleadings in the case." Objection to this instruction was made by defendants on the ground that "the pleadings were not proper to be considered by the jury in arriving at their verdict." The record shows that the jury took with them the complaint and answer. Section 612, Code of Civil Procedure, provides: "Upon retiring for deliberation, the jury may take with them all the papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court to be taken from the person having them in possession. * * *" Section 1137 of the Penal Code is similar in its provisions (although the phraseology differs somewhat), except that the jury "may also take with them the written instructions given." It does not appear that the pleadings, or any part of them, were read to the jury as evidence; nor does it appear that the jury read them after retiring. The Colorado Code is similar to ours in its provision as to what papers may be given to the jury. In a civil action the defendant requested the court to send the pleadings with the jury on retiring. The claim was that defendant was entitled to have the admissions contained in plaintiffs' complaint before the jury for consideration. The court said: "This assignment is not well taken. It would be a vicious practice indeed, to require the pleadings to be sent out, in order that the jury might determine as to what matters were admitted therein and what were not. If the pleadings in this case contained any admission that the defendant was entitled to have considered by the jury, he should have requested the court to have given an instruction to the jury setting forth the facts so admitted." Spaulding v. Saltiel, 18 Colo. 86, 31 Pac. 486. In Drew v. Andrews, 8 Hun, 23, the trial court, over defendants' objection, directed the jury (they being unable to fix the amount of damages) to take the pleadings and return and fix the amount. They returned with an amount greater than claimed, after proven credits were allowed. The court said the pleadings were not evidence and reversed the judgment. In that case, however, manifest injury appeared by the use made of the pleadings. In a Missouri case the practice of sending the pleadings to the jury was said to be of doubtful propriety; but the court said that, as trial courts throughout the state had followed this practice, it would not be held prejudicial, unless some improper use of the pleadings is shown. Bluedorn v. Mo. Pac. R. Co., 121 Mo. 258, 25 S. W. 943. We have not the statute of that state before us. In an Iowa case for personal injury the trial court directed the jury to take the pleadings, for which error was claimed. The court said: "As the jury was correctly instructed as to the issues in the case, and no ground for the objection appears, we do not think the record shows the court's action in this regard to be prejudicial." McGinty v. Keokuk, 66 Iowa, 725, 24 N. W. 506. See Swanson v. Allen, 108 Iowa, 419, 79 N. W. 132, holding apparently otherwise. The Iowa statute does not differ much from ours. In Texas it seems that the pleadings may go to the jury, and in International, etc., R. Co. v. Leak, 64 Tex. 654, the court directed the jury to read the pleadings on retiring, for which error was claimed, because the pleadings were declamatory and strong statements of the appellees' case not supported by the evidence, but calculated to inflame the minds of the jury. The court said: "The jury hear the pleadings read in the beginning of the case, and take them with them in their retirement, and may read them again. It is not their duty to do so, and the court below commits an error in charging the jury that it is their duty. It is the duty of the court to evolve from the pleadings and the evidence the issues to be passed upon by the jury. The verdict is the jurors' response to the charge of the court, not to the pleadings. In cases where the pleadings are numerous and voluminous, and parts are exorcised by exceptions, and the issues are complicated, such a charge as that here complained of might mislead the jury and be ground for reversal. No such result is claimed in this case, and the assignment is, therefore, not sustained." In People v. Cochran, 61 Cal. 548, 551, defendant requested the court to give the jury a diagram used at the trial. It was held that section 1137, Pen. Code, is not mandatory, but that the discretion is with the court to send or not send the papers to the jury; that the diagram was not "used as evidence" in the sense of the statute; and, as the jury did not ask for the diagram, the refusal to send it to the jury did not prejudice the defendant or influence the verdict.

See 12 Ency. Pl. & Pr. p. 598, and cases cited, where it is stated that the practice of allowing the jury to take the pleadings is condemned as of doubtful propriety; but it is stated to be the general rule that, where the jury has been correctly instructed as to the issues in the case, there is no error in taking with it by direction of the court the pleadings in the cause. Granite G. M. Co. v. Maginness, 118 Cal. 131, 50 Pac. 269, seems to point to the necessity of introducing the pleadings in evidence before they can be read as such. Our statute provides that the jury may take with them the papers "received in evidence in the cause," with some exceptions. This would seem to imply that papers not received in evidence should not go to the jury on their retirement; and in cases where papers have been read in evidence we think it discretionary with the court whether to allow the jury to take them or not. We do not think the practice of allowing pleadings to be taken to the jury room a safe one, however the statute may be viewed; for it must be apparent to every practitioner that cases might arise where it would work prejudice, if this were permitted. In the present case no prejudice or injury was caused, and none is pointed out. The importance and the novelty of the question in our practice must justify the attention here given to it, and it is strongly urged upon trial courts to avoid possible prejudicial error by adhering closely to the statute, and not going beyond it.

It is advised that the judgment and order be affirmed.

We concur: GRAY, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: McFARLAND, J.; SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

146 Cal. 567

In re LEE LOOK. (Cr. 1,241.)

(Supreme Court of California. April 8, 1905.)

HABEAS CORPUS—CUSTODY OF PRISONER PENDING HEARING IN FEDERAL COURT—JURISDICTION OF STATE COURT.

Where the United States Supreme Court has assumed jurisdiction of habeas corpus proceedings begun in the United States District Court in a criminal case for the determination of constitutional objections after affirmance of a judgment of conviction by a state Supreme Court, questions arising concerning the custody of accused pending the hearing are also within the jurisdiction of the federal courts, and the state courts are not the proper tribunals in which to present a petition for a writ of habeas corpus to procure a change of custodian for the accused.

In Bank. Petition by Lee Look against J. W. Tompkins, warden of the state prison at San Quentin, for writ of habeas corpus. Petition denied.

James H. Campbell, Dist. Atty., for the warden. A. H. Jarman, for petitioner.

LORIGAN, J. The petitioner, Lee Look, having been convicted of murder in the superior court of Santa Clara county and sentenced to death, appealed to this court from the judgment, which was affirmed. 76 Pac. 1028. The date originally fixed for his execution having passed pending his appeal, upon the affirmance of the judgment he was again brought before said superior court, and on December 23, 1904, an order was made by said court directing his execution on March

3, 1905, and further directing that the sheriff of Santa Clara county, in whose custody he then was, deliver him to the warden of the state prison at San Quentin to be executed. On December 24, 1904, petitioner applied to the district court of the United States for a writ of habeas corpus to be discharged from the custody of said sheriff, challenging, on constitutional grounds, the validity of the judgment of conviction against him upon which the order for his execution was based. This petition was denied. Having immediately filed an assignment of errors and tendered a sufficient bond on appeal, he applied to the same court, and subsequently to the Circuit Court of the United States, for an order allowing him an appeal to the Supreme Court of the United States from the judgment of said District Court denying his petition for the writ, which application both courts denied. Thereafter he applied to the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, for the allowance of such an appeal from the said judgment of the United States District Court, which on February 2, 1905, was granted, and a citation issued directed to the sheriff to show cause before the Supreme Court of the United States at a date subsequent to that fixed by the order for execution by the superior court of Santa Clara county. This matter is still pending before said Supreme Court of the United States. Intermediate the time between the denial by the United States District Court of petitioner's application for a writ of habeas corpus and the allowance of an appeal therefrom by the said justice of the Supreme Court of the United States, and on December 29, 1904, the sheriff of Santa Clara county delivered the petitioner, pursuant to the said order of the superior court of said county of December 23, 1904, to the warden of the state prison at San Quentin, in whose custody he has ever since remained. By this proceeding the petitioner now seeks to obtain an order from this court directing that he be returned by the warden of the said state prison to the custody of the sheriff of Santa Clara county, to be by the latter retained until the disposition of petitioner's application by the Supreme Court of the United States. In this behalf his counsel insists that the proceedings in the District and Circuit Courts of the United States—his petition for a writ of habeas corpus and applications for the allowance of an appeal—had the effect, under section 766 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 597], of staying the hands of the state court and its officers in the exercise of any authority or the enforcement of any process relative to the custody of petitioner pending proceedings in the courts of the Union raising the question as to the validity of his detention; that while assuming to do so the District and Circuit Courts had no authority to refuse to allow his appeal; that he was entitled to take such appeal to the Supreme Court of the United States from the judgment of the District Court denying his application for a writ as an absolute matter of right, and that the proceedings on habeas corpus originally inaugurated in said District Court, and the allowance of the appeal by the Supreme Court of the United States was one proceeding, which, under the section of the Revised Statutes, precluded in the interim any change in the custody of the petitioner, and rendered his transfer from the sheriff to the warden unauthorized and void. On the other hand, it is claimed by the respondent warden that an appeal from the judgment of the United States District Court denying the right of habeas corpus was not a matter of absolute right, but a matter of discretion in the District or Circuit Court to grant or refuse it, and that after the application of petitioner for a right of appeal was denied by these courts, and before an application was made to the Supreme Court of the United States, there was no proceeding pending in the federal courts which could affect the custody of petitioner or restrain his delivery by the sheriff to the warden under the order of the superior court; and hence that he is lawfully in the custody of the latter.

These are the claims of the parties, and authorities are cited on both sides, which, it is claimed, support their respective positions. If, as contended by petitioner, the authorities cited by him sustain his claim that he had an absolute right of appeal from the judgment of the District Court denying his petition for a writ of habeas corpus, still, on the other side, there are the decisions of a District Court and Circuit Court in this same matter holding that the grant of a right of appeal is discretionary only, and this view seems to find some support in the cases of In re Durrant (C. C.) 84 Fed. 317, and In re Storti (C. C.) 109 Fed. 807. But, whatever the weight of authority upon this point may be, it is quite apparent from the situation thus presented that we are asked in this proceeding to dispose of a question which is purely federal—to examine and construe the decisions of the federal courts which have been cited by either side as in point, and to place a construction upon federal laws and federal procedure. This is, however, a matter which is properly within the province of the federal courts, and should always be committed to them. If it is available to the petitioner to invoke the aid of those tribunals to the extent that he seeks it here, it is before them that his application should be made and disposed of, and not before us. It is the federal rule that pending the proceedings on habeas corpus the custody of the petitioner is to be taken to be in the court or judge who issued the writ. 2 Foster, Fed. Prac. p. 845. This being true, and the petitioner being in contemplation of law under the control of the Supreme Court of the United States, any matter pertaining to his actual custody should be left to the jurisdiction of that federal tribunal. The proceedings there being in habeas corpus, as here, all matters ancillary to the jurisdiction of that court should be left to it. The Supreme Court of the United States having this complete control of petitioner under its writ, there is nothing that this court might do with reference to his actual custody which would be binding on that court. No judgment which we might render would control, and it would be not only idle, but inconsonant with the dignity of this tribunal, to assume to act where its determination might be so entirely futile. If the surrender of the petitioner by the sheriff to the warden was in violation of the federal laws, the federal tribunals, in the exercise of their jurisdiction, and in protection of the rights of the petitioner, have ample power to take all measures which may be necessary in his behalf. He can, under such proceedings as are authorized by the federal laws or procedure, invoke the jurisdiction of the federal court under whose process he is now held, and its determination of the matter will have that efficiency which our decision might not. As every right can be secured to him by invoking the jurisdiction of the court under whose process he is held, we see no occasion for our intervention in the matter.

The petitioner is therefore remanded to the custody of the warden.

We concur: BEATTY, C. J.; SHAW, J.; HENSHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

146 Cal. 577

PAGE v. GARVER. (Sac. 1,159.)

(Supreme Court of California. April 15, 1905.)

ACTION—REAL PARTY IN INTEREST—STATUTE—CONSTRUCTION—FRAUDULENT CONVEYANCE—STATUTE OF LIMITATIONS.

1. Under Code Civ. Proc. § 367, providing that every action must be prosecuted in the name of the real party in interest, the widow of an intestate is entitled to prosecute a suit to recover land conveyed by the intestate in his lifetime through the fraudulent representations and undue influence of the grantee.

2. Code Civ. Proc. § 318, providing that no action for the recovery of real property can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action, is applicable to a suit by the widow of an intestate to recover property conveyed during the lifetime of the intestate through the fraudulent representations and undue influence of the grantee.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 73–75, 182, 183.]

Commissioners' Decision. In Bank. Appeal from Superior Court, Kings County; H. Z. Austin, Judge.

Action by Lilian H. Page against Mary A. Garver. From a judgment for defendant, plaintiff appeals. Reversed.

H. Scott Jacobs, for appellant. T. E. Clark, for respondent.

CHIPMAN, C. The complaint alleges: That plaintiff is the widow of Samuel Page, deceased, who died intestate on the 24th day of June, 1899, leaving him surviving his said widow, an unborn child then in esse, who was thereafter, on October 28, 1899, born alive, but died the same day, and three sons, Elias, Henry, and Solomon, and one daughter (defendant) by a former wife, who were and are the only heirs of said Samuel; that at his death the said Samuel "was seised in fee simple, absolutely possessed, and entitled to the possession of, and was the owner of, a large amount of real property" (describing it); that on or about December 9, 1896, "with intent thereby to cheat and defraud the said Samuel Page, and any other heirs and legal representatives than themselves that he might leave at his death, out of the property above described, and out of any property of which he might die seised and possessed, and while the said Samuel Page, now deceased, was in a sick, weak, and exhausted condition, and while he was by said sickness wholly incapacitated to do any business whatsoever, through great physical weakness and unsoundness of mind and memory, * * * the defendant and Solomon C. Page conspiring wickedly," etc. Then follow allegations with great particularity to the effect that by fraudulent and false representations, and through their undue influence over him (fully set out), these two children of Samuel induced him to convey the land in question to defendant, and other of his property to Solomon, not here involved. The complaint also alleges that, as the widow of said Samuel and the mother of the said infant Winifred, plaintiff is owner, by succession as such widow, and as the sole heir of the said Winifred, of seven-fifteenths of said property, and entitled to the possession thereof; that plaintiff became acquainted with the said Samuel about January 27, 1899, prior to which time she knew nothing whatever of the fraud and deceit perpetrated on the said Samuel by the said defendant and the said Solomon, through their undue influence over him; that defendant has collected and appropriated to her own use the rents and profits of said land since said December 9, 1896. The complaint was filed July 17, 1901. Judgment is prayed for the cancellation of said conveyance of said land, for an accounting of the rents and profits, that defendant holds the title to said seven-fifteenths of said land and said rents in trust for plaintiff, "and for all other legal and equitable relief." A general demurrer for insufficiency of facts, lack of jurisdiction of the court to grant the relief, also for ambiguity and uncertainty, and because the action is barred by section 353 of the Code of Civil Procedure, was sustained; and, plaintiff declining to amend, defendant had judgment, from which plaintiff appeals.

The lack of jurisdiction as ground of demurrer is based on the failure of the complaint to show that there has been any administration of Samuel Page's estate. The point urged by defendant as of most importance is that plaintiff has failed to show that she has any interest in the property, or ever had any interest therein, and hence has no interest in the result of the suit, as contemplated by section 367, Code of Civil Procedure. When Samuel died, he was the equitable owner of the property, with the right to assert his interest and attack his conveyance to defendant on the grounds alleged in the complaint. Dying intestate, plaintiff succeeded to a widow's interest, in his equitable estate. See subdivisions 2 and 7 of section 1386, Civ. Code. In the recent case of Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820, an adopted daughter brought the action against the widow of plaintiff's adopted father on grounds similar to those here alleged. A demurrer was sustained to the complaint, alleging as grounds of demurrer insufficiency of facts, among other grounds, and also pleading subdivision 4 of section 338, Code of Civil Procedure, in bar of the action. The case went off on the statute of limitations, but it seemed to have been conceded that the action, brought by the heir of deceased, would lie. In Trubody v. Trubody, 137 Cal. 172, 69 Pac. 968, the action was to set aside a deed made by deceased in his lifetime to his then wife on the ground of undue influence. The plaintiffs were sons by a former wife. A demurrer to the complaint was sustained, which alleged insufficiency of facts, that the action could not be maintained by the heirs in the absence of administration, that the action is barred by the statute of limitations, and some other grounds. It was held that the facts were sufficient, and that the plaintiffs could maintain the action. See, also, Janes v. Throckmorton, 57 Cal. 368; Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428. Tully v. Tully, 137 Cal. 60, 69 Pac. 700, relied on by defendant, was an action by the wife, then seeking a divorce from her husband, to set aside a conveyance made in fraud of her rights by her husband to his children by a former wife. The court held that her interest was a right to a lien on the land to secure payment of alimony, and that she could not divest the defendants of their title. Whether she could sue, had she been the widow, instead of the wife, to set aside a deed of her husband procured through fraud and undue influence, was a question not involved.

The points made by defendant's demurrer, except as to the statute of limitations, are decided against her in Trubody v. Trubody. Defendant's plea of the statute of limitations is decided adversely to her contention in Murphy v. Crowley, supra, where it is held that the five-year statute (Code Civ. Proc. § 318) applies to cases of this character. See, also, South Tule Ind. Ditch Co. v. King (Cal.) 77 Pac. 1032.

It is advised that the judgment be reversed.

We concur: SMITH, C.; COOPER, C.

For the reasons given in the foregoing opinion the judgment is reversed: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.

146 Cal. 590

LOS ANGELES COUNTY v. KELLOGG. (L. A. 1,636.)

(Supreme Court of California. April 17, 1905.)

ADMINISTRATORS — PUBLIC ADMINISTRATORS — NATURE OF OFFICE—COMPENSATION.

1. By Pol. Code, § 4103, and the county government act (St. 1897, p. 492, c. 277), a public administrator is a county officer. Pol. Code, § 4303, requires the public administrator to perform such duties as are prescribed in Code Civ. Proc. c. 13, tit. 11, pt. 3. Code Civ. Proc. § 1743, provides that, when no direction is given for the government of a public administrator in discharging his duties, the provisions relating to administrators generally shall govern. Section 1727 declares the public administrator's official bond and oath to be in lieu of the administrator's bond and oath. Section 1726 requires the public administrator to take charge "(4) of the estates upon which letters of administration have been issued to him by the court." Section 1365 requires letters of administration to be granted to "(8) the public administrators." Sections 1736, 1737, 1739, 1740, and 1742 prescribe certain duties of the public administrator, distinct from those required of other administrators. *Held*, that the public administrator, in acting under section 1726, subd. 4, is a public officer acting by virtue of his office, and not merely by virtue of the letters issued to him by the court.

2. The county government act (St. 1897, p. 496, c. 277, § 159) fixes the salary of the public administrator of a certain county. Section 215, p. 572, of the same act, provides that the salaries provided for therein shall be in full compensation for all services rendered by the respective officers. Section 216 requires salaried county officers to pay the fees allowed by law into the county treasury. Section 217 requires the officers to keep a feebook. Section 226, p. 575, requires them to complete the business of their respective offices to the time of the expiration of their respective terms. Code Civ. Proc. § 1618, provides that a public administrator shall receive the same compensations and allowances as are allowed to other administrators. *Held*, that the provision of the county government act fixing the salary of the public administrator of the county in question, being a special act, controls the general provision of the Code, and the salary of the public administrator of such county is in full compensation for all services rendered by him.

3. Nor can the public administrator of such county retain the fees allowed him for services rendered after the expiration of his term of office.

4. Under Code Civ. Proc. § 1726, requiring a public administrator to take charge of estates upon which letters of administration have been issued to him by the court, and section 1735, authorizing the court to order the public administrator to account for and deliver all money and property of an estate in his hands to the heirs or administrator regularly appointed, a public administrator, who, during the two months between the election of his successor and the expiration of his own term of office, fails to procure a revocation of his letters, and to state his

accounts to the close of his term, and to petition for relief from the further performance of his trust, but continues to administer upon the estates in his hands after the expiration of his term of office, cannot complain because his services are regarded as voluntary, and he is denied special compensation therefor.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the county of Los Angeles against C. G. Kellogg. From a judgment for plaintiff, and from an order directing the payment of money, defendant appeals. Affirmed.

Leon F. Moss, for appellant. U. S. Webb, Atty. Gen., J. D. Fredericks, Dist. Atty., and Wm. P. James, Chief Dep. Dist. Atty., for respondent.

CHIPMAN, C. This case is here on an agreed statement of facts, and was begun under the provisions of section 1138, Code Civ. Proc. The facts, so far as it is necessary to state them, are as follows: Defendant was the public administrator of Los Angeles county for the term of four years, ending January 5, 1903. He received as compensation for his services during said term, and no longer, $250 per month; being the salary provided by law to be paid to him as public administrator. During his said term as public administrator he was appointed administrator of many estates, some of which were fully administered during his said term, and he paid into the treasury of the county, as required by law, all commissions allowed by the superior court in the administration of all said estates in which administration was completed during said term. He was appointed as administrator, at different times in 1902, of seven different estates, and one in the year 1900, in all of which administration was continued by him after the term of his office had expired and was completed, in six of them in the latter part of the year 1903, and in two of them in the year 1904. In each estate at the close thereof he claimed and the court allowed in his final account a certain sum as his commissions, aggregating $4,857.72, in all of the said estates, which sum is now in his possession. It is stated "that said Kellogg has devoted a great deal of time and labor in the performance of his duties as administrator of said estates during the time which has elapsed since the expiration of his term of office, and prior to the allowance of said final accounts, and that he has not received any compensation for his services as such administrator which have been performed subsequent to the expiration of his said term of office." It also appears that his successor in office duly qualified and drew the salary allowed him by law during all the times mentioned after the expiration of defendant's term of office. It is then stated that Los Angeles county claims that each of said sums, commissions as aforesaid, should be paid into the county treasury, and that said Kellogg "has no right to retain the same or any part thereof," and that said Kellogg claims that "he is entitled to each of said sums, in the aggregate sum of $4,857.72, as compensation for his services as administrator of said estates, respectively." The court is asked "to determine said controversy, and to cause judgment to be entered in one form, determining whether or not the said Kellogg is entitled to said sums," or either of them, or whether or not said county of Los Angeles is entitled thereto, and for such other relief as may be meet and proper in the premises. The agreed statement makes no attempt to show what part of the services, if any, was performed, or what proportion, if any, of the commissions earned, before defendant's term of office expired. Commissions were claimed by defendant and allowed at the hearing and approval of the final account in each estate. Presumably the commissions covered the entire service both before and after the expiration of his term of office, for it is only at the close of the administration that the amount can be ascertained or ordered paid. The court adjudged that said Kellogg received said sum of money as a trustee of said Los Angeles county, and that the same is the property of said county, and ordered him to pay the said sum into the county treasury. Defendant appeals from the judgment and from the order.

The public administrator is a county officer (Pol. Code, § 4103; County Government Act [St. 1897, p. 492, c. 277]), and "must perform such duties as are prescribed in chapter 13, tit. 11, pt. 3, of the Code of Civil Procedure" (Pol. Code, § 4303). Among other duties, he "must take charge of the estates of persons dying within his county, as follows: (1) Of the estates of decedents for which no administrators are appointed, and which in consequence thereof are being wasted, uncared for or lost; (2) of the estates of decedents who have no known heirs; (3) of the estates ordered into his hands by the court; and (4) of the estates upon which letters of administration have been issued to him by the court." Code Civ. Proc. § 1726. Section 1743, Code Civ. Proc. is as follows: "When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding chapters of this title must govern" (i. e., such as relate to administrators generally).

Appellant contends that the office of public administrator is a mere qualification, and, when letters are granted to him because of such qualification, he occupies precisely the same position towards the estate as any other administrator; that his authority is derived wholly from his appointment by the issuance of letters to him; that he has no authority in the premises by virtue of his commission as public administrator, and his position as administrator of any particular estate is not affected in any respect by the expiration of his term of office as public administrator. Citing Beckett v. Selover, 7 Cal. 230, 68 Am. Dec. 237; Rogers v. Hoberlein, 11 Cal. 127; Estate of Hamilton, 34 Cal. 468; Estate of Aveline, 53 Cal. 260; Estate of Pingree, 100 Cal. 80, 34 Pac. 521. It is true that, where a public administrator seeks administration of an estate under paragraph 4 of section 1726 and section 1365 of the Code of Civil Procedure, before he can take charge of the estate he must have a warrant of authority from the court, and the letters issued to him in the particular estate are his authority, as was held in some of the cases cited. But it is also true, as was said in Healy v. Superior Court, 127 Cal. 659, 60 Pac. 428: "The public administrator is the eighth class enumerated in section 1365 of the Code of Civil Procedure. He obtains letters of administration, not as an individual, but as public administrator, by virtue of his office." His official character, in our opinion, is not changed, nor is it taken from him, by the imposition of the duties devolved on him by the letters issued to him. He is as much the public administrator when administering an estate in the instance above referred to as when acting under any other paragraph of section 1726; and, in those cases where for the time being he manifestly acts wholly by virtue of his office, he must "with all convenient dispatch procure letters of administration thereon [i. e., on the estate] in like manner and on like proceedings as letters of administration are issued to other persons." In these and in all cases "his official bond and oath [unlike the case of other persons appointed] are in lieu of the administrator's bond and oath." Code Civ. Proc. § 1727; Healy v. Superior Court, supra. That he retains his official character while acting under letters of appointment, so far as the particular estate is concerned, even though his term of office has expired, is entirely consistent with the fact, as held in Rogers v. Hoberlein, supra, that the grant of letters continues until it is set aside or revoked by another appointment, and, as was held in Estate of Aveline, supra, that the sureties on his bond remain liable after his term expires as to all unfinished business. It was held in Mitchell v. Hecker, 59 Cal. 558, that his sureties are liable for wrongful appropriation of money of the estate, notwithstanding the letters issuing to him did not (as they generally do and always should) refer to his official character. In several respects his duties differ from those of other persons who may be appointed. He must make return to the court every six months, etc. Code Civ. Proc. § 1736. And this is not the equivalent of the return required of administrators by section 1622. Estate of Hedrick, 127 Cal. 186, 59 Pac. 590. He must deposit with the county treasurer all moneys received (Code Civ. Proc. § 1737), which can only be drawn out on his order "countersigned by a superior judge." Id. He must settle his accounts under oath with the county clerk for all moneys, etc., on the first Monday of each month. Id. § 1739. On final settlement of the estate any money in the hands of the public administrator, unclaimed, must be paid over to the county treasurer, in default of which the district attorney must institute the requisite proceedings against him and his sureties for judgment in the amount of money so withheld. Id. § 1740. He may administer oaths in regard to all matters pertaining to his duty or the administration. Id. § 1742. All these sections apply to a public administrator administering an estate, no matter under what particular section or paragraph of a section of the Code of Civil Procedure he may be acting, and they all deal with him in his official capacity and character of public administrator. It is made as much his official duty as public administrator to administer the estate under paragraph 4 of section 1726 as in any other case. The section declares that he "must take charge of the estates of persons dying within his county as follows," and paragraph 4 is as much controlled by this provision as are the other paragraphs of the section under which he has express authority to administer, at least temporarily, by virtue of his office alone. The purpose of the law is to provide a public officer, acting under his oath of office and official bond, who shall be in a position at all times to administer estates where there is a failure of heirs or other persons competent to perform the service.

In Rogers v. Hoberlein, supra, it was held that the successor of the public administrator did not by force of his office alone become entitled to administer an estate not yet fully administered by his predecessor, but must obtain a grant of letters. The court did not intimate that the outgoing public administrator lost his official character in continuing the administration. On the contrary, the court seemed to entertain quite the opposite view. The court said: "At common law a sheriff was, after the expiration of his term, from a principle of convenience considered in some respects as an officer. He could finish some kinds of business which he had begun. And so it has been held in other states that an executor or administrator after his resignation or removal is to be treated, for purposes of settlement, remedies, etc., as administrators in office." With this view of the relation of the public administrator to estates being administered by him, we are to inquire whether he is entitled to the commission allowed to other administrators for services performed after his term of office has expired, in counties where he receives a salary. By section 159, subd. 10, County Government Act 1897 (St. 1897, p. 499, c. 277), the public administrator of Los Angeles county receives a salary of $3,000 per annum. Section 215 of that act (St. 1897, p. 572, c. 277) provides as follows: "The salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers herein named, either as officers or ex officio officers, their deputies and assistants, unless in this act otherwise provided, and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, unless in this act otherwise provided. * * *" Section 216 (St. 1897, p. 573, c. 277) is as follows: "All salaried officers of the several counties of this state shall charge and collect for the use of their respective counties and pay into the county treasury on the first Monday in each month the fees now or hereafter allowed by law in all cases, except where such fees, or percentage thereof is allowed such officers, and excepting also such fees as are a charge against the county." Section 217 (St. 1897, p. 573, c. 277) is as follows: "Each of the officers authorized to receive fees under the provisions of this act must keep a fee book * * * in which must be entered at once in detail all fees or compensations, of whatever nature, kind, or description, collected or chargeable. * * * On the expiration of the term of such officer, he must deliver all fee books kept by him to the county auditor." Section 226 (St. 1897, p. 575, c. 277) provides: "It shall be the duty of all officers in this act named to complete the business of their respective offices to the time of the expiration of their respective terms. * * * The only other statute bearing upon the question of the public administrator's compensation is section 1618 of the Code of Civil Procedure: '* * * Public administrators shall receive the same compensation and allowances as are allowed in this title to other administrators.'"

But for the provisions of the county government act, supra, making the public administrator of Los Angeles county a salaried officer, doubtless section 1618 would measure his compensation. The act, however, fixing his compensation by a salary, and directing him to keep a book, recording therein "all fees or compensation of whatever nature, kind or description," and also providing that he must pay monthly into the county treasury the fees allowed him in all cases, and declaring that his salary shall be in full compensation for all services, is a special act, and must control. Healy v. Superior Court, supra. Unless he ceases to be controlled by this act at the expiration of his term, which we do not think should be held, there is no law by which he can be paid for subsequent services. The contrary view contended for by appellant would offer strong inducements for the public administrator, who is a salaried officer, to delay the settlement of estates, by doing which he would draw a salary to the close of his term, and full compensation after his term had ended, for such estates as were not fully administered; and, besides, the county would be paying his successor the salary provided by law. Furthermore it would be a temptation to the successor to favor this practice, as it would relieve him from the labor and responsibility of caring for partly administered estates, and, besides, would be a practice profitable to him when he passed out of office.

Appellant insists that it was not only his right to continue his administration after his term closed, but that it was his duty, and that it is but just and fair to compensate him, since he was but performing a duty imposed upon him. In a sense it is true that, so long as his letters remained unrevoked, it was his right and duty to faithfully execute his trust, and, if there was no way by which he could have relieved himself of this trust, the equity of his claim for compensation under an implied promise might have some force. But it is not true that he had no means of relief. He knew at the November election whether he was to continue in office. He had two months in which to close the business and prepare to turn over his trust to his successor. He should have asked the court, by appropriate petition, to revoke his letters, resigning his appointment in estates remaining unadministered. He should have stated his accounts to the close of his term, and asked to be relieved from further performance of the trust. It would have been the duty of the court to settle his accounts, accept his resignation, revoke his letters, and direct his successor to take charge of the estate. See sections 1735 and 1726. If for any reason the successor could not act, the court should have appointed a special administrator. With this means of being relieved, if the outgoing officer still persists in continuing to administer, or refuses to relinquish his trust to his successor, he cannot be heard to complain if his services are regarded as voluntary, and he be denied the right to any compensation therefor, except such compensation as he had already received by way of salary.

Since the transcript was filed the parties have stipulated that in one of the estates administered by defendant he is charged with having received $175.85 in excess of the amount in fact received by him as fees and commissions, and that, if the judgment be affirmed, this amount should be deducted therefrom.

It is advised that the order be affirmed, and that the sum of $175.85 be deducted from the judgment, and, as thus diminished, it be affirmed.

We concur: GRAY, C.; COOPER, C.

For the reasons given in the foregoing opinion, the order is affirmed, and the sum of $175.85 deducted from the judgment, and, as thus diminished, it is affirmed: LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

146 Cal. 580

CAMERON v. BURNHAM et al. (S. F. 3,551.)*

(Supreme Court of California. April 17, 1905.)

CONTRACTS—FULFILLMENT OF CONDITIONS PRECEDENT.

Civ. Code, § 1439, declares that before any party to an obligation can require another party to perform he must fulfill the conditions precedent imposed on himself. Plaintiff and others agreed to subscribe various sums to a fund to secure a lease and in prospecting certain land supposed to contain mineral; it being agreed that each subscriber should own an interest proportionate to his subscription. Thereafter the owner of the land granted to plaintiff and the others the right to enter on the land to prospect and mine for a certain term, the owner to receive a royalty, or the lessees were entitled to pay a sum in cash as full consideration for their rights. Plaintiff failed to make any of his payments, and after the discovery of mineral by the others he sued for a decree declaring him to be the owner of an interest. *Held*, that plaintiff was not entitled to recover, he having forfeited his rights, it being immaterial whether the agreement executed by the owner was a lease or a mere mining privilege, and the statute of frauds having nothing to do with the case.

Commissioners' Decision. Department 1. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Suit by P. A. Cameron against J. R. Burnham and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

H. A. Powell and W. A. Dow, for appellant. W. B. Kollmyer and Wm. R. Davis, for respondents.

GRAY, C. This action is brought to obtain a decree that plaintiff is the owner of a one-ninth interest in a subterranean gold-bearing gravel channel upon a certain tract of land in Sacramento county, and for an accounting of all dealings in relation to said mine by and on behalf of an alleged mining partnership in which plaintiff claims to be a member. The judgment was for defendants, and the plaintiff appeals therefrom.

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*Rehearing denied May 17, 1905.

The plaintiff and six others, who are made defendants herein, entered into a written agreement on May 17, 1901, wherein the tract of land in question is described, and it is recited that the parties to said agreement are desirous of leasing the mining rights and privileges on said land from W. B. Plumb, the owner thereof. Six of the parties, including the plaintiff, agreed to and did subscribe $500 each, and a seventh party to the contract, named J. R. Burnham, subscribed $1,500, making an entire fund of $4,500, "for the purpose of securing said lease and prospecting said land." It was agreed that "each subscriber shall own and be entitled to an interest in said lease and mining privilege in proportion as the amount he subscribes is to the whole amount subscribed, when the whole amount of said subscription shall have been paid up." It was also agreed that "said sums so subscribed shall be paid into the hands of said A. T. Eastland in payments of equal proportion to the sum subscribed at such time or times and in such sums as shall be designated and fixed by said A. T. Eastland. And if any subscriber shall fail, or refuse or neglect to make such payments at the time so designated by said A. T. Eastland and the same shall remain unpaid for the period of ten (10) days after the date set for such payment, and after the same should have been paid, then, and in that case, such delinquent subscriber or subscribers immediately forfeit all interest and rights in said lease and mining privileges and shall forfeit all moneys that he or they shall have paid under this agreement." On the day following the execution of the above agreement, May 18, 1901, said W. B. Plumb, one of the defendants herein, entered into an agreement with the plaintiff and other defendants for the purpose of carrying out the purposes of the first agreement. It was agreed on the part of Plumb that he "hereby grants to said parties of the second part the exclusive right to enter upon the lands hereinafter described, and to prospect and mine the same for the term of six years from and after the 18th day of May, 1901." The right to use the land for agricultural and grazing purposes was reserved to the owner, Plumb. The second parties agreed to pay to the first party 15 per cent. "of the gross amount of all gold so extracted," or at their option in lieu of the above-named consideration they could within six months pay $10,000 as the full consideration for said "exclusive right and privilege to mine as aforesaid."

It appears from the evidence and findings that soon after the execution of these instruments, and in that same month of May, the said Eastland designated and fixed the sum of $100 to be paid by plaintiff and each of the other parties interested with him on account of their several subscriptions. One of the subscribing parties, James Wing, it appears had already paid the entire amount of his $500 subscription. The plaintiff and the other subscribing defendants, except Wing, were duly notified of the fixing of this $100 sum as due from each of them, and all of them paid up within the 10 days given them, except the plaintiff. The plaintiff refused and neglected to pay anything, and "persistently and willfully declined and refused to participate in, or to have anything to do with, the work, enterprise, or undertaking referred to in said agreements." Time and again he declared that he was out of it and was glad of it; that defendants were "a bad lot"; that he had "not paid in," and was not going to pay anything, or have anything at all to do with the matter. The court finds that "ever since the 21st day of May, 1901, the plaintiff has repudiated, disavowed, withdrawn from, deserted, and abandoned said work, enterprise, undertaking, agreements, and all the duties, obligations, options, and benefits thereof." In the meantime the other parties to the agreement, recognizing that plaintiff was "out of it," proceeded to prospect the ground at an expense to them of much more than the original amounts subscribed, and finally, as appears, in about October, 1901, struck a rich mine, and have since worked the same with considerable profit. Plaintiff has done nothing at any time and contributed nothing toward the discovery, development, or working of this mine.

On the foregoing facts we are of opinion that plaintiff was not entitled to the relief prayed for. The plaintiff is or was a party to both the contracts above referred to, and as they were both intended for the accomplishment of one purpose, so far as plaintiff is concerned, they should be construed together as one contract. The plaintiff, after having neglected and refused to perform any part of his agreement, after standing by for five months watching the other parties spending their money in search of this gold that no one knew existed, all the time declaring that he was "out of it," and would have nothing to do with it, doing what he could to discourage the enterprise, now seeks in this equitable action to compel the defendants to share with him the profits of their industry and expenditure of moneys. This he cannot do in a court of equity. He who asks equity must do equity. He who seeks to enforce a contract must show that he has complied with the conditions and agreements of the contract on his part to be performed. Civ. Code, § 1439. Plaintiff failed and refused to pay any part of the amounts he agreed to pay, and thereby by the very terms of the contract forfeited any right that he may ever have had in the property in dispute. It makes no difference whether we call the agreement executed by Plumb a lease or a mere "mining privilege," and the statute of frauds has nothing to do with the case. Plaintiff could have no rights in equity, and no right to be heard in a court of equity, until he did the equitable thing by his associates and performed his part of the agreement. To give him an interest in this mine and the proceeds thereof now would be the grossest injustice to his co-contractors. A court of equity will not countenance such an injustice. On the most familiar principles of equity it is clear that the trial court, sitting as a court of equity, was fully warranted in denying the plaintiff all relief.

We advise that the judgment be affirmed.

I concur: CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

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146 Cal. 598

CLARK v. SUPREME COUNCIL OF ORDER OF CHOSEN FRIENDS et al. (S. F. 3,274.)

(Supreme Court of California. April 19, 1905.)

BENEFICIAL ASSOCIATIONS—FOREIGN CORPORATIONS — INSOLVENCY — DOMESTIC ATTACHING CREDITORS—RIGHTS OF—PREFERENCES — FOREIGN RECEIVER—ANCILLARY RECEIVER — APPOINTMENT—PLEADING.

As against domestic creditors of an insolvent foreign corporation, who have attached funds and money thereof situate in the state, and seized the same under executions on judgments obtained by them, an ancillary receiver will not be appointed, in an action by a foreign receiver of the corporation, to collect the funds and turn them over to such foreign receiver.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco.

Action by Cyrus J. Clark, receiver, etc., against the Supreme Council of the Order of Chosen Friends and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Rothchild & Ach and Van Ness & Redman, for appellant. F. D. Brandon, S. M. Ehrman, Martin Stevens, H. W. Hutton, and D. E. Besecker, for respondents.

GRAY, C. This action was brought by plaintiff, appointed by the superior court of a certain county in the state of Indiana as receiver of the above-named defendant, an insolvent fraternal insurance organization. The object of the action is to have an ancillary receiver appointed in California to take charge of certain moneys of the concern and turn them over to the plaintiff. The defendants had judgment in their favor on demurrers to the complaint, and plaintiff appeals from that judgment. The facts and law governing the case have already been considered by this court in Lackmann v. Supreme Council, etc., 142 Cal. 22, 75 Pac. 583. Little need be added here to what is said in that case. Here, as there, the defendants, as creditors of the defunct concern, have attached the funds and money in controversy in some instances, and in others have seized it under executions issued upon judgments which they have already obtained. That the defendants occupy the position of creditors is settled by the case cited. That they will not be compelled to surrender their claims to the property under the laws of this state in deference to the claims of a foreign receiver of this foreign corporation is also clearly decided in that case. The only difference between that case and this is that here an ancillary receiver is asked for, but only for the purpose of collecting the funds and turning them over to the Indiana receiver. This will indirectly accomplish the same purpose sought in the case cited. It will have the effect by legal process to transfer the funds to the hands of the Indiana receiver. This is contrary to the law of this state, as laid down in the California cases cited in Lackmann v. Supreme Council, supra. Our law prefers the claims of the domestic attaching creditors to those of foreign creditors or claimants, and this policy will be upheld against indirect as well as against direct attacks. The complaint sets forth the facts necessarily showing the claims of the defendants preferred under our law to those of plaintiff, and the demurrer to this complaint was therefore properly sustained.

No point seems to be made in appellant's brief to the effect that the complaint states a case for relief as to any books or assets of the defunct concern other than the money attached, and, on a careful examination of the complaint, we are unable to find any allegation that any of the defendants have in their possession any books or other assets of the concern, except the said money. The prayer of the complaint regarding records, books, papers, etc., is of no consequence in the absence of any allegation showing that some party to the suit has property of that description in its or his possession.

We advise that the judgment be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed. ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

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146 Cal. 530

PALOMARES LAND CO. v. LOS ANGELES COUNTY. (L. A. 1,590.)*

(Supreme Court of California. April 6, 1905.)

TAX SALES—REDEMPTION—VOLUNTARY PAYMENT—SCHOOL TAXES—PENALTIES—ASSESSMENTS.

1. Pol. Code, § 3817, as amended March, 1895 (St. 1895, p. 333, c. 218), giving the right to redeem real estate sold to the state for delinquent taxes by making payment of the taxes due thereon at the time of the sale, with penalties based thereon, is but an offer of the state to release its claims to the land on the terms mentioned, and, being accepted, the payment is

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*Rehearing denied May 5, 1905.

voluntary, and cannot be recovered, though the sale was void.

2. District school taxes, as well as state and county taxes, are included in Pol. Code, § 3817, as amended March, 1895 (St. 1895, p. 333, c. 218), authorizing redemption of real estate sold to the state for delinquent taxes by payment of the amount of taxes due thereon at the time of the sale, with penalties based thereon.

3. Under Pol. Code, § 3817, as amended March, 1895 (St. 1895, p. 333, c. 218), requiring one redeeming real estate sold the state for taxes to pay, in addition to other sums, "for each year since the sale for which taxes on said land have not been paid, an amount equal to the percentage of taxes for that year on the value of the real estate assessed for that year, or, if not so assessed, then on the value of the property as assessed in the year nearest the time of such redemption," and penalties to be computed "on each year's taxes," reckoning from the time "when the lands would have been sold for that year if there had been no previous sale thereof," penalties are not required to be paid as respects taxes of any year subsequent to the sale in which there was no valid assessment of a tax against the property.

4. An assessment of real estate without deduction of amounts due on mortgages thereon is not void because thereof, but is an assessment to the wrong person, within Pol. Code, § 3628, declaring that no mistake in the name of the owner of land shall invalidate the assessment thereof.

5. An assessment is void, the description therein not being "sufficient to identify" the tract, as required by Pol. Code, § 3650, subd. 2, though it was sufficient to enable the owner to know that such land was intended to be described.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 720.]

6. Payment of amounts illegally exacted as a condition of redeeming lands is not voluntary, and may be recovered.

Commissioners' Decision. Department 2. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the Palomares Land Company against the county of Los Angeles. Plaintiff had judgment for less than prayed, and appeals. Modified.

Lee & Scott and Lee, Scott, Bailey & Chase, for appellant. U. S. Webb, Atty. Gen., J. D. Frederick, Dist. Atty., and W. J. James, Chief Deputy Dist. Atty., for respondent.

SMITH, C. The suit was brought to recover money paid by plaintiff to respondent's treasurer, as penalties, etc., in redemption of lands sold to the state for taxes. No claim is made for repayment of the taxes themselves. The lands affected by the sale are in Los Angeles county, and consist of a tract of land owned by Mrs. Lugarda A. de Palomares in the Rancho San José, and of two tracts, elsewhere situated, owned by Concepcion de Avila and others. Both properties were assessed to Mrs. Palomares for the year 1895, but separately; and the following year the lands were sold to the state for the taxes levied on these assessments. There was also a claim for money paid under protest for taxes on the same lands for the year 1898; but this claim was found by the court to be barred by the statute of limitations, and no objection is made to this finding. The amount demanded by the plaintiff was $719.59, with interest, etc.; but the court gave it judgment for the sum of $192 only (which was held to be due on the auditor's estimate under the rules in San Diego Invest. Co. v. Shaffer, 137 Cal. 323, 70 Pac. 179), and costs. The plaintiff's appeal is from the judgment.

In the case cited the statutory provisions involved were—it is said by the court—those of section 3817 of the Political Code as amended in February, 1895. In this case they are those of the amendment of the following month. St. & Amend. 1895, pp. 22, 333, cc. 11, 218. But the provisions of the two acts are identical, except in the concluding sentences in each, relating to matters not here involved, and in the omission from the latter act of a clause of the former, requiring to be paid, in addition to "amount of taxes" and "interest," the "costs and expenses which may have accrued by reason of such delinquency and sale." Under this ruling the appellant was charged with the penalties for delinquency prescribed by the Political Code (section 3817, Amend. 1895, cited above), ranging from 80 to 20 per cent. on the taxes for the year of the sale, 1895, and the years 1896 and 1897; and it is claimed that this was erroneous, for the reason that the several assessments, and consequently the penalties, were in fact null and void. Failing this contention, it is further claimed that the provisions of the section cited, imposing penalties for delinquency, were not intended to apply to the district school taxes included in the several assessments, and that to this extent, at least, the estimates were wrong. In these contentions no distinction is made by the appellant's counsel between the assessments for the year 1895, for which the lands were sold, and those for subsequent years; but these will be considered separately, commencing with the former.

With regard to the taxes for 1895, we think the provisions of the law authorizing redemption (Pol. Code, § 3817) are to be regarded simply as an offer by the state to release its claims to the land sold upon the terms proposed, and, therefore, as applying to all sales, whether valid or otherwise. In the redemption, therefore, the state is to be regarded as asserting, and the redemptioner as admitting, the validity of the assessment and of the resulting title of the state. Thus far, therefore, the payment of the taxes by the plaintiff was simply the acceptance of an offer of the state which it was at liberty to decline, and hence purely voluntary. This, we think, accords with the obvious intention of the act, for otherwise—according to the appellant's contention—in the case of a sale technically void, the effect of the act would be to permit a redemption without paying either penalties, costs, or taxes, which would be to devolve upon the county auditor the judicial function of determining the validity of the assessment and of the title of the state, and the power to make on behalf of the state, without consideration, "a deed of reconveyance" of its title, if regarded by him as invalid. Nor is the language of the act consistent with such a construction. For upon this theory there would be no sale to redeem from, nor money to be paid; and hence the language of the act would be inapplicable. It is clear, therefore, that the payment of the "amount of taxes" due at the time of the sale is made by the act an essential condition of redemption; and, as this is the principal sum on which the percentages described in the act are to be estimated (San Diego v. Shaffer, 137 Cal. 325, 70 Pac. 179), it follows that the payment of the prescribed penalty is equally a condition. Nor in the application of this provision can any distinction be made between the state and county and district school tax. For the last constitutes, within the plain intent of the act, part of "the amount of taxes due * * * at the time of the sale"; and it is to this, as we have in effect held, that the provision imposing the penalty obviously refers.

It is to be observed, however, that the auditor's estimate includes the 15 and 5 per cent. penalties imposed by section 3756 of the Political Code, and also the costs imposed by section 3770, with interest and percentage for redemption, which, under the provisions of section 3817, as amended in March, 1895 (St. 1895, p. 333, c. 218), and the decision in San Diego Invest. Co., supra, was unwarranted; and also that the same errors were made with regard to the taxes for the subsequent years 1896 and 1897. But we suppose, and hence assume, that the sums thus erroneously charged and paid are included in the amount of $191 allowed by the court, and that the errors were thus corrected. This leaves us to consider only the penalties for redemption for the years following the year of the first assessment, the validity of which will depend upon provisions of the statute other than those we have been considering, namely: Those of section 3817 of the Political Code, as to the principal amounts to be paid, and those relating to the penalties. As to the former, the statute requires the redemptioner, in addition to "the amount of taxes due * * * at the time of the sale," etc., to pay "also, for each year since the sale for which taxes on said land have not been paid, an amount equal to the percentage of taxes for that year, upon the value of the real estate as assessed for that year, or, if not so assessed, then upon the value of the property as assessed in the year nearest the time of such redemption." As to the latter, the provisions are: "The penalty shall be computed upon the amount of each year's taxes in like manner, reckoning from the time when the lands would have been sold for that year, if there had been no previous sale thereof."

Under the former of the provisions quoted, two cases are presented, namely: The case where the property has been assessed for the year referred to, and the case where it has not been assessed for that year. In the former case, the redemptioner is required to pay "an amount equal to the percentage of taxes," upon the value of the property as assessed, which is but to say "the taxes assessed"; for the taxes are assessed, or rather levied, by simply applying to the assessed value the rate as ascertained under the provisions of sections 3696, 3714, and 1837 of the Political Code, and this function, which is performed by the auditor, is purely ministerial. Pol Code, §§ 3731, 3715. The expression used is, therefore, to be regarded as equivalent to the expression in the section as it now stands, to wit, "all unpaid taxes of every description assessed against the property for each year since the sale"; and, while both expressions are sufficiently clear, the former is clearly the more accurate. We find, therefore, with regard to each year subsequent to the sale, two classes of cases provided for by the act, namely: Those of taxes assessed against the property, and those of unassessed property. To the former case the penalty clause obviously applies; but we think it equally clear that it cannot be regarded as applying to the latter. For, having regard to the language used, the penalty is to be computed upon "each year's taxes," and, properly speaking, there are no taxes upon unassessed land; and that the word "taxes" is here used in its proper sense, is shown by the provision following: That the penalty shall be computed "from the time when the land would have been sold for the taxes of that year, if there had been no previous sale thereof"—which, with regard to unassessed land, would be an impossible contingency. Still less can we suppose the intention of the Legislature to have been to impose a penalty upon any one for not paying money which, until assessment, he was under no obligation, legal or moral, to pay.

The question, therefore, is, whether the plaintiff is to be assigned to the one or to the other of the two categories referred to in the act; and this question, we think, is to be determined by the question of the validity or nonvalidity of the assessment in each case. For, if the assessment was void, there was no obligation on the plaintiff to pay it, and consequently no ground for a penalty. To the validity of the assessments, numerous objections are made, but of these two only apply to the assessments now under consideration. One of these, which applies to all the assessments in question, is that the property in each case was assessed without regard to mortgage liens; the other, applying only to the San José land, that the description in each assessment is fatally insufficient. In support of the former point the decision in Knott v. Peden, 84 Cal. 299, 24 Pac. 160, is cited, where it was held that such assessments are void; but this decision was in effect overruled in the later case of Henne v. Los Angeles Co., 129 Cal. 297, 61 Pac. 1081, and, upon the authority of that case, we think it must be held that the failure of the assessor to deduct the amounts due on the mortgages did not render the assessment void. And this, on principle, seems to be correct; for the error of the assessor in such case is simply that of assessing real property to the wrong person, as to which it is provided: "No mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." Pol. Code, § 3628; Lake County v. S. B. Q. M. Co., 66 Cal. 17, 4 Pac. 876.

As to the assessments of the San José land, it appears from the findings that in each of them the metes and bounds given, or most of them, are false; and it is expressly alleged and found that the description given in the assessment is not "sufficient to identify said tract." In this, therefore, the assessor has failed to observe the express provisions of the law, which required him to describe the land "by metes and bounds or other description sufficient to identify it"; and it cannot, we think, be doubted, that the assessment was wholly void. Pol. Code, § 3650, subd. 2; People v. Mahoney, 55 Cal. 286; Harvey v. Meyer, 117 Cal. 60, 48 Pac. 1014; Miller v. Williams, 135 Cal. 184, 67 Pac. 788; Best v. Wohlford, 144 Cal. 737, 78 Pac. 293; Cen. P. R. R. Co. v. Nevada, 162 U. S. 524, 525, 16 Sup. Ct. 885, 40 L. Ed. 1057. In the cases cited it is held that a stricter rule is applied in the case of tax deeds than others; and in the first case cited it is held that "evidence aliunde to render (the description) certain" is inadmissible. The latter point has, perhaps, been overruled in Best v. Wohlford, supra. But, in view of the finding, neither of the propositions asserted in the former cases need be resorted to here. It is, indeed, found by the court that the descriptions were "sufficient to enable the owners of said land to know that the land was intended to be described in said assessments, and * * * sufficient to enable them to pay the taxes on said land before delinquency." But this finding we regard as immaterial. It is, indeed, said in Bosworth v. Danzien, 25 Cal. 300, that "the test * * * to which every false call occurring in the course of tax proceedings is to be subjected is: Has it probably had the effect to mislead the landowner in relation to the land assessed, advertised, and sold?" But this is to be understood as assuming that the description be sufficient to identify the land. 1 Cooley on Tax'n, 744, 775. The same observation may be made as to what is said in Best v. Wohlford, supra.

It follows that the penalties for redeeming the land in the San José ranch, assessed to Mrs. Palomares, were illegally exacted, and that these sums, aggregating $162.60, should have been allowed the plaintiff in addition to the amount adjudged it by the lower court. As to the amounts thus to be adjudged, we have no doubt they may be recovered under the provisions of section 3804 of the Political Code. But, were it otherwise, the result would be the same; for these amounts were illegally exacted from the plaintiff as a condition of availing itself of a right given it by the state. The payments, therefore, cannot be regarded as in any sense voluntary.

We advise that the judgment appealed from be modified by inserting therein in lieu of the sum of $192, therein adjudged to the plaintiff, the sum of $354.60, and that the judgment as thus modified be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment appealed from is modified by inserting therein, in lieu of the sum of $192, therein adjudged to the plaintiff, the sum of $354.60, and the judgment as thus modified is affirmed: LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.

146 Cal. 600

In re ASHLEY. (Cr. 1,256.)

(Supreme Court of California. April 24, 1905.)

ATTORNEYS — DISBARMENT — SUPREME COURT—JURISDICTION—ORIGINAL PROCEEDING — ACCUSATION BY PRIVATE PARTY—WHERE INSTITUTED—PRACTICE.

1. While, under the express provisions of Code Civ. Proc. § 287, the Supreme Court has both original and appellate jurisdiction of proceedings for the disbarment of an attorney for alleged breach of professional duty, it will entertain the accusation as an original proceeding only when the prosecution is instituted by a bar association, or other public body, in the public interest.

2. Where the accuser is a private person, alleging misconduct prejudicial to himself, the proceeding should be instituted and the issues tried in the superior court of the county where the misconduct is alleged to have occurred.

In Bank. Proceeding for the disbarment of Arthur H. Ashley. Dismissed without prejudice.

PER CURIAM. This is an accusation by a private party charging an attorney at law with breach of professional duty, and seeking his disbarment. This court has both original and appellate jurisdiction in such cases. Code Civ. Proc. § 287. But it declines to entertain the accusation as an original proceeding except when the prosecution has been instituted by a bar association, or other public body, in the public interest. When the accuser is a private person, alleging misconduct prejudicial to himself, it is more convenient and more appropriate in every way that the proceeding should be instituted and the issues tried in the superior court of the county where the misconduct is alleged to have occurred, and where it is to be presumed the witnesses reside.

For these reasons the proceeding here is dismissed without prejudice.

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146 Cal. 601

PEOPLE v. HELWIG. (Cr. 1,137.)

(Supreme Court of California. April 25, 1905.)

ARSON—EVIDENCE—ADMISSIBILITY.

On a trial for arson defendant was charged with setting fire to a building in which he had personal property insured for $500. The property was not injured, and was later sold for $50. The buyer, a secondhand dealer, testified as a witness for the state that defendant wanted $50 for the goods. On cross-examination he testified that the goods were worth $100. *Held*, that the court did not err in excluding evidence on cross-examination as to the original value of the goods, and in not permitting defendant to call the witness for the sole purpose of asking him what they were worth when new to remove the impression that the goods were insured in an excessive amount.

Department 2. Appeal from Superior Court, Butte County; John C. Gray, Judge.

August Helwig was convicted of arson, and he appeals. Affirmed.

Geo. E. Gardner, for appellant. U. S. Webb, Atty. Gen., and C. N. Post, Asst. Atty. Gen., for the People.

McFARLAND, J. Defendant was convicted of arson, and appeals from the judgment and from an order denying his motion for a new trial. There are no points and authorities or brief on behalf of appellant on file, and at the oral argument his counsel did not contend that the evidence does not support the verdict, or that the trial court erred in instructing the jury, or in any respect other than in two rulings made in respect to the testimony of the witness J. W. Jewell. The building which appellant was charged with burning was occupied by him as a lodging house and restaurant, and he had in it some personal property which he had insured a few days before the fire for $500. This personal property was not injured by the fire, which was extinguished before any considerable damage was done; and the prosecution called the said witness Jewell, who testified that a few days after the fire he bought all this personal property from appellant for $50. Now, the argument of appellant's counsel is that the court afterwards refused to allow him to prove the value of the property at the time it was insured, and thus remove the impression that it was insured for more than its value. But the record does not show any foundation for this argument. Appellant was not prevented from showing the value of the property at the time of the insurance. The appellant himself as a witness testified, over the objection of the prosecution, very fully as to the value of the property, and that it had cost him nearly $800; and it was shown that the insurance agent had examined the property when he fixed $500 as its value. The witness Jewell, after testifying that he was a dealer in secondhand furniture, was asked by the prosecution to state "what you paid for the property, and how you arrive at the price; that is, your conversation with Mr. Helwig." He testified that he went to see Helwig, and asked him what he would take for the property, and Helwig said $50, whereupon witness gave him the money and took a bill of sale. Then on cross-examination appellant's counsel asked him, "What do you consider the value of that property?" To this question the prosecution objected, but the objection was overruled, and the witness went on to testify on the subject, saying that it was worth about $100. After a number of questions by appellant's counsel and answers by witness, the latter was asked, "Could you buy them in the market for that price?" to which the district attorney objected that "It does not tend to prove value, and is not cross-examination," and the objection was overruled. Afterwards the witness said, "Do you mean could I go and purchase that same amount of goods new from some retail dealer?" and counsel for appellant said, "No, those goods secondhand, used, in the condition they were," to which witness said that he could. Thereupon counsel for appellant said, "I wanted the original value," and then the court said, "Objection sustained." It is clear from this record that the objection to the testimony of the witness to the actual value of the property as secondhand furniture was overruled, and that the only question excluded was as to the "original value." Afterwards the appellant called the said Jewell as his own witness, and simply asked him the direct question, referring to the said personal property, "What is it worth new?" and the objection of the prosecution to the question that it was immaterial, irrelevant, and incompetent was by the court sustained. Upon these rulings of the court touching the testimony of the witness Jewell appellant bases his sole contention for a reversal of the judgment. But we do not think that these rulings constitute good ground for reversal. The question asked Jewell when he was a witness for the prosecution was not proper cross-examination. When he was a witness for appellant the sole question asked him was as to the value of the property when new. The issue was the value of the property as secondhand property at the time of the insurance—not its value when new. It may be that, where an adverse witness has testified to the value of secondhand property, it would be proper to ask him on cross-examination what its value was when new for the purpose of testing his general knowledge of the subject, but it was not proper as an original and isolated question asked by appellant of his own witness. Moreover, taking the whole case together, it is evident that the said rulings of the court as to the testimony of the witness Jewell, even if they could be considered as erroneous, were not of sufficient importance to have been prejudicial to appellant, or to afford just grounds for a new trial.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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146 Cal. 604

FRENCH et al. v. SENATE OF STATE OF CALIFORNIA. (Sac. 1,395.)

(Supreme Court of California. April 28, 1905.)

STATES — LEGISLATURE — EXPULSION OF MEMBERS—INTERFERENCE BY COURTS—RULES OF LEGISLATURE — CONSTITUTIONAL LAW — DUE PROCESS OF LAW—DEPRIVATION OF OFFICE—BILLS OF ATTAINDER—PLEADING—EFFECT OF DEMURRER—EVIDENCE—JUDICIAL NOTICE.

1. Under Const. art. 3, providing that one department of the state shall not exercise the functions of either of the other departments, the judiciary cannot revise even the most arbitrary and unfair action of the Legislature, or of either house thereof, taken in pursuance of the power inherent in the Legislature, and recognized by Const. art. 4, § 9, to expel a member thereof.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 129–132.]

2. Under Const. art. 3, prohibiting any person charged with the exercise of powers properly belonging to one of the departments of government to exercise any functions pertaining to either of the others, except as expressly authorized by the Constitution, a session of the Legislature which has adjourned sine die cannot be reconvened upon mandate of the judiciary, nor be in any way again called together, except in special session and at the behest of the Governor, as provided by Const. art. 4, § 2, and article 5, § 9, authorizing the Governor to specially convene the Legislature on extraordinary occasions.

3. When the Senate has expelled a member, it cannot reinstate him except when lawfully called in session.

4. Even if the court should attempt to encroach upon the Legislature and compel the

Senate by mandamus to reinstate expelled members, it could not make its process effective where, prior to the issuance thereof, the Senate has adjourned sine die, and will be composed of different persons, and will be a different body, from that served with the original process, when it next convenes in regular session.

5. It is not necessary to plead facts of which the court will take judicial notice, but such facts will be considered by the court although not pleaded.

6. Allegations of a pleading which are unnecessary and which are contrary to facts of which judicial notice is taken are not admitted by demurrer, but will be treated as a nullity.

7. Under Code Civ. Proc. § 1875, subd. 3, providing that courts take judicial notice of public and private official acts of the Legislature, the court will take judicial notice of proceedings entered upon the journal of the Senate by which members have been expelled.

8. In mandamus proceedings to compel the Senate to reinstate expelled members it will be presumed, in the absence of a direct allegation to the contrary, that the petitioners had notice of the expulsion proceedings which appear spread upon the journals of the Senate, and that they were allowed as members to participate therein.

9. The Senate may adopt any procedure and change it at any time and without notice, and cannot tie its own hands by establishing unchangeable rules.

10. Senators who have been expelled by the Senate in the manner prescribed by the Constitution and in the exercise of the power therein given are not deprived of the right to office without due process of law, in violation of U. S. Const. Amend. 14.

11. Const. art. 4, § 35, declaring that any member of the Legislature who is influenced in his official action by any reward or promise thereof is guilty of a felony, and providing that upon conviction he shall be forever disqualified from holding any public office or public trust, does not have any effect whatever upon the power expressly given the Legislature to expel its members by section 9 of the same article, in case of the exercise of that power because of the guilt of the expelled member of bribery.

12. A resolution of the Senate resulting in the expulsion of a member is not a bill of attainder within the inhibition of U. S. Const. art. 1, § 10, and State Const. art. 1, § 16.

In Bank. Original proceedings in mandamus by Frank French and others against the Senate of the State of California, Thirty-Sixth Session. Writ denied.

Geo. D. Collins, H. V. Morehouse, J. E. Alexander, F. C. Jacobs, and Wm. F. James, for petitioners. U. S. Webb, Atty. Gen., for respondent.

SHAW, J. This is an original proceeding in mandamus to compel the Senate of the state of California to admit the petitioners as members thereof. The case was submitted to this court upon a general demurrer to the petition, and the writ denied.

The petitioners were duly elected senators of the state from the respective districts which they represent, and each duly qualified and acted as a member of the Senate at the thirty-sixth regular session until the 27th day of February, 1905, when they were by the Senate expelled therefrom for malfeasance in office, consisting of taking a bribe to influence their conduct as senators. Since then they have not been allowed to sit as members of the Senate nor to participate in its proceedings. It is alleged in the petition that in the proceedings expelling the petitioners the Senate did not give them a hearing, nor afford them a trial upon the charges made, nor permit them to make any defense thereto; that the charges of bribery upon which they were expelled are false; and that neither of them has been convicted of such crime.

Even if we should give these allegations their fullest force in favor of the pleader, they do not make a case justifying the interposition of this court. Under our form of government the judicial department has no power to revise even the most arbitrary and unfair action of the legislative department, or of either house thereof, taken in pursuance of the power committed exclusively to that department by the Constitution. It has been held by high authority that, even in the absence of an express provision conferring the power, every legislative body in which is vested the general legislative power of the state has the implied power to expel a member for any cause which it may deem sufficient. In Hiss v. Bartlett, 69 Mass. 473, 63 Am. Dec. 768, the Supreme Court of Massachusetts says in substance that this power is inherent in every legislative body; that it is necessary to enable the body "to perform its high functions, and is necessary to the safety of the state"; that it is a power of self-protection, and that the legislative body "must necessarily be the sole judge of the exigency which may justify and require its exercise." In this state the power does not depend on implication; it is expressly given; or, as the power would exist without the express grant, perhaps it is more accurate to say that it is expressly recognized and limited. The Constitution provides that the Senate "shall determine the rule of its proceeding, and may, with the concurrence of two-thirds of all the members elected, expel a member." Article 4, § 9. If this provision were omitted, and there were no other constitutional limitations on the power, the power would nevertheless exist, and could be exercised by a majority. The only effect of the provision is to make the concurrence of two-thirds of the members elected necessary to its exercise. In all other respects it is absolute. The Legislature is a co-ordinate department of the state government. By article 3 of the Constitution it is provided that one department of the state shall not exercise the functions of either of the other departments, except as in that instrument expressly directed and permitted. There is no provision authorizing courts to control, direct, supervise, or forbid the exercise by either house of the power to expel a member. These powers are functions of the legislative department, and, therefore, in the exercise of the power thus committed to it, the Senate is supreme. An attempt by this court to direct or control the Legislature, or either house thereof, in the exercise of the power, would be an attempt to exercise legislative functions, which it is expressly forbidden to do.

Even if the court should attempt to usurp this legislative function, there is no means whereby it could carry its judgment into effect and give the relief demanded. The thirty-sixth session of the Legislature has adjourned sine die; it is a thing past, and cannot be reconvened upon the mandate of the judicial power. Const. art. 3. The Senate could not reinstate the petitioners as members of that session except when lawfully in session. Nor can the body which composed the thirty-sixth session be again called together except in special session and at the behest of the Governor. Const. art. 4, § 2; article 5, § 9. The next regular session of the Senate will be composed of different persons and will be a different body from that now supposed to be before the court. The court is without power to issue its final process against a body not lawfully served with its original process and which has not submitted itself to its jurisdiction. Moreover, before the next session convenes, the terms of all the petitioners except Wright will have expired. The court cannot issue any effective mandate to reinstate the petitioners as members of the Senate.

We think it is proper to say further, out of respect to a co-ordinate department of the government, that, notwithstanding the arbitrary action apparently charged against the Senate by the language of the petition, we cannot give the statements therein contained their full force. Ordinarily, when a case is submitted on a demurrer, all the facts stated in the pleadings demurred to are taken as true. To this rule there are some exceptions, one of which is important here. Only those facts are admitted by a demurrer which it is necessary to allege in the pleading. It is not necessary to allege facts of which the court will take judicial notice. Such facts will be considered by the court although not pleaded. 12 Ency. Pl. & Pr. 1; 1 Chitty, Pl. 215, 217, 218; People v. Mahaney, 13 Mich. 481; Mullan v. State, 114 Cal. 581, 46 Pac. 670, 34 L. R. A. 262; Bliss, Code Pl. 177, 194. Those allegations of a pleading which are not necessary, and which are contrary to the facts of which judicial notice is taken, are not admitted by a demurrer, but are to be treated as a nullity. 12 Ency. Pl. & Pr. 1; 1 Chitty, Pl. 215; Mullan v. State, supra; Ohm v. San Francisco, 92 Cal. 449, 28 Pac. 580. The courts take judicial notice of the public and private official acts of the legislative department of the state. Code Civ. Proc. § 1875, subd. 3; Mullan v. State, supra; Davis v. Whidden, 117 Cal. 623, 49 Pac. 766. Among these official acts are included the proceedings by which the petitioners were expelled and which are entered upon the journal of the Senate. We are therefore bound to take notice that charges were preferred against the petitioners in the Senate and were referred by it to a committee for investigation; that the committee reported that it had made the investigation and that the charges were true, and recommended that the petitioners be expelled; that this report was taken up and considered by the Senate; that the petitioners, being then members, had upon such consideration an opportunity to present, or have presented, arguments in their behalf; and that the resolution expelling them was regularly offered and adopted by the Senate. There being no direct allegation to the contrary, we must presume that the petitioners had notice of these proceedings, and that they were allowed as members to participate therein. In view of these facts, we cannot consider the allegations of the petition as imputing to the Senate the arbitrary and unfair treatment of the petitioners which might be inferred from the language used, but will rather consider them as a statement of the conclusion of the pleaders that the proceedings taken, of which we take judicial notice, did not constitute a trial or hearing, and did not give them the opportunity to be heard in their own behalf, which they believe they were entitled to have.

There is no averment that the manner of the proceeding was contrary to the rules established. And even if it were as abrupt as the interpretation of the pleading most favorable to the petitioners would imply, the matter would be immaterial. The Senate has power to adopt any procedure, and to change it at any time and without notice. It cannot tie its own hands by establishing rules which, as a matter of power purely, it cannot at any time change and disregard. Its action in any given case is the only criterion by which to determine the rule of proceeding adopted for that case. There is no constitutional provision giving to the petitioners the right to have a trial and opportunity to be heard upon the charges made against them in the Senate other than that which they have received.

The fourteenth amendment to the Constitution of the United States does not affect the case, nor have its provisions been violated by the action of the Senate. While it is true that, so far as private persons are concerned, the right to hold a public office duly conferred upon an individual has many of the attributes of private property, and is protected by the law of the land, yet, as between the officeholder and the sovereign power, such right is not violated when the proper governmental authority, acting in pursuance of a power expressly given to it by the fundamental law, has removed such person from the office. Matter of Carter, 141 Cal. 319, 74 Pac. 997. The sovereign power which created the office can also fix the terms upon which it is held, and can delegate the power of removal. The title is held subject to the conditions thus imposed. The relations between the body politic and its officers are not in this particular essentially different from those existing between a private person and his servants. Although there may be a difference as to the liability for damages for a dismissal without cause, the right or power to dismiss always exists. The Senate having expelled the petitioners in the manner prescribed by the Constitution, in the exercise of the power therein given, it is not true that they have been deprived of the right to the office without due process of law.

With respect to the possible abuse of such power, the case is analogous to that of the President of the United States with respect to officers of the United States subject to arbitrary removal by him. In regard to this the Supreme Court of the United States says that the only restraint upon the abuse of the power "must consist in the responsibility of the President, under his oath of office, to act as shall be for the general benefit and welfare." Shurtleff v. U. S., 189 U. S. 317, 23 Sup. Ct. 535, 47 L. Ed. 828. The same is true of the power of the Senate here under consideration. The oath of each individual member of the Senate, and his duty under it to act conscientiously for the general good, is the only safeguard to the fellow members against an unjust and causeless expulsion. This is the only practical rule that can be adopted as to those unrestricted governmental powers which are necessary to the exercise of governmental functions, and which must be lodged somewhere. Each department of the state is necessarily vested with some power which is beyond the supervision of any other department, and in such cases the only protection against abuse is the conscience of the individual in whom the power is vested. The decisions holding that, where a power is given to remove an officer "for cause" without requiring any previous notice or any hearing, such notice must nevertheless be given and a hearing had, have been disapproved in this state. Matter of Carter, supra. But, in any event, they clearly have no application to the present case, where the power to remove is, as we have seen, inherent and necessary to the exercise of the functions of the body possessing it, and are given without limitation or restriction.

It is claimed that the power to expel for bribery is, by section 35, art. 4, limited to those cases in which the member has been convicted of the crime defined in that section. The section provides that any member of the Legislature who is influenced in his official action by any reward or promise thereof is guilty of a felony, and that upon conviction he shall be forever disqualified from holding any office or public trust. It is obvious that this section was not intended to have any effect whatever upon the power to expel members of the Legislature given by section 9 of the same article. The two provisions are entirely independent, and are made for different objects and purposes. The power to expel is given to enable the legislative body to protect itself against participation in its proceedings by persons whom it judges unworthy to be members thereof, and affects only the rights of such persons to continue to act as members. The provision of section 35 defines a certain crime, and prescribes the effect of a judgment of conviction thereof upon the subsequent status as a citizen of the person found guilty. A resolution of the Senate expelling a member, whether for bribery or for some other offense, or improper conduct, is not the equivalent of the conviction of the person of the crime set forth in the charges against him.

The proposition that a resolution or other action of the Senate resulting in the expulsion of a member is in substance a bill of attainder, and therefore a violation of section 16, art. 1, of the state Constitution, and of section 10, art. 1, of the Constitution of the United States, is scarcely worthy of notice. The charges upon which a member is expelled may or may not constitute a charge of crime, but the resolution expelling him has not the force of law, and it cannot by any stretch of construction be denominated a bill of attainder. At common law "a bill of attainder was a legislative conviction for an alleged crime, followed by a prescribed punishment therefor, with judgment of death." And, even where a milder punishment was inflicted, its effect was an extinction of civil and political rights and capacities. Cooley, Const. Lim. (7th Ed.) 368. The resolution of expulsion has no effect upon the rights of the member expelled further than to terminate his right to sit as a member of the legislative body, and it bears no just resemblance to a bill of attainder.

We find no ground upon which the application of the petitioners can be supported, and we are of the opinion that the writ was properly denied.

We concur: BEATTY, C. J.; VAN DYKE, J.; HENSHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

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146 Cal. 585

DUNDON v. McDONALD et al. (S. F. 3,983.)*

(Supreme Court of California. April 17, 1905.)

BANKS—FRAUD OF OFFICER—ACTION BY DEPOSITOR—PURCHASE OF STOCK—RATIFICATION BY BANK—EVIDENCE—SUFFICIENCY—APPEAL—HARMLESS ERROR.

1. In a suit by a bank depositor against the bank and its president to establish the equitable title of the bank to certain shares of railroad stock claimed by the president as his individual property, evidence *held* sufficient to sustain a finding that a purported purchase of the stock was for the use of the president, though in the name of another person.

2. The evidence was also sufficient to sustain a finding that the purchase of the stock by the president was not ratified by the bank.

3. The objection that a bank depositor could not maintain an action against the bank and

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*Rehearing denied May 17, 1905.

its president to establish the equitable title of the bank to certain shares of railroad stock alleged to have been received by the president to the use of the bank in lieu of other shares, until after demand on the directors to bring suit, was obviated by the filing of a cross-complaint by the bank, in whose favor judgment was rendered.

4. In an action by a bank depositor against the bank and its president to establish the equitable title of the bank to certain shares of railroad stock, the bank filed a cross-complaint, and judgment was rendered in favor of plaintiff and the bank, directing a sale of the stock, and the distribution of the proceeds to the president, in the amount of his disbursements, with interest, and to the bank the balance after payment of plaintiff's costs and expenditures for counsel fees. *Held*, that a contention of the president that the judgment was inequitable to him, because, in taking the bonds and the stocks, which he was required to take with them, he incurred obligations by which he might have been damnified, was untenable, where he made no claim that he was in fact in any way injured, and made no attempt to show that there were any existing liabilities against which he should be indemnified.

5. Where the court on appeal assumed, in favor of the president, that the market value of the bonds was as claimed by him, error in the rejection of evidence of their value was harmless as to him.

6. Where evidence was erroneously excluded on the issue whether the sale to the president was ratified by the bank, the error was harmless as to the president; the fact being itself insufficient to establish his contention, and there being no other evidence.

7. The erroneous rejection of evidence on the issue whether the president was chargeable with actual or merely constructive fraud was harmless as to him; the decision of the court resting, not on the theory of actual fraud, but on the fact that the president procured the stock while acting as trustee and agent of the bank, such being, under Civ. Code, § 2229, providing that a trustee may not use or deal with the trust property for his own profit or for any other purpose unconnected with the trust in any manner, and section 2234, providing that every violation of the article is a fraud against the beneficiary of the trust, and established equitable principles, a constructive or quasi fraud.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; Jas. M. Seawell, Judge.

Action by P. F. Dundon against J. M. McDonald and others. From the judgment and an order denying his motion for a new trial, McDonald appeals. Affirmed.

Roger Johnson, for appellant. W. T. Baggett, J. Stephens, and Curtis Hillyer, for respondent Dundon. Gavin McNab, for respondent Pacific Bank.

SMITH, C. The plaintiff is one of the depositors of the defendant bank, of which, since April, 1894, the defendant McDonald has been president, and the other defendants directors. Since some time in June, 1893, the bank has been in liquidation under the bank commissioner's act of March 30, 1878 (St. 1877–78, p. 740, c. 481), and its amendments. The suit was brought by the plaintiff on behalf of himself and other depositors, and its object, or at least its main object, was to assert the equitable title of the bank to 156 shares of stock of the Los Angeles Railway Company, which had been received by the defendant McDonald in lieu of 150 shares of stock in the Los Angeles Consolidated Electric Railway Company, to whose property interests the former company had succeeded. The stock in the latter company prior to August 1, 1895, had belonged to the defendant bank, and the claim of the plaintiff and the bank is that it was acquired by McDonald under such circumstances as to make him constructively the trustee of the latter. The findings and judgment were in favor of the plaintiff and the defendant bank, and provision was made in the judgment for the sale of the stock, and the payment of the proceeds as therein directed; that is to say, to the defendant McDonald $67,715.76, being the amount of his disbursements on account of the stock, with interest, less receipts on account of dividends; to the plaintiff, the amount of his costs and of his expenditures for counsel fees, etc.; and to the defendant bank, the balance. The defendant McDonald appeals from the judgment, and from an order denying his motion for a new trial.

McDonald deraigns title to the stock in question through one S. G. Murphy, to whom, for the consideration of $75,000, the stock was assigned by the Pacific Bank. But it is found by the court, in effect, that Murphy's purchase of the stock was on the account and for the use of McDonald, and the principal question in the case is as to the sufficiency of the evidence to justify this finding of the court. On this point the following facts either appear from the documentary evidence or are undisputed: In July, 1895, the Pacific Bank was indebted to the National Bank of Commerce of New York in the sum of about $97,000, for which the latter bank held as security the stock in question and other collaterals, with about $30,000 previously collected by Murphy, who was its agent in this city; and in the latter part of that month a proposition was made by McDonald to Murphy, and accepted by the latter, to pay to the creditor bank in settlement of its claim the sum of $90,000; Murphy agreeing to take the stock in question for the sum of $90,000, and McDonald, to guaranty him against loss. And in pursuance of this agreement the following writings were executed, namely: Of date August 1, 1895, the note of McDonald to Murphy for the sum of $75,000, for the use of the First National Bank of San Francisco, of which the latter was president; a check from McDonald to Murphy for the amount of the note, and the Pacific Bank's assignment of the stock to Murphy, executed by its secretary. Of date August 2, 1895, an order of Murphy upon the Bank of California, the custodian of the bonds, to deliver them to McDonald. And of date August 3, 1895, Murphy's check on the First National Bank in favor of the Bank of Commerce for $90,000. The transaction, according to the testimony of Murphy, was closed, and the documents of date August 1st and 2d delivered, on the latter date; and at the same time the collaterals and cash in the hands of Murphy to the credit of the Pacific Bank were returned to it.

So far there is no dispute. But as to the date and terms of the arrangement between Murphy and McDonald which was thus consummated there is some discrepancy in their statements. The original agreement between them, of some 15 days' prior date, was that, upon Murphy's taking the bonds, McDonald would guaranty him against loss; but, according to the testimony of both, this arrangement was modified by McDonald's agreeing to take the bonds. The latter agreement, McDonald says, was made at Murphy's instance, after the original agreement had been consummated, and the title to the bonds vested in him. But Murphy testified that it was made at McDonald's instance on or before the 1st day of August; and his testimony on this point is conclusively confirmed, and that of McDonald refuted, by the note and check of the latter, both of which were of date August 1st, and therefore prior to the consummation of the transaction on August 2d. It appears, therefore, from the dates of the several transactions, that the purchase money was in fact advanced by McDonald. Nor can it be claimed there is anything in the evidence to rebut the legal presumption thus arising (Civ. Code, § 853), or at least anything of a very convincing character. The conclusion is therefore irresistible that the purchase was made by Murphy on account of McDonald; and this accords with his testimony in the former suit, referred to in his answer, where he says, in effect, that Murphy refused to buy the bonds, but took them on his (McDonald's) account, or that of the bank. We are of the opinion, therefore, that the finding of the court on this point was fully justified by the evidence.

We are also of the same opinion with regard to the finding of the court that the transaction—that is, the purchase by McDonald—was not ratified by the bank. The settlement with the Bank of Commerce, and the sale of the bonds to Murphy as part thereof, were ratified by the board of directors, but the fact of McDonald's purchase was not reported to the board; nor, with the possible exception of one director, who was attorney for McDonald, does it appear that the fact was known to any one until afterwards. Indeed, the only directors who appeared as witnesses, with the exception above stated, testified they did not become cognizant of the fact until afterwards. Their subsequent knowledge of the fact is immaterial, unless in connection with their failure to act, as justifying the finding of the court that a request by the plaintiff to the directors to bring the suit would have been unavailing.

Other points urged by the appellant are that the plaintiff could not maintain the action until after demand upon the directors to bring the suit, that the judgment is inequitable and unfair to the appellant, and that the court erred in excluding evidence of the value of the stock at the time of the sale. As to the first proposition—assuming for the purposes of the decision that the failure of the demand was not excused by the facts alleged in the amended complaint and found by the court—we are of opinion that the objection was obviated by the filing of the cross-complaint of the defendant bank, in whose favor the judgment is. Possibly that defendant might have objected to the judgment in favor of the plaintiff for his costs, etc., but it has not done so, and in that matter the appellant is not interested. As to the second point, the objection of the appellant is that in taking the bonds and the stocks, which he was required to take with them, he incurred obligations by which he might have been damnified. But he does not claim that he has in fact been in any way injured, nor did he attempt to show there were any existing liabilities, against which he should be indemnified. As to the evidence excluded, there can be no doubt that it was material to certain issues in the case—"as, for instance, whether the sale to McDonald was ratified by the corporation, or whether he should be charged with actual fraud or merely constructive fraud" (Dundon v. McDonald, 137 Cal. 4, 69 Pac. 499), and it should therefore have been admitted; but the only consequence of its exclusion is that it must be assumed in favor of the appellant that the market value of the bonds was as claimed by him, and this we have assumed. But with regard to ratification, this fact was itself insufficient to establish the appellant's contention, and there was in fact no other evidence; and, with regard to the issue of actual fraud, the decision of the court rests, not upon that theory, but upon the fact that the appellant procured the stock while acting as trustee and agent of the bank, which, under the provisions of the Code and established equitable principles, was a constructive or quasi fraud. Civ. Code, §§ 2229, 2234; Golson v. Dunlap, 73 Cal. 159, 14 Pac. 576, and authorities cited.

We advise that the judgment and order appealed from be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

146 Cal. 657

STILWELL v. CUTTER et al. (S. F. 3,268.)*

(Supreme Court of California. May 3, 1905.)

BROKERS—TRANSACTIONS WITH PRINCIPAL—SALES ON MARGINS—RECOVERY OF MONEY PAID—CREDITS.

1. A transaction by which defendants purchased for plaintiff's account 200 shares of the capital stock of a corporation, which were not delivered and were not intended to be delivered at the time of the purchase, defendants receiving only a percentage of the purchase price sufficient to secure them against any loss which might result from the decline in value of the stock, with an understanding that they should retain the shares as security for such balance and sell the same in the event of a decline endangering their security, plaintiff being charged with the purchase price of the shares and broker's commissions and interest on the balance due defendants, and credited with the stock purchased and money paid, was within the inhibition of Const. art. 4, § 26, declaring contracts for the sale of shares of stock on margin, or to be delivered at a future day, void.

2. The action given by Const. art. 4, § 26, to recover money paid on contracts for the sale of stock on margin, lies in favor of the principal against the broker who procures the stock for him, although the latter does not himself sell it to the former, but purchases it from another broker for the former's account.

3. In an action against a broker under Const. art. 4, § 26, to recover money paid on a contract for the sale of stock on margin, a balance standing to plaintiff's credit with defendant after the sale of certain wheat options, which had nothing to do with the stock transactions, did not constitute a payment or credit on the sum sued for.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Henry C. Stilwell against Edward B. Cutter and another, copartners as Cutter & Moseley. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Campbell & Metson and Campbell, Metson & Campbell, for appellants. I. B. L. Brandt and Whitworth & Shurtleff (Charles A. Shurtleff, of counsel), for respondent.

CHIPMAN, C. This action was brought to recover money paid by plaintiff to defendants on an alleged contract for the sale of stocks on margin. Plaintiff had judgment, from which, and from an order denying their motion for a new trial, defendants appeal.

The action was authorized by article 4, § 26, of the state Constitution, reading as follows: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts, may be recovered by the party paying it by suit in any court of competent jurisdiction."

The court found that plaintiff paid to defendants, and defendants received, $3,071.46, for the purposes and under the following circumstances, which were well known by defendants: That at divers times, to wit, between April 10th and 16th, in the year 1900, for the purpose of speculating in the rise and fall of shares of the capital stock of the American Steel & Wire Company, a corporation, defendants, as stockholders, at the request of plaintiff, purchased for his account 200 shares of the capital stock of said corporation; that said shares were never delivered to plaintiff, and were purchased with the understanding that they were not to be delivered at the time of the purchase, but, on the contrary, were to be delivered at some future time, when the sum of money due the defendants on account of said purchase should be paid by plaintiff; that at the time of said purchase defendants demanded and received only a percentage of the purchase price, in an amount sufficient, in defendants' judgment, to secure them against any loss which might result from a decline in value thereof, and with a further understanding that defendants should retain said shares as security for the balance due defendants, and might sell the same whenever such a decline occurred in the value thereof as would endanger defendants' security; that plaintiff was charged with the purchase price of said shares, together with the broker's commission, and with interest on the balance due defendants, and was credited with the stock purchased and the money paid on said account; that, upon receiving orders for the purchase of said shares, defendants, without plaintiff's knowledge or consent, instructed certain stockbrokers in Chicago to purchase said shares, who purchased the same by telegraph in New York City; that, pending said transaction between plaintiff and defendants, the value of said shares declined, in consequence whereof defendants called upon plaintiff and received from him, "from time to time, further and additional moneys to keep up his marginal account and protect the same; that plaintiff demanded the return of said sum of $3,071.46 from defendants, but defendants failed and refused to return the same or any part thereof, and no part thereof has been paid to plaintiff." From these findings the court found, as conclusions of law, that said article of the Constitution had been violated, and that plaintiff was entitled to recover the amount above stated.

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*Rehearing denied June 2, 1905.

Appellants contend that the evidence does not show the existence of a contract for the sale of shares on margin, and that defendants were but the agents of plaintiff, and that, because defendants executed plaintiff's orders to purchase the stock through other brokers, plaintiff has sued the wrong party.

Appellants urge with much amplification that the constitutional inhibition does not extend to contracts "of" sale on margin, but only to contracts "for" the sale on margin; that the former class are but ordinary executed contracts, while the latter are executory; and that the present case falls under the former class, and are therefore not inhibited. We do not think it necessary to decide whether or not such distinction can be drawn. There is evidence to support the findings, and the findings show that the contract was within the express terms of the Constitution, and was clearly void under the provisions of that instrument.

The court found that plaintiff gave his orders for the purchase of the stock to defendants, and did not know whence or from whom they obtained it, or who made the purchase for plaintiff's account. The objection that defendants were but the agents of plaintiff, and, inferentially, that the brokers who purchased the shares should have been sued, is not new. It was held in Cashman v. Root, 89 Cal. 373, 26 Pac. 883, 12 L. R. A. 511, 23 Am. St. Rep. 482, that, admitting the broker to be the agent of his customer, if by the transaction the customer is enabled to do that which is prohibited, to wit, purchase stock on margin, it would be within the prohibition even if the broker agent did not himself sell to his customers. The court said: "In the accomplishment of the unlawful purpose he took the place of the vendor, and carried the stock as the vendor might have done, and the end was thus reached per interpositam personam. The end attained, and not the form of the transaction, must determine the question." See, also, Parker v. Otis, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56. Since the adoption of the new Constitution, the provision in question has several times been before the court under varying conditions of fact. We find nothing in the present case that should take it out of the category of cases heretofore decided adversely to defendants' contention. Substantially all the questions presented by the evidence and now involved were decided against defendants in the cases above cited. See, also, Wetmore v. Barrett, 103 Cal. 246, 37 Pac. 140; Sheehy v. Shinn, 103 Cal. 325, 37 Pac. 393; Baldwin v. Zadig, 104 Cal. 594, 38 Pac. 363, 722; Kullman v. Simmens, 104 Cal. 595, 38 Pac. 362; Fox v. Hale & Norcross G. Co., 108 Cal. 385, 41 Pac. 308.

Appellants claim that the judgment was too great by $106.04. This conclusion is reached by deducting from the amount lost on the steel wire company's stock deal ($3,071.46) the balance said to be to the credit of plaintiff at a certain date after the sale of certain wheat options ($2,965.42). Plaintiff testified that his purchases of grain futures had nothing to do with his purchase of the wire company's stock, and that he paid in all $3,886.91 as margin on the shares of the steel wire company. Accepting the testimony of plaintiff, as the trial court must have done, the judgment was not too great. The defendants pleaded no counterclaim for the $106.04, and it did not technically constitute a payment or credit on the sum sued for.

It is advised that the judgment and order be affirmed.

We concur: COOPER, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed: SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.

146 Cal. 661

In re CARPENTER'S ESTATE. (Sac. 1,285.)

(Supreme Court of California. May 3, 1905.)

EXECUTORS — ADVANCES — INTEREST — MINOR HEIRS — DEVISEES — ATTORNEYS — APPOINTMENT—ACCOUNTING — FEES — PRIORITY OF ALLOWANCE — APPEAL — PARTIES — NOTICE —FINDINGS—REVIEW.

1. Where a creditor of an estate, whose claim had been allowed, did not make any appearance on the settlement of the executor's account, it was not necessary to serve him with a notice of appeal therefrom.

2. Where an executor was directed, by an order settling his account, to pay certain sums as

compensation for legal services rendered to the executor, the attorneys rendering such services were not persons interested in the estate, nor proper parties to the proceeding for settlement of the executor's account, and hence it was not necessary to serve them with notice of an appeal from the order of settlement.

3. Where the court found that an order fixing the fee for an attorney appointed to represent minor devisees and legatees, who had no guardian, as authorized by Code Civ. Proc. § 1718, was duly made and entered, it would be presumed in favor of the order, in the absence of a showing to the contrary in the record, that all persons interested were duly notified of the application for the fixing of the fee, and that the order was not ex parte.

4. Where an order was entered fixing the fee of an attorney appointed to represent minor devisees and legatees, as authorized by Code Civ. Proc. § 1718, the mere fact that there had been no previous account filed by the executor was insufficient to establish want of notice of the application to fix such fee to all persons interested.

5. Where it was found that an executor made proper and beneficial expenditures for the estate, when he was without funds belonging to the estate, for the purpose of carrying on litigation relating to the maintenance of the will under which minor devisees and legatees claimed, an order allowing the executor interest on the sums so advanced was not erroneous, in the absence of a bill of exceptions showing the evidence on which the allowance was made.

6. Where an attorney was appointed to represent minor heirs and devisees, under Code Civ. Proc. § 1718, authorizing such appointment, and providing that the charge for his services shall be made against the interests represented by the attorney, and that payment thereof shall be made out of the estate only where it can be reimbursed by retaining the amount from the portion of the heir represented, the fee of such attorney was not a part of the debts of the estate or expenses of administration, and was therefore not entitled to priority over a claim by the executor for advances and interest.

Department 1. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Judicial accounting by the executor of the will of C. W. Carpenter, deceased. From an order settling the account, the assignee of one S. D. Woods appeals. Affirmed.

Arthur L. Levinsky, for appellant. Jas. A. Louttit and Louttit & Middlecoff, for respondent.

ANGELLOTTI, J. This is an appeal from an order settling an account of the executor of the will of C. W. Carpenter, deceased. The account covered the period between the time of the appointment of the executor on February 23, 1884, and January 1, 1901, and was not presented or settled as a final account. The only appellant is the assignee of one S. D. Woods, who, as appears from the findings, was, on the 19th day of September, 1892, by an order "duly made, given and entered in the above-entitled matter and estate," allowed the sum of $3,000 "as attorney's fees for services rendered by him as attorney of the minor legatees and devisees named in the last will and testament of said C. W. Carpenter, deceased," and payment of said amount was, by said order of September 19, 1892, directed to be made as necessary expenses of administration. No part of the same has ever been paid.

It is claimed that the appeal should be dismissed for the failure on the part of appellant to serve his notice of appeal on certain persons alleged to be adverse parties. One of such alleged adverse parties was a creditor whose claim had been duly allowed, but who did not, so far as the record shows, make any appearance in the matter of the settlement of this account. As he did not appear and make himself a party to this proceeding, it was not necessary to serve the notice of appeal upon him. Est. of McDougald, 143 Cal. 476, 77 Pac. 443. The other alleged adverse parties were attorneys who had rendered legal services to the executor in the matter of said estate, and to whom the executor was directed, by the order settling his account, to pay certain sums as compensation therefor. These attorneys of the executor were not persons interested in the estate, and could not be parties to the proceeding of settlement of account. It was not necessary to serve the notice of appeal on them. Est. of Kruger, 143 Cal. 141, 76 Pac. 891.

It is urged by respondent that the order of September 19, 1892, in favor of S. D. Woods, was made without jurisdiction and is void, and that his assignee has therefore no interest whatever in the estate, and cannot maintain this appeal. From the record before us we cannot say that the order, so far as it fixes the fee to be received by the attorney theretofore appointed under the provisions of section 1718, Code Civ. Proc., to represent the minor legatees and devisees, was beyond the jurisdiction of the superior court. Under the provisions of that section, which was repealed in 1903 (St. 1903, p. 243, c. 206), the court was authorized to appoint an attorney to represent devisees and legatees who were minors and had no general guardian, and to fix the fee of the person so appointed. It is found that the order fixing the fee was duly given, made, and entered, and it must be presumed in favor of the order, in the absence of a showing to the contrary in the record, that all persons interested were duly notified of the application for the fixing of the fee, and that the order was not, as suggested, an ex parte order. The mere fact that there never had been any previous account filed by the executor, if such fact is shown by the record, does not conclusively establish want of notice to all parties interested of the application for the fixing of this fee. There may have been an application for the sale of realty, or some other appropriate proceeding, in which all of the parties interested were before the court, with full notice of the application for the fixing of this fee. The record does not show that such was not the case.

The principal points made by appellant for reversal are, first, that the superior court erred in allowing the executor interest upon the money advanced by him, and, second, that said court erred in decreeing that the executor should have and recover from the estate the balance remaining due him for moneys advanced, and interest thereon, before any payment should be made on account of appellant's claim. The superior court allowed the executor interest upon all amounts expended by him, at the rate of 7 per cent. per annum, from the time of payment to January 1, 1901, and charged him with interest upon all amounts received by him as executor, at the same rate, from the time of receipt to January 1, 1901. It found that on such basis there was due the executor on January 1, 1901, a balance of $22,201.41. As to such allowance of interest to the executor, the court found "that all of said expenditures made by said executor were proper and beneficial to said estate and those interested therein, and resulted in the preservation thereof for the parties entitled thereto, and said executor made said expenditures at a time when there were no funds of said estate in his hands, and he is entitled to interest on said amounts as set forth above." There is no bill of exceptions showing the evidence taken on the hearing in the superior court. The account and report show that the great bulk of the disbursements made by the executor were made in and about the large amount of litigation in which the estate appears to have been involved, most of which related to the maintenance of the will under which the minor devisees and legatees claimed. We cannot say, in the face of this finding, and in the absence of any bill of exceptions showing the evidence, that the court erred in allowing the executor interest upon advances made by him. It appears to be well settled that circumstances may be such as to justify a court in allowing the executor or administrator interest upon advances made by him, for the benefit of the estate, either from his own funds, or from money borrowed by him for that purpose. It is true that claims for interest are not favored, will be viewed with caution, and examined with scrupulous care, but it is uniformly recognized that the condition of an estate is sometimes such as not only to authorize, but strongly commend, such advancement of money. In 11 Am. & Eng. Ency. of Law (2d Ed.) p. 1267, it is said: "In regard to interest on advances to the estate made by the executor or administrator out of his own funds, the rule is well settled that credit will be allowed if the advances were beneficial to the estate, and the necessity of making them was not occasioned by any neglect or delay on the part of the executor or administrator. But such claims are not favored, and in no case will they be allowed if the advances were not beneficial to the estate, or if the executor had funds of the estate in his hands, or could have put himself in funds from the estate." See, also, Woerner on Am. Law of Administration (2d Ed.) § 523; Liddel v. McVickar, 11 N. J. Law, 44, 47, 19 Am. Dec. 369; Pettingill v. Pettingill, 60 Me. 411, 425; Trimble v. James, 40 Ark. 393, 406. Where it is absolutely essential for the protection of an estate, and the preservation of the property thereof for those beneficially interested, that the executor should advance money, and he does so, thereby producing benefit to those interested therein, it is only equitable that he should be fully reimbursed, and "it is according to the rules and principles of equity that the acts of an executor had in the administration of his trust are to be adjudged." In re Clos' Estate, 110 Cal. 494, 501, 42 Pac. 971. In the absence of the evidence, we cannot say that the circumstances of this estate were not such as to justify the action of the court both as to the allowance of interest and the rate thereof.

As to the claim that the court erred in providing that the executor might repay himself the balance due him for advances and interest before paying appellant any portion of his claim, it would seem to be clear that appellant is entitled to the payment of his claim only after the payment of all expenses of administration and debts. His claim is not an expense of administration of the estate in the true sense. The status of an attorney appointed under section 1718, Code Civ. Proc., was discussed at some length in Estate of Lux, 134 Cal. 3, 66 Pac. 30, and it was there said that the statute directs the charge for the services of such an attorney to be made against the interest represented by the attorney, and that it authorizes payment out of the estate only where the estate can be reimbursed by retaining the amount from "the portion of the heir represented." It was further said that a payment to such an attorney is in the nature "of a partial distribution to the heir." The provision of section 1718 to the effect that the attorney may receive a fee, to be fixed by the court, which must be paid out of the funds of the estate as necessary expenses of administration, can therefore be held to mean only that such fee shall be paid from the portion of the heir, legatee, or devisee represented, as a necessary part of the expense of administration; but, until the payment of the general expenses of administration of the estate and the debts of deceased, there can be no portion of the party so represented from which such payment can be made. The attorney so appointed stands in no better position than the person whom he represents, and his compensation is dependent upon the existence of a fund or property belonging to such person. Until the payment of the general expenses of administration and debts of deceased, there can be no such fund or property.

In his written objections to the annual account, appellant alleged "that said account does not show what property or estate is in the possession of said executor." There was nothing in this objection which precluded the court from proceeding to settle the account. Nor was it essential that the order settling the account "shall set forth the present condition of said estate," or show "the property and estate on hand, together with its value."

We cannot, of course, upon this appeal from the order settling the account, consider the contention that the court erred in refusing to grant a motion, made by appellant more than a month after the taking of such appeal, for the amendment of the findings of fact filed upon the settlement of the account.

The order appealed from is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

146 Cal. 611

POWER v. FAIRBANKS et al. (Sac. 1,313.)

(Supreme Court of California. April 29, 1905.)

NEW TRIAL — ORDER — REVIEW — ABSENCE OF BILL OF EXCEPTIONS—RECITALS OF ORDER—FINDINGS—FAILURE TO FIND ON MATERIAL ISSUE — PLEADING — IMPROPER CROSS-COMPLAINT—WAIVER OF IMPROPRIETY.

1. Where, in an action for trespass in cutting timber, defendant filed a cross-complaint alleging that he was the owner of certain lands, not described in the complaint, and that plaintiff claimed some interest in the timber thereon, and asking a decree adjudging defendant to be the owner and restraining plaintiff from making any such claim, any question as to the propriety of such cross-complaint was waived, no objection having been made thereto by plaintiff, who answered it, and submitted without objection to a trial of the issues made thereby.

2. Where, in an action for trespass in cutting timber on certain described lands, the court found that plaintiff owned certain of the lands, and that defendant had cut the timber thereon, but no finding was made as to a portion of the lands, defendant could not complain of such failure to find.

3. That the trial court made a finding outside of the issues does not warrant the granting of a new trial, such an objection being available only on an appeal from the judgment.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 124, 127.]

4. The failure of the trial court to make a finding on a material issue is ground for a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 125, 165½.]

5. The party appealing from an order granting a new trial must affirmatively show error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3670, 3814.]

6. Statements or recitals in an order granting a new trial as to the showing made constitute no part of the order, and such things can be shown only on appeal by the bill of exceptions or statement.

7. On appeal from an order granting a new trial the reasons given by the court for its action are immaterial.

Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Harold T. Power against P. M. Fairbanks and others. From an order granting a new trial, plaintiff appeals. Modified.

John M. Fulweiler, for appellant. Tabor & Tabor, for respondent.

ANGELLOTTI, J. This is an action for $600 damages for trespass in the cutting down and removal of timber growing on land alleged to belong to plaintiff, and described in the complaint as the "S. E. ¼ and the E. ½ of the S. W. ¼ of Sec. 5, T. 15 N., R. 11 E., M. D. M.," and for an injunction restraining the further cutting of timber on said land. The answers deny any cutting of timber except upon the S. W. ¼ of said section 5, which, with the timber thereon, was alleged by such answers to be the property of defendant. The defendants also served and filed a cross-complaint, alleging that they were the owners of the whole of the S. W. ¼ of said section 5; that plaintiff claimed some interest in the timber growing thereon, and that such claim was wholly without right; and asking a decree adjudging them to be such owners and restraining plaintiff from making any such claim. Plaintiff answered this cross-complaint, denying the allegations of ownership of defendants, and admitting and alleging his own claim thereto. There might be some question as to the propriety of such a cross-complaint in an action of this character, especially in regard to real property not covered by the complaint, but that question is obviated by the fact that no objection was made thereto, the plaintiff answering the same, and submitting without objection to a trial of the issues made thereby, and the subject-matter thereof being within the jurisdiction of the superior court. See Santa Barbara v. Eldred, 95 Cal. 378, 381, 30 Pac. 562. The trial was by the court without a jury, and the court found that the plaintiff was the owner of all the timber standing and growing upon the S. E. ¼ and N. ½ of the S. W. ¼ of said section 5, and that defendants had, without plaintiff's consent, cut down and removed therefrom timber of the value of $342, for which amount it gave judgment. The injunction asked for by plaintiff was denied. There was no finding as to the ownership of the S. E. ¼ of the S. W. ¼ of said section 5. Subsequently, on defendants' motion, a new trial was granted "as to the limited issue involving the right of possession, trespass upon and injury to said S. E. ¼ of S. W. ¼ and said N. W. ¼ of S. W. ¼, and as to such other issues as involve said two tracts," and denied in all other respects. Plaintiff appeals from such order granting a new trial as to the issues named.

So far as the issues made by the complaint and answer are concerned, a new trial could not properly be granted solely as to the questions named in the order. The issue as to the S. E. ¼ of the S. W. ¼ is immaterial, in view of the judgment given. No relief was ordered by the decision or given by the judgment in regard thereto, the only relief given being damages for the removal of timber from other lands. Defendants therefore have no ground for complaint because of the failure of the court to make a finding as to such S. E. ¼ of the S. W. ¼. Assuming that a finding thereon should be in their favor, the judgment as to damages, in view of the other findings, would not be different. As to the so-called issue as to the N. W. ¼ of the S. W. ¼ of section 5, there can be no new trial on the question of damages, as there was no issue in regard thereto presented by the complaint, and no recovery was sought in regard thereto. The finding in this respect was outside of the issues. The fact that the trial court has made a finding outside of the issues does not warrant the granting of a motion for a new trial. Such an objection is available only upon an appeal from the judgment. A new trial is simply a re-examination of an issue of fact, and where there is no issue of fact there is nothing to retry.

As to the issues made by the cross complaint and the answer thereto, a different question is presented. There was an issue as to the ownership of both the N. W. ¼ and the S. E. ¼ of said S. W. ¼ of section 5. The court failed to make any finding as to the S. E. ¼, and failure to find upon a material issue is ground for a new trial of such issue. The court did find upon the issue as to the ownership of the timber on the N. W. ¼ of the S. W. ¼ of section 5, and a new trial could be granted as to such finding upon any ground specified in the statute for the granting of new trials. The record on appeal before us contains only the judgment roll, the order granting the motion, the notice of appeal and the certificate of the clerk. There is no statement or bill of exceptions before us, and the so-called notice of motion for a new trial constitutes no part of the record on appeal. This being the record, we can find no ground for interfering with the order appealed from so far as it permits a new trial as to the questions stated herein. Every presumption is in favor of that order, and it devolves upon the party appealing from an order granting a new trial to affirmatively show error. This can only be done by presenting a record showing what was before the court upon the hearing of the motion. The order of the trial court cannot take the place of a bill of exceptions or statement. The order simply indicates the action of the court, and not the showing upon which such action is based. Therefore statements or recitals in the order as to the showing made constitute no part of the order. These things can be shown only by the bill of exceptions or statement, in the preparation of which the party in whose favor the order is made will have an opportunity, by the presentation of proposed amendments, to make the record speak the truth. He cannot be deprived of this by recitals in the order. Likewise the reasons given by the court for its action are immaterial. The reasons given for the decision may be bad, and the decision at the same time correct for other reasons. It is the action of the court that is presumed to be correct, and this presumption obtains even though the reasons given may be bad. We have had occasion recently to consider the question here presented. Skinner v. Horn, 144 Cal. 278, 77 Pac. 904. In accordance with the view there expressed, we must assume in favor of the action of the trial court that the motion for a new trial was based upon some one or more legal grounds upon which a sufficient showing was made to warrant the action of the trial court in regard thereto. The record before us does not show the contrary.

As already stated, there can be no new trial in the respects specified in the order as to the issues made by the complaint and answers, and the judgment for damages cannot, therefore, be affected by a new trial. But we cannot say that the evidence upon a new trial as to the issues made by the cross-complaint and answer may not be such as to entitle defendants to a judgment based upon their cross-complaint as to the ownership of the timber on the specified subdivisions of land, quieting their title thereto.

So far as the order grants a new trial as to the issues involving the ownership of and right of possession to the timber growing upon the S. E. ¼ of the S. W. ¼ and the N. W. ¼ of the S. W. ¼ of said section 5, it is affirmed. In all other respects it is reversed.

We concur: SHAW, J.; VAN DYKE, J.

(146 Cal. 635)

SAN FRANCISCO PAV. CO. v. EGAN et al.

(S. F. 3,158.)

(Supreme Court of California. May 2, 1905.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—PAVING MACADAMIZED STREETS—EXCEPTED PROPERTY—FORMAL PREREQUISITES—ENGINEER'S CERTIFICATE—PROCESS—RETURN OF WARRANT—APPEAL—QUESTIONS AVAILABLE.

1. Under St. 1891, p. 196, c. 147, § 2, authorizing a city council to order the whole or any portion of the streets of the city paved or repaved, macadamized or remacadamized, the fact that a street has once been macadamized does not, unless it has been constructed and accepted by the city council as a completed street, as provided for by St. 1885, p. 160, c. 153, § 20, preclude the council from ordering the street paved with bituminous rock.

2. Under St. 1891, p. 204, c. 147, § 7, subds. 10, 11, authorizing lot owners to improve the street in front of their own property, and directing the city council to except, from an order of improvement and resolution of intention, work of the same class already done at the expense of the owner, the fact that such work had already been done upon a greater part of the line of the contemplated improvement, as designated in the resolution of intention, is immaterial.

3. Under Civ. Code, § 498, requiring street railroads to pave or macadamize the entire length of the street used by their track between the rails, and for two feet on each side thereof, and to keep the same constantly in repair, the city council may exclude from the resolution of

intention to improve a street "that portion required by law to be kept in order by the railroad company having tracks thereon."

4. The fact that the resolution of intention to improve a street includes work of various kinds upon other streets does not render it invalid.

5. St. 1891, p. 206, c. 147, § 34, providing that every certificate signed by the city engineer in relation to street improvements shall be prima facie evidence in the courts, does not require the city engineer to make a certificate.

6. A certificate of the city engineer that he had examined the work described in a resolution of intention, and had found the same practically to official line and grade, and stating the area of the pavement laid, and the length of the curb constructed, sufficiently complies with St. 1891, p. 206, c. 147, § 34, requiring the city engineer to do the engineering work in connection with a street improvement, and declaring his certificate to be prima facie evidence of the truth of its contents.

7. Where a complaint to foreclose the lien of an assessment for street improvement work alleged the making of a valid bid and the execution of a valid contract, and the court found that the allegations were true, and the bill of exceptions contained no specification of insufficiency of evidence to sustain the findings in that respect, an objection that the bid and contract were void was not available on appeal.

8. A return signed in behalf of the contractor by the person who had made the demand, and verified by his oath, sufficiently complies with Street Improvement Act, § 10 (St. 1885, p. 155, c. 153), requiring the return to the warrant to a street improvement assessment to be signed by the contractor or some person in his behalf, and to state the nature and character of the demand made upon the persons assessed, and the amount of the assessment which remains unpaid.

Department 1. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by the San Francisco Paving Company against Annie Egan and others. From an order denying a new trial, defendants appeal. Affirmed.

George D. Collins, for appellants. J. C. Bates, for respondent.

ANGELLOTTI, J. This is an action to foreclose the lien of an assessment for street improvement work. Plaintiff had judgment, and defendants appeal from an order denying their motion for a new trial.

1. It is contended by defendants that the resolution of intention to order the work done was invalid for several reasons. Assuming that all the objections made to the resolution are available to defendants on the record before us, we are of the opinion that there is no merit in any of them. The property upon which it is sought to enforce a lien fronts on Twenty-Ninth street, between Noe and Sanchez streets, in San Francisco. It is claimed that the evidence introduced by defendants shows that at the date of the resolution this portion of Twenty-Ninth street had once been macadamized, and was then in good order. It also appeared that, within six months prior to such date, the said block, excepting only the lot of defendants, which has a frontage of 55 feet, had been paved with bituminous rock, and that granite curbs had been laid thereon by the property owners under a private contract. There is no claim that such block had ever been accepted by the city as a completed and fully constructed street. See section 20, Street Improvement Act, St. 1885, p. 160, c. 153. Under these circumstances, the board of supervisors passed the resolution of intention. It included street work of various kinds upon other streets than Twenty-Ninth street, but, so far as applicable to Twenty-Ninth street, it expressed the intention of the board as follows, viz.: "That granite curbs be laid on Twenty-Ninth street, between Sanchez and Noe streets, where not already laid, and that the roadway thereof be paved with bituminous rock where not already paved, except that portion required by law to be kept in order by the railroad company having tracks thereon." It is urged that the board had no power to order a street that had once been macadamized to be paved with bituminous rock. We find no such limitation upon the power of the city council expressed in the law relative to street improvements. By section 2 of the act, as it existed at the date of these improvements, it was provided that: "Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order the whole, or any portion, either in length or width, of the streets * * * of such city, graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, * * * and to order any other work to be done which shall be necessary to complete the whole or any portion of such streets * * *, and it may order any of said work to be improved." St. 1891, p. 196, c. 147. It may be that after a street has been fully constructed and accepted by the city council as a completed street, as provided in section 20 of the act (St. 1885, p. 160, c. 153), the council has no power to further improve the same at the expense of the property owners, but that question is not here involved, and is not decided. Until such acceptance, it is clear that the council has full power to determine whether work of any class designated in section 2 of the act is required upon any street, or portion of a street, by the public interest or convenience, and to order the same done in the manner provided by the act. The mere fact that work of some other class than that ordered has already been done on the street cannot affect this power. Although once macadamized, the public interest or convenience may require that a street be paved with bituminous rock. The determination by the board of supervisors that the public interest or convenience does so require is conclusive, at least in the absence of fraud.

Under the provisions of the statute (subdivisions 10 and 11, § 7, St. 1891, p. 204, c. 147), the board properly excepted from the order work of the same class already done at the expense of the owner. The fact that such work had already been done upon a greater part of the line of the contemplated improvement, as designated in the resolution of intention, and that the resolution, therefore, in effect, affected only a minority of the frontage, is immaterial. In McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71, a substantially similar resolution of intention and order for work for one block were under consideration, and the objection was made that the assessment was void on its face, as only a part of the lots on the line of work designated were assessed. The court said, after discussing section 2, and subdivisions 11 and 8 of section 7, of the street improvement act: "It thus appears that authority is given to the city council in certain cases to order the improvement of only a portion of a street lying between two main street crossings, and that such improvement may be confined to a portion of the street upon one side of its middle line." See, also, Perine v. Erzgraber, 102 Cal. 234, 238, 36 Pac. 585. That notices of the passage of the resolution of intention could be posted in such a case in accordance with the requirements of the act is shown in Dowling v. Hibernia, etc., Soc., 143 Cal. 425, 427, 77 Pac. 141.

The exception of "that portion required by law to be kept in order by the railroad company having tracks thereon" did not render the resolution void. The requirement of the law as to street railroad corporations in this regard is to be found in section 498 of the Civil Code, and is as follows, viz.: "To plank, pave, or macadamize the entire length of the street used by their track, between the rails, and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street, and with good crossings." The exception, therefore, sufficiently described the portion of the street which was excepted from the effect of the resolution for that reason, as definitely as did the exceptions "where not already laid" and "where not already so paved" describe the portions excepted because of work already done. Dowling v. Hibernia, etc., Soc., supra; Reid v. Clay, 134 Cal. 207, 212, 66 Pac. 262; Edwards v. Berlin, 123 Cal. 544, 56 Pac. 432; Williams v. Bergin, 116 Cal. 56, 47 Pac. 877; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71. We think that there can be no doubt, under the provisions of our law, that the supervisors had the right to except such portion of the street as was required by law to be kept in order by the railroad company at its own expense, and, so far as we know, was so being kept in order.

The fact that the resolution of intention included work of various kinds upon other streets does not render it invalid. Bates v. Twist, 138 Cal. 52, 70 Pac. 1023.

2. It is contended that the certificate of the engineer is void, because it does not conform to the requirements of section 34 of the street act (St. 1891, p. 206, c. 147). We find nothing in the law requiring a certificate of the city engineer under the circumstances of this case. See O'Dea v. Mitchell, 144 Cal. 374, 379, 77 Pac. 1020; Chase v. Troutt (Cal.) 80 Pac. 81. The certificate made did show that the engineer had examined the work described in the resolution of intention, and had found the same "practically to official line and grade." It showed the area of the pavement laid and the length of curb constructed. Assuming any certificate to have been required, we cannot say this was not a sufficient certificate. It does not appear that the diagram "on the back of the certificate" was not recorded. If such document was a part of the certificate, it affirmatively appears that it was recorded.

3. It is contended that the bid for the work and contract were void for certain specified reasons, but these objections are not available to defendants. The making of a valid bid and the execution of a valid contract were alleged by plaintiff, and the court found that these allegations were true. The bill of exceptions contains no specification of insufficiency of evidence to sustain the findings in these respects. We have, however, considered the objections on their merits, and find nothing in them.

It is further urged that the return of the warrant was not signed by the superintendent of streets. It was signed, in behalf of the contractor, by the person who had made the demand, and was verified by his oath. This appears to have been a compliance with the law in that regard. Section 10 of the street act (St. 1885, p. 155, c. 153).

4. The return very clearly shows that demand for payment was publicly made upon the premises assessed in full accord with the requirements of section 10 of the street act.

This disposes of all points made by defendants. There was nothing in the evidence offered by them to overcome the prima facie case made by plaintiff by the introduction in evidence of the assessment, diagram, warrant, return, and engineer's certificate.

The order denying a new trial is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

146 Cal. 640

FRANZ v. MENDONCA. (S. F. 3,278.)

(Supreme Court of California. May 2, 1905.)

TITLE BY PRESCRIPTION — PRIVATE ROADS — CLAIM OF RIGHT—LAW OF CASE—FORMER APPEAL—ADVERSE USE—PERMISSIVE USE—SUFFICIENCY OF EVIDENCE.

1. In an action to enjoin defendant from preventing plaintiff from passing over an alleged private road on the ground that plaintiff had acquired the way by prescription, testimony of plaintiff that he always thought the road was his, that he was given the right by the original owner of defendant's land, and that the owner gave him the title, was consistent with the theory

that plaintiff based a claim of right to the use of the road on a gift from the owner, and that he had been using it under such claim of right ever since, and did not show merely a permissive use.

2. In such action, what was said in a former opinion on appeal as to the general principles applicable in the case must obtain in the determination of the question as to whether the use was adverse, and becomes the law of the case.

3. Civ. Code. § 811, subd. 4, provides that a servitude is extinguished, when it was acquired by enjoyment, by disuse thereof by the owner for the period prescribed for acquiring title by enjoyment. *Held*, that a finding against defendant in the action which was begun June 1, 1896, the court finding that plaintiff personally and continuously used the road from the year 1858 to the year 1892, and that he and his tenants continuously used it from the year 1892 to April, 1895, when defendant prevented the further use thereof, was sustained by evidence that the road was used to some extent by plaintiff or his tenants each year, and that when interfered with in 1895 plaintiff at once asserted his claim, and almost immediately began legal proceedings to enforce his right.

Department 1. Appeal from Superior Court, Alameda County; S. P. Hall, Judge.

Action by Sebastian Franz against Francisco A. Mendonca. Judgment for plaintiff, and defendant appeals. Affirmed.

John D. Whaley, for appellant. Reed & Nusbaumer, for respondent.

ANGELOTTI, J. This action was brought to obtain an injunction to prevent defendant from obstructing and from preventing the plaintiff from passing over a certain byway or alleged private road over the lands of defendant, and for damages. The first trial resulted in a judgment for defendant. The court afterwards granted the plaintiff a new trial, from which order the defendant appealed to this court, and the order was here affirmed. Franz v. Mendonca, 131 Cal. 205, 63 Pac. 361. The case was again tried in the court below, and resulted in a judgment for plaintiff, from which, and from the order denying his motion for a new trial, the defendant prosecutes this appeal.

In his complaint the plaintiff claims the right of way by reason of necessity, by reason of it being the only mode of ingress and egress to and from his lands, and also by prescription. It was stipulated in open court at the commencement of the trial that the plaintiff would abandon any claim to the way by reason of necessity, or that the way was the only mode of ingress and egress to and from the plaintiff's lands. This left the case to be tried solely upon the claim that plaintiff had acquired the way by prescription. The court found that continuously from 1858 to 1895 the plaintiff and his tenants did "uninterruptedly, peaceably, notoriously, and visibly, with the knowledge of the grantors of said defendant, and without any permission from the grantors, or any of the grantors of said defendant, travel over, upon, and along said private road to and from his said dwelling to said public highway; that said use of said private road by plaintiff was under a claim of right, and was adverse to the possession of the grantors of defendant, and grew up with a knowledge thereof by defendant's grantors." The above finding, in so far as it finds that the use of the way was without permission, and under a claim of right, and adverse to defendant and his grantors, is challenged by defendant as being without evidence to support it, and this is the principal point for reversal made upon this appeal.

Upon the former appeal from the order granting the plaintiff's motion for a new trial, the principal point discussed both by counsel and the court was as to whether the evidence was such that it would sustain a finding that plaintiff's use of the road in question was under a claim of right, and without permission of defendant's grantors. If it would not, there was apparently no ground upon which the order granting a new trial could be sustained; and this appears to have been the view of both counsel and this court. This court discussed the evidence presented by the record on that appeal and the general principles by which the question as to whether the use was adverse should be determined. It was recognized by the court that the question as to whether a use was merely permissive, where no permission or license had been expressly given, was one to be determined by the jury or court sitting as such, in the light of the relations between the parties and all the surrounding circumstances. By affirming the order granting a new trial, it necessarily held that the evidence contained in the record as to the relations of the parties and the surrounding circumstances was of such a nature that it would have sustained a finding of adverse use. We have examined the evidence given upon the new trial, as the same is shown by the bill of exceptions on this appeal, and find that it is substantially the same as that considered upon the former appeal. Defendant's counsel has pointed out several particulars in which he claims that the evidence on the second trial was different from that given on the first trial, but there is no difference that is material upon the question as to whether the finding of the trial court as to adverse use finds sufficient support in the evidence. Counsel places much reliance upon the evidence of plaintiff to the effect that Vallejo, the original owner of defendant's land, gave him the right to this road over 40 years ago, claiming that it shows simply a permissive use. Plaintiff said, among other things: "I always thought the road was mine. Vallejo, when I talked to Vallejo, he gave me the right. When Vallejo was up to my house, he gave me title to it." The evidence given by plaintiff is consistent with the theory that he based a claim of right to the use of the road upon a gift from Vallejo, and that he has been using it under such claim of right ever since. Under these circumstances there is much strength in the claim of plaintiff that, if it was not error for the court to set aside a judgment rendered in favor of defendant upon the ground that the decision was against the evidence, it certainly cannot be error for the court to render judgment for the plaintiff upon the same evidence. See Raymond v. Glover, 144 Cal. 548, 78 Pac. 3. However this may be, there can be no doubt that what was said in the former opinion as to the general principles applicable in this case must obtain in the determination of the question between these parties as to whether the use was adverse, and has become the law of this case. See Mahan v. Wood, 79 Cal. 258, 21 Pac. 757. It is sufficient to say that an examination of the record satisfies us that under the rules announced it cannot be held that the finding of the trial court is without sufficient support in the evidence. The same may be said as to such finding in so far as it declares that the use of plaintiff was with the knowledge of defendant's grantors.

It is contended that the right to the use of this road has been lost by disuse by plaintiff. Civ. Code, § 811, subd. 4. Upon this question the finding of the trial court is against defendant, the court finding that plaintiff personally and continuously used the same from the year 1858 to the year 1872, and that he and his tenants continuously used it from the year 1872 to April, 1895, when defendant prevented the further use thereof. This action was commenced June 1, 1896. There was evidence to the effect that the road was used to some extent by plaintiff or his tenants each year, and that when this use was interfered with the first time in the year 1895 plaintiff at once asserted his claim, and almost immediately followed such assertion with legal proceedings to enforce his right. It cannot be held that the finding upon this question is not sustained by the evidence.

There is no other point requiring notice. The judgment and order are affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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146 Cal. 644

ANGLO-CALIFORNIAN BANK, Limited, v. FIELD et al. (S. F. 3,409, 3,410.)

(Supreme Court of California. May 2, 1905.)

CORPORATIONS — POWERS — EXISTENCE — EVIDENCE — SUFFICIENCY—STATUTE—CONSTITUTIONAL LAW—MORTGAGES—MERGER ACTIONS—TRANSFER OF INTEREST—EFFECT—PLEADING—DENIAL—AMENDMENT —APPEAL—HARMLESS ERROR.

1. Under the direct provisions of St. 1871-72, p. 826, c. 566, § 1, as amended by St. 1899, p. 111, c. 94, § 1, requiring foreign corporations doing business in the state to designate a resident of the state on whom service of process may be made, and providing that the designation shall be filed in the office of the Secretary of State, a copy of such designation, duly certified by the Secretary of State, is made sufficient evidence of incorporation thereof.

2. St. 1871-72, p. 826, c. 566, is entitled "An act in relation to foreign corporations." St. 1899, p. 111, c. 94, is amendatory thereof, and is so entitled. Section 1 of the amendatory act requires corporations of other states and foreign countries doing business in the state to designate a resident agent on whom process may be served, and provides that the designation shall be filed in the office of the Secretary of State; making a certified copy of such designation sufficient evidence of incorporation. Section 2 provides that any such corporation failing to comply with section 1 shall be denied the benefit of the laws limiting the time for the commencement of civil actions, and shall not maintain or defend any action in the state until it has complied therewith, and directs the reception of certain evidence to prove the corporate existence of such corporations; limiting the sufficiency thereof to be determined by the court. Section 3 (page 112) provides that, on compliance with section 1 by such corporations, they shall be entitled to the benefit of the laws of the state limiting the time for the commencement of civil actions. The amended act contained the same provisions, except that it did not name corporations of foreign countries. *Held*, that neither of the acts is repugnant to Const. art. 4, § 24, providing that every act shall embrace but one subject, which subject shall be expressed in its title.

3. Nor can the acts be condemned as special laws regulating practice in courts, or granting special and exclusive rights, privileges, and immunities to corporations.

4. A mortgage in the form of an absolute deed, reciting that the deed is subject to the claim of the Anglo-Californian Bank, Limited, imports that the bank is a corporation, and, in a suit by the bank to foreclose its claim under a mortgage, furnishes prima facie evidence of plaintiff's corporate character.

5. The acceptance of a mortgage in the form of an absolute deed, reciting that it is subject to the claim of the Anglo-Californian Bank, Limited, is an admission by the mortgagee that the bank mentioned was at that time a corporation; and that condition, having once been shown to exist, is presumed to continue until the contrary is shown.

6. The taking of a mortgage is not a purchase, location, or holding of property, within Civ. Code, § 299, providing that no corporation shall purchase, locate, or hold property in any county in the state without filing a certified copy of its articles of incorporation in the office of the clerk of such county within 60 days after the purchase or location, and that any corporation failing to comply therewith shall not maintain or defend an action or proceeding in relation to such property until it has so complied.

7. An action to foreclose a mortgage is not an action in relation to property purchased, located, or held in the county, within Civ. Code, § 299.

8. The merger of mortgage liens with the fee, on both being united in the same person, is a question of intent, and merger will not be implied where there is an intervening claim, but equity will keep the legal title and the mortgagee's interests separate, though held by the same person, whenever necessary for the full protection of his just rights; and if, from all the circumstances, a merger would be disadvantageous to the party holding the fee, his intention that merger shall not result will be presumed and maintained, and equity will keep the liens alive for the purpose of doing justice.

9. Under Code Civ. Proc. § 385, providing that, in case of any transfer of interest other than by death or disability of a party, the action or proceeding may be continued in the name of the original party, a mortgage foreclosure suit may be continued in the name of the original plaintiff for the benefit of a person who purchases the plaintiff's claim during the pendency of the action.

10. In a suit to foreclose a mortgage, where a second mortgagee, as cross-complainant, alleged that it discovered that a certain person claimed to be the owner of the mortgage and notes, and had also discovered that he claimed to be the owner in fee and entitled to possession, a denial of the allegations was not a denial of ownership or claim of ownership, but a denial of the discovery; and hence, without more, there was nothing in the record which required the claimant to allege his intention to keep his first mortgage alive.

11. Under Code Civ. Proc. § 1500, providing that an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate of a deceased person subject thereto, where all recourse is expressly waived in the complaint, it is an abuse of discretion for the court, in an action to foreclose a mortgage, to refuse to permit an amendment of the complaint to be made at the trial by inserting a waiver of all recourse against the estate of the deceased mortgagor, other than that described in the complaint.

12. Under Code Civ. Proc. § 1500, where the court, in an action to foreclose a mortgage, erroneously refused to permit an amendment of the complaint to be made at the trial by inserting a waiver of all recourse against the estate of the deceased mortgagor, the error was cured by the court allowing the filing of a statement with the clerk waiving all recourse against the mortgagor's estate, since the paper was in substance an amendment of the complaint.

Department 1. Appeal from Superior Court, Monterey County; N. A. Dorn, Judge.

Action by the Anglo-Californian Bank, Limited, against T. J. Field, administrator of the estate of George Brandt, deceased, Thomas W. Cowan, and others. From the judgment and from an order overruling motions for a new trial, plaintiff and Cowan separately appeal. Reversed.

J. W. Lilienthal and Dougherty & Lacey, for appellant. S. F. Geil and J. H. Andersen (Dorn & Dorn & Savage, of counsel), for respondents.

SHAW, J. Two appeals are here presented from the judgment and from an order overruling motions for a new trial—one by the plaintiff and the other by the defendant Thomas W. Cowan. It appears from the record that, after the action was commenced, Cowan purchased from the plaintiff the notes and mortgage sued on, and that plaintiff now has no interest therein, although it still stands as plaintiff; Cowan never having been substituted in its stead. Both appeals are presented upon substantially the same record.

The action is to foreclose a mortgage executed March 10, 1894, by George Brandt and his wife to the plaintiff upon land in Monterey county to secure the payment of about $8,000 then and thereafter loaned by the plaintiff to said George Brandt. The mortgage was duly recorded on March 22, 1897, at which time all the contemplated loans had been made. It was made in the form of an absolute deed, but it was intended by both parties to operate only as a mortgage. The complaint was filed about March 1, 1898, and is in the ordinary form of an action to foreclose a mortgage. The Bank of Monterey was made a defendant, it being alleged that it claimed a lien subordinate to the plaintiff's mortgage. On January 6, 1902, by leave of court it filed an amended and supplemental answer and cross-complaint. The answer denied that plaintiff was a corporation as alleged, and averred that on January 24, 1899, some 10 months after the action was begun, the plaintiff transferred its mortgage and the debts thereby secured to Thomas W. Cowan, and further that the said Bank of Monterey held a mortgage on the same premises for $6,600, executed to it on April 16, 1897, which, though subsequent in date, is alleged to be prior, to the mortgage to the plaintiff.

The cross-complaint seeks to foreclose the defendant bank's mortgage, and, in addition to the usual allegations, contains a charge that after the action was begun Cowan took and held possession of the land, and received the rents and profits thereof, in pursuance of a conspiracy between him and the plaintiff to avoid applying such rents on plaintiff's mortgage, and to keep defendant bank ignorant of the arrangement, apparently for the purpose (though this is not charged) of preventing the defendant bank from applying for a receiver to collect the rents. The prayer is for an accounting as to the rents, and for the foreclosure of the defendant's mortgage as a lien prior to that of the plaintiff. George Brandt died on November 20, 1899, and T. J. Field, as administrator of his estate, was duly substituted as a party defendant.

The court found that the respective mortgages were executed as alleged; that in January, 1899, plaintiff's notes and mortgage were transferred to Cowan, who still holds the same; that on February 28, 1899, Brandt and his wife conveyed to Cowan the mortgaged premises; that Cowan had been in possession of the land ever since that time; that the rental value was $75 a month; that Cowan paid $8,000 to plaintiff for the notes and mortgage; that this payment was intended as an extinguishment of the plaintiff's lien; and that, in buying the land from Brandt, Cowan intended to take the same subject to the mortgage of the Bank of Monterey. It was further found that plaintiff is not a corporation, that it had not complied with the provisions of section 299 of the Civil Code, and that plaintiff's notes and mortgage had not been presented to the administrator of the estate of Brandt for allowance. Judgment was thereupon given foreclosing the mortgage to the Bank of Monterey, as the first and only lien on the land, and declaring that plaintiff and Cowan should be forever barred of any claim thereon.

1. The finding that the plaintiff was not a corporation is contrary to the evidence. The averment was that it was a foreign corporation organized under the laws of Great Brit-

ain, and doing business in San Francisco, in this state. The plaintiff introduced in evidence a duly certified copy of a "certificate of designation of agent," filed in the office of the Secretary of State on May 22, 1894. This certificate stated that the Anglo-Californian Bank, Limited, is a corporation created under the laws of the kingdom of Great Britain, doing business in California, and having its principal place of business in San Francisco, and that certain persons named, and residing in San Francisco, were designated to receive service of process on the corporation, issued under the laws of this state. There was no evidence contrary to this, and it was competent and sufficient to prove the allegation under the statute of 1872 (St. 1871–72, p. 826, c. 566), and the amendatory act of 1899 (St. 1899, p. 111, c. 94). There is no merit in the respondent's contention that these statutes are void for the reason that they do not comply with the constitutional provision that "every act shall embrace but one subject, which subject shall be expressed in its title." Const. § 24, art. 4. The title of the act of 1872 is "An act in relation to foreign corporations." This is a sufficiently specific designation of the subject of the act to satisfy the constitutional requirement. The title of the act of 1899 is "An act to amend 'An act in relation to foreign corporations,' approved April 1st, 1872," and it also is sufficiently specific. Nor do either of these statutes contravene any other constitutional provision. They apply uniformly to all foreign corporations. Such corporations constitute a class distinct from domestic corporations, and necessarily require laws of a different character, such as those contained in these statutes. They cannot be condemned as special laws regulating practice in courts, or granting special and exclusive rights, privileges, and immunities to any corporation. Foreign corporations are allowed to do business in this state by virtue of the comity between the states, and special legislation expressing the extent to which this comity is given, specifying the terms with which they must comply, and providing the method of proving corporate existence, and for the service of process on them, is both appropriate and necessary, and is not objectionable, so long as it does not permit them to do business under conditions more favorable than those imposed on domestic corporations. The conditions imposed by these laws are not more favorable than those required of other corporations, but are, if anything, less favorable. Furthermore, the recitals in the mortgage executed by Brandt to the Bank of Monterey furnish prima facie evidence of the corporate existence of the plaintiff. This mortgage is also in the form of an absolute deed, and recites that "this deed is subject to the claim of the Anglo-Californian Bank, Limited, amounting to the sum of $8,000, with interest thereon at the rate of 7 per cent. per annum from December 26th, 1896." The name "Anglo-Californian Bank, Limited," by which the plaintiff is here described, imports that the plaintiff is a corporation, and furnishes prima facie evidence of corporate character. The acceptance of this deed by the defendant bank amounts to an admission that the plaintiff was at that time a corporation, and that condition having been shown once to exist, it is presumed to continue until the contrary is proven.

2. The fact that plaintiff had not complied with section 299 of the Civil Code is immaterial. That section purports to apply to domestic corporations. Conceding, however, that foreign corporations, under section 15 of article 12 of the Constitution, are bound to comply with this section, the fact remains that the circumstances here existing do not bring the plaintiff within its terms. In substance, it provides that no corporation shall purchase, locate, or hold property in any county in the state without filing a certified copy of its articles of incorporation in the office of the county clerk of such county, within 60 days after the purchase or location, and that any corporation failing to comply with these provisions shall not maintain or defend an action or proceeding in relation to such property until it has so complied. It will be observed that the section does not apply to the plaintiff, unless it has purchased, located, or held property in Monterey county, nor unless this action is one in relation to such property. The taking of a mortgage by the plaintiff upon land situate in the county of Monterey is not the purchase, location, or holding of property in that county, within the meaning of section 299, Civ. Code. The action to foreclose the mortgage is simply and only an action for the collection of a debt, and the enforcement of a lien on the land for its payment. Under such circumstances, it was said by this court in Savings & Loan Society v. McKoon, 120 Cal. 180, 52 Pac. 305, that "it is manifest that the plaintiff did not, at the time of the commencement or trial of this action, own or hold the said mortgaged property, and therefore did not subject itself to the penalty imposed by section 299 of the Civil Code, even if it did not comply with its provisions."

3. The court below erred in holding that the lien of the mortgage to plaintiff was extinguished and merged in the fee by the conveyance of the equity of redemption by Brandt to Cowan. The evidence on this subject is not conflicting, nor are the facts disputed. There is no evidence of the intention of Cowan to extinguish the lien of plaintiff's mortgage, except the inferences to be deduced from the assignment, in connection with the circumstances under which it was given and accepted, and the subsequent transactions between Cowan and Brandt. The mortgage to the Bank of Monterey recited that it was subject to the claim of the Anglo-Californian Bank. The fact that the

word "claim" was used in the recital is of no consequence. It was a term broad enough to include a mortgage. The plaintiff's mortgage was then of record, and was constructive notice. It was the only claim plaintiff had on the land. The recital was sufficient, of itself, to put the Bank of Monterey on inquiry, and was equivalent to actual notice to it, and estops it from disputing that plaintiff's mortgage was originally the prior lien. The assignment of plaintiff's notes and mortgage to Cowan was made pending the action to foreclose the mortgage assigned, to which action the Bank of Monterey was a party defendant; and the instrument of assignment stated that $8,000 had been paid therefor, and contained a guaranty that the mortgage assigned was the first lien on the premises. The deed from Brandt to Cowan declared that Cowan was to hold the land "subject to those two certain mortgages on said premises made heretofore in favor of the Anglo-Californian Bank, Limited, and the Bank of Monterey, respectively." Cowan, immediately after receiving this deed, took possession of the land. The consideration stated in the deed is $5, and there is no evidence of any other consideration. Certainly these facts furnish no direct evidence of an intention to extinguish the first mortgage. The recitals and circumstances, in connection with the well-known rules of equity on the subject, imply an intention not to extinguish the lien, but, on the contrary, to keep it alive for the benefit of Cowan, the purchaser, as against the second mortgage. He did not assume the payment of either mortgage, nor undertake with Brandt that he would pay them. The recital that he should hold subject to both merely states the character which the law would give his holding if a third party had then held the Anglo-Californian Bank mortgage. When considered in connection with the fact that he himself then held that mortgage, the recital raises a strong presumption against any intention to extinguish it by virtue of the conveyance. The guaranty in the assignment that it was a first mortgage raises an equally strong presumption that there was no intention to extinguish the lien as against subsequent liens at the time the assignment was made. It is true that under ordinary circumstances, where the holder of a mortgage acquires the estate of the mortgagor, the mortgage interest is merged in the fee, and the mortgage is extinguished. This is the ordinary legal effect of the transaction, and ordinarily the intention is presumed to accord with the act accomplished. But this rule is never applied where there is an intervening lien on the property, which it is to the interest of the purchaser to keep on foot, and where there is no evidence, direct or circumstantial, of an express intention to extinguish the first mortgage and hold subject only to the second. In such a case the legal title and first mortgage lien will be considered as separate interests whenever necessary for the protection of the just rights of the purchaser. The question was fully considered in Davis v. Randall, 117 Cal. 12, 48 Pac. 906. The law on the subject is well stated in the syllabus to that case in these words: "The merger of mortgage liens with the fee, upon both being united in the same person, is a question of intent; and merger will not be implied where there is an intervening claim, but equity will keep the legal title and the mortgagee's interests separate, though held by the same person, whenever necessary for the full protection of his just rights; and if, from all the circumstances, a merger would be disadvantageous to the party holding the fee, his intention that merger shall not result will be presumed and maintained, and equity will keep the liens alive for the purpose of doing justice." See, also, Hines v. Ward, 121 Cal. 118, 53 Pac. 427; Scrivner v. Dietz, 84 Cal. 298, 24 Pac. 171; Brooks v. Rice, 56 Cal. 428; Rumpp v. Gerkens, 59 Cal. 496; Carpentier v. Brenham, 40 Cal. 221; Henderson v. Grammar, 66 Cal. 335, 5 Pac. 488; Wilson v. White, 84 Cal. 243, 24 Pac. 114; Tolman v. Smith, 85 Cal. 289, 24 Pac. 743; Shaffer v. McCloskey, 101 Cal. 580, 36 Pac. 196; Jones on Mortgages, §§ 870, 873.

That a merger of the lien of the first mortgage would operate to the disadvantage of Cowan, there can be no question. If the merger is not allowed to take place, he is, of course, bound to take subject to the second mortgage; but upon a sale he would be entitled to receive out of the proceeds all the money due on the first mortgage, or he could keep the property by paying only the excess it brings over the first mortgage, whereas, if there is a merger, he would be bound to pay the second mortgage in full in order to keep the property he bought, or obtain any of the proceeds of its sale.

It is claimed that Cowan, although made a party, did not file any pleading alleging his intention to hold his mortgage interest separate from the legal title, and that therefore he cannot claim any benefit on account of such intention. The mere transfer of the plaintiff's claim to him during the pendency of the action did not make it necessary that he should be made a party. The foreclosure suit could be continued in the name of the original plaintiff, for his benefit, without substituting him. Code Civ. Proc. § 385. He was not originally a party, and the complaint contained no allegation concerning him. The record does not contain the order of the court making him a party, but the only matter in the pleadings which required him to become a party was the allegation of the cross-complaint of the Bank of Monterey, alleging that he had been in possession of the premises, and had received rents therefor, for which an accounting was asked. There was no allegation therein that Cowan had purchased either the plaintiff's mortgage or the mortgaged premises. The allegation was that the Bank of Monterey had upon March 15, 1901, discovered that Cowan "claimed to be the owner" of the mortgage and notes, and that on November 25, 1901, it had discovered that he "claimed to be the owner in fee and entitled to the possession" of the premises. The denial by Cowan of these allegations was not a denial of his ownership or claim of ownership. It was simply a denial of the discovery. Therefore there was nothing in the record which required Cowan to allege his intention to keep his first mortgage alive. There was no issue tendered by the cross-complaint concerning his respective purchases of the mortgage and the fee. If the findings that those purchases were made were pertinent at all, it was solely because of the issue arising from the averment in the answer of the Bank of Monterey that its mortgage was prior to the mortgage of the plaintiff. This answer, however, being directed to the complaint of the plaintiff, must be taken to relate to the facts existing at the time the action was begun, and cannot be considered as tendering an issue concerning subsequent transactions. If the defendant desired to show the occurrence of facts after the action was begun, which would destroy the priority of the plaintiff's mortgage existing at the time, it should have made affirmative allegations stating the facts upon which it based its claim. It appears, therefore, that the findings of the court respecting the subsequent purchases of Cowan were outside of the issues; but, inasmuch as these purchases were shown apparently in response to the issue as to priority, the defendant Cowan, for the protection of his rights, is clearly entitled to avoid the apparent legal effect of his ownership of the first mortgage and the fee by claiming the equitable results flowing from his presumed intention. If, as the respondent seems to contend, there was no issue at all involving these purchases, and it was incumbent upon Cowan, if he desired to have his rights adjudged, to file a supplemental complaint, alleging his purchases and his intention to keep alive his first mortgage, then it would follow that these findings are entirely without the issues. In that case the court should have ignored these facts, and made its findings and decree foreclosing plaintiff's mortgage upon the issues tendered by the complaint, answer, and cross-complaint. We therefore hold that the mortgage to plaintiff was not merged by Cowan's purchase of the fee after he bought the mortgage.

4. A further claim is made on behalf of the respondent to the effect that the plaintiff's mortgage could not be foreclosed because the amended complaint contained no allegation that the mortgage debt, after the death of Brandt, had been presented to his administrator for allowance, nor any allegation waiving all recourse against any property of the estate, as provided by section 1500, Code Civ. Proc. This contention is, under the circumstances shown by the record, manifestly untenable. At the time of the trial the plaintiff asked leave of court to amend the complaint by inserting a waiver of all recourse against the property of the estate of George Brandt, other than that described in the complaint. To this the defendants objected, and the court sustained the objection in form, but allowed the plaintiff and the defendant Cowan to file with the clerk a statement that they waived all recourse against such property. The court should have allowed the amendment, and it was an abuse of discretion to refuse it; but, inasmuch as we think the paper filed by leave of court was in substance an amendment of the complaint, we think this error may be disregarded. The statement filed was entitled in the cause, and contained the waiver made necessary by section 1500, Code Civ. Proc., in cases where the claim has not been presented to the administrator. It was filed in the action and among the papers in the case, and, under the circumstances under which it was filed, it must be considered as a part of the complaint.

5. The appellant insists that this court should remand the cause, with directions to enter judgment in its favor for the foreclosure of this mortgage. Under the findings, we do not think this can be done.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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146 Cal. 616

LEONARD v. McPHERSON et al. (S. F. 3,412.)*

(Supreme Court of California. May 1, 1905.)

LIBEL—NEWSPAPER PUBLICATIONS—COMPLAINT—DEMURRER.

Where an entire newspaper article, containing an alleged letter written by plaintiff, was charged to be false, and, if the letter were fabricated, the article, taken as a whole, was libelous per se, and was not a privileged publication specified by Civ. Code, §§ 45, 47, 48 (Code Civ. Proc. § 460), it was error to sustain a demurrer to the complaint for its failure to point out the portion of the publication charged to be libelous.

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by J. J. C. Leonard against Duncan McPherson and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Chas. M. Cassin and Lindsay & Netherton, for appellant. Joseph H. Skirm, for respondents.

VAN DYKE, J. This is an action for libel. The demurrer of the defendants to the amended complaint of the plaintiff was sustained by the court below, and, the plaintiff declining further to amend, judgment was rendered against him and in favor of the defendants. This appeal is prosecuted from said judgment.

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*Rehearing denied May 31, 1905.

It is alleged in the amended complaint that the plaintiff is, and for more than two years prior to the commencement of the action had been, engaged in the hotel business in the city of Santa Cruz, and was then, and for more than a year prior thereto had been, the sole owner and proprietor of the Hotel St. George, situated in said city, and, as such owner and proprietor of said hotel, was then, and had been for the period named, engaged in the hotel business, and catering to the public as such, including both the residents of said city and county of Santa Cruz, and others who arrived at said city from abroad, in the matter of hotel accommodations and board and lodging. That the defendants were, and for more than five years continuously had been, the exclusive proprietors and owners of the newspaper named the "Santa Cruz Morning Sentinel," published in the said city of Santa Cruz, which has, and has had, a large and extensive circulation in said city and county and state. That on the 30th day of March, 1902, the said defendants did falsely and maliciously, and with intention to expose the plaintiff to hatred, contempt, ridicule, and obloquy, and to cause him to be shunned and avoided, and to be injured in his occupation and business, publish in said newspaper, of and concerning the plaintiff, the following article, to wit:

" 'For Shame! For Shame!

" 'Hotel St. George, Leonard & Walsh, Props.

" 'Santa Cruz, Cal., Nov. 8th, 1899.

" 'Mrs. C. W. Waldron, Dear Madam: It having been brought to our attention that you will not patronize anyone stopping at the "St. George," thereby decreasing our receipts between $2.50 and $3.00 per month, we have decided to retaliate in the following manner.

" '1st. We have notified our female help, which numbers eight girls at present, to take their patronage from you, under penalty of losing their positions.

" 'We have and do distribute among the business houses of this city from $1500 to $2000 monthly, and we will notify each and every one of them of your action, and notify them that we will withdraw our patronage from any of them that patronize you directly or indirectly during the term of your boycott of our house.

" 'We have never lowered ourselves to do anything of this kind previously, and hope never to have to do so again, and will not do it without notifying the parties concerned, as we do nothing underhanded, preferring all our actions to be open and aboveboard.

" 'Very respectfully yours,

" 'Leonard & Walsh.'

"In justice to Mr. Walsh, who is an intelligent gentleman, we will say that he disclaimed at the time all connection with the above threat. At that date J. J. C. Leonard was in active management, Mr. Walsh merely acting in an advisory capacity, although a partner in the hotel.

"Mr. and Mrs. Waldron were guests of the house when Leonard & Walsh became the lessees. While they were at the hotel during the Leonard & Walsh management their bills amounted to about $700. Desiring to go to housekeeping, as they had an American right to do, having become tired of hotel life, which was their great American privilege, they notified Mr. Leonard of their contemplated change on the eve of their leaving. This announcement aroused Mr. Leonard's anger to such a degree, at a second meeting, that he became insulting, apparently having been hurt at the idea of guests having the audacity to leave his inn without previously consulting him.

"The above letter, which is the very worst kind of a boycott, is self-explanatory. It can be seen at the Sentinel office by any one interested. It proves beyond doubt what may be termed 'bulldozing' tactics. It shows a desire to crush a woman engaged in business, although she had been a guest at his hotel and entitled to the most courteous treatment.

"Now for the facts to show that Mrs. Waldron was an innocent party, and the folly of jumping too hastily at conclusions: Gus E. Dorn, representing a San Francisco millinery house, had his trunks delivered at the St. George. He learned later that a former customer of his was stopping at the Ocean House, then conducted by the Pixleys. In order to sell her goods, he had his trunks taken to the Ocean House. Mrs. Waldron did not know that he had moved his trunks, nor did she care. It was Mr. Dorn's privilege to do what he pleased to accommodate or secure customers. As a matter of fact, Mrs. Waldron does not purchase, to any extent, of commercial travelers, preferring to make her selections at the wholesale houses in San Francisco.

"It was not on her account that Mr. Dorn decided to change from one hotel to the other, yet Mr. Leonard evidently jumped to the conclusion that it was.

"When Mr. Dorn heard of the letter he was greatly surprised and very indignant, knowing that Mrs. Waldron was an innocent party. He has never since visited Santa Cruz, although he used to come here often. Other commercial travelers for millinery houses also heard of the boycotting letter, and became so indignant over it that some of them cut Santa Cruz out of their itinerary.

"What can fair-minded people think of such a letter as the above?

"At the time Mrs. Waldron was advised by several prominent business people here to begin legal proceedings, but she decided to merely keep the letter as a souvenir of the present incumbent of the St. George."

And it is averred in the said amended complaint that the said publication was and is false and defamatory; that by means of said false and defamatory publication, as above alleged, said defendants did falsely and maliciously expose the plaintiff to general and public hatred, contempt, ridicule, and obloquy, causing him to be avoided and shunned, and did injure him in his occupation and business, to his damage in the sum of $10,000, for which judgment is prayed. The demurrer is placed upon the ground that the said amended complaint does not state facts sufficient to constitute a cause of action, and is ambiguous, unintelligible, and uncertain, specifying wherein it is alleged to be so ambiguous, unintelligible, and uncertain. In the order of the court below sustaining the demurrer it is recited, as a reason for sustaining the same, that a part of the publication consists of a letter written by the plaintiff himself, and that the pleader must select that portion of the publication upon which he bases his action. The amended complaint, however, as will be seen, denounces the whole article, as published, as being false, and this sweeping allegation applies to the letter alleged to have been written by the plaintiff, as well as to the comments upon it.

If the letter were fabricated, as must be assumed from the allegations of the complaint, then the article, taken as a whole, is libelous per se, inasmuch as it does not fall within the definition of a privileged publication. Civ. Code, §§ 45, 47, 48; Code Civ. Proc. § 460. The case of the late James Lick v. John J. Owen et al., 47 Cal. 252, is somewhat analogous to the one at bar. In that case the defendants, as editors and publishers of the San Jose Daily Mercury, published an article consisting of comments upon an alleged interview with Mr. Lick. In the interview Mr. Lick is alleged to have given, somewhat in detail, his early career, including wanderings in South America, and his arrival in California in pioneer days, and his various transactions and business in this state, where, by good luck rather than good management, he had accumulated a fortune. Subsequently, as stated in the article, defendants published a so-called "apology," making some few corrections in the alleged interview. Instead of demurring, the defendants in that case answered, admitted the publication, but alleging that it was published as a mere pleasantry, and without malice. The plaintiff submitted the case to the jury on the pleadings, and the only testimony for the defense was as to the exculpatory matter set up in the answer, denying that the publication was malicious. This being all the evidence, the court, of its own motion, charged the jury that the publication was libelous as tending to reflect shame upon the person of the plaintiff, and to hold him up to the people as an object of ridicule. In the opinion on the appeal in this court, it is said: "We agree with the court below on this point. * * * If the publication be libelous and not privileged, the law implies that it was malicious. This is not a mere presumption which may be wholly overcome by proof, but it is a legal conclusion, which cannot be rebutted. But whilst the absence of actual malice cannot be shown as a bar to the action, the defendant may plead and prove 'any mitigating circumstances to reduce the amount of the damages.'" And, as is said in Wilson v. Fitch, 41 Cal. 363: "All libels are conclusively presumed to be in some degree malicious." See, also, Fitch v. De Young, 66 Cal. 339, 5 Pac. 364.

The court below, under the circumstances, erred in sustaining the demurrer to the amended complaint. The judgment entered against the plaintiff must therefore be reversed, and the cause remanded with directions to overrule the demurrer.

It is so ordered.

We concur: SHAW, J.; ANGELLOTTI, J.

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146 Cal. 673

SAVINGS & LOAN SOC. v. CITY & COUNTY OF SAN FRANCISCO. (S. F. 3,272.)*

(Supreme Court of California. May 3, 1905.)

TAXATION—ASSESSMENT—CHANGE OF ASSESSMENT—VALIDITY—STATUTE—NOTICE TO TAXPAYER—SUFFICIENCY—PRESUMPTIONS.

1. Loans secured by stocks and bonds are assessable for taxation as solvent credits.

2. In a suit by a taxpayer to recover a sum paid on an assessment for solvent credits on the ground that it had been added to the assessment without authority of the board of equalization, an allegation of the answer that defendant denied that such item was added without any authorization or direction by any board of equalization was sufficient to put the matter of authorization in issue.

3. In a suit by a taxpayer to recover taxes paid under protest on the ground that the assessment was not legally made the burden was on him to show that the acts relative to the assessment were unauthorized.

4. Pol. Code, § 3681, provides that the board of equalization may cause the assessor to assess any taxable property that has escaped assessment, or to make and enter new assessments; and section 3885 provides that no assessment or act relating to assessment or collection of taxes is illegal on account of informality. After an assessment book was delivered to the board of equalization, the assessor deducted from the item of "bonds" assessed to a taxpayer a certain sum, and assessed it as "solvent credits," the change being brought to the notice of the board, and the assessment as changed being allowed by the board to remain as the assessment, notwithstanding a claim made to the board by the taxpayer that the change had been unauthorized. *Held*, there was a proper assessment within the statutes.

5. The taxpayer having had notice to appear before the board to show cause why his "assessment" should not be increased, and having appeared and been informed of the change, the no-

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*Rehearing denied June 2, 1905.

tice was sufficient under Pol. Code, § 3681, requiring five days' notice to the taxpayer.

Department 1. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by the Savings & Loan Society against the city and county of San Francisco. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Drown, Leicester & Drown, for appellant. Franklin K. Lane, City Atty., for respondent.

ANGELLOTTI, J. This is an action to recover the sum of $5,702.46, taxes for the fiscal year ending June 30, 1900, paid, under protest, upon an apparent assessment of $349,844 against plaintiff for solvent credits, upon the ground that said apparent assessment was void. The defendant had judgment, and plaintiff appeals therefrom upon the judgment roll.

At the time of the completion of the assessment book and its delivery by the assessor to the clerk of the board of supervisors, the only description of personal property contained in the assessment against plaintiff was to be found under the general column headed "Description of Property," with subheadings devoted to real property, and was as follows, viz.: "Fur. $1,000. Money $53,916. Bonds $569,952. Franchise $2,500. Bonds $1,183,244;" and in the column headed "Personal," under the subheading "Money and Solvent Credits," "$1,807,112," and under the subheading "Other Personal Property," "$1,000, 2,500," the various valuations aggregating $1,810,612. Thereafter, on July 14, 1899, while said assessment book was in the possession of the board of supervisors sitting and acting as a board of equalization, the assessor made the following changes in the descriptive part of the assessment, namely: He erased the words and figures "Bonds $569,952," and wrote in place thereof "Solv. Crdts. $349,844"; he changed the item "Bonds $1,183,244" to "Bonds $863,052"; and he changed the figures under the heading "Money and Solvent Credits" from "$1,807,112" to "$1,266,812," thus making the valuation of personalty aggregate $1,270,312, instead of $1,810,612. The county auditor computed the taxes to be paid by plaintiff upon its personalty upon said total sum of $1,270,312 only. When it came to the collection of taxes, it was ascertained and admitted that the only assessable bonds belonging to plaintiff on the first Monday of March, 1899, were certain municipal, county, and school district bonds, aggregating in value $220,108, and that the assessment on bonds was invalid to the extent of $642,944, the tax on which, at the rate for the year, was $10,479.98. This amount was therefore deducted by defendant, and the taxes on the remainder only claimed.

Plaintiff contended that the assessment was still further invalid to the extent of the $349,844 claimed to have been assessed on solvent credits, its claim being that no solvent credits had originally been assessed to it, and that it was only by reason of an unauthorized and void act of the assessor that it was apparently so assessed upon the roll in the hands of the tax collector. It accordingly paid the tax of $5,702.46 on such amount, under protest, and now seeks to recover it. The trial court found that the item of "Bonds $569,952" originally on the assessment roll in fact consisted of said sum of $349,844 in loans secured by stocks and bonds, assessable as solvent credits, and of $220,108 bonds of municipal corporations, and that the larger item of "Bonds $1,183,244" consisted entirely of bonds, including a duplication of the item of $220,108 municipal bonds. It further found, in effect, as follows, viz.: On July 11, 1899, plaintiff had been notified to appear before the board on July 14, 1899, to show cause why its assessment should not be increased. On July 13, 1899, it filed its verified petition asking for a reduction of its assessment for bonds by deducting $661,222.72. On July 14, 1899, it appeared before said board, after the changes heretofore noted had been made by the assessor, and in the presence of the board was informed by the assessor of such changes, and was requested by the assessor to examine the same, and, if dissatisfied therewith, to suggest the correction thereof. Plaintiff thereupon stated to the board that the changes had not been authorized, and were void, and asked for the reduction of its assessment on bonds, and failed to ask for any relief in regard to the changes, although it examined the roll and saw what alterations had been made. The board did not adjourn as a board of equalization until July 17, 1899. There is no claim that plaintiff did not own $349,844 of solvent credits, being the amount of loans secured by stocks and bonds, which were assessable as solvent credits (Sav. & L. Soc. v. City, etc., 131 Cal. 356, 63 Pac. 665; City, etc., v. Societe etc., 131 Cal. 612, 63 Pac. 1016; Security Sav. Bank v. City, etc., 132 Cal. 599, 64 Pac. 898). and the court expressly found that it did own such solvent credits. Plaintiff seeks to recover upon the ground that it was assessed in addition to its furniture, franchise, and money only for "bonds," and not for any solvent credits. It says that there was a valid assessment only for bonds in the aggregate sum of $1,753,196, and that such assessment has never been lawfully changed, and is still in force. Confessedly, an assessment limited literally to bonds could be enforced only to the extent of $220,108, so that, if it be determined here that it was never legally assessed for its solvent credits, it will escape payment of taxes upon $349,844, property owned by it, and for which it should have been assessed.

It must, of course, be conceded that a valid assessment is essential to the collection of a tax. As said by Mr. Cooley, it is the most important of all proceedings in taxation, is the first step, and the foundation of all others. Cooley on Taxation (3d Ed.) p. 597 As said by this court in Lake County v. S. B. Q. M. Co., 66 Cal. 17, 20, 4 Pac. 876: "Without an assessment, all subsequent proceedings are nullities; and in making the assessment the provisions of the statute under which it is to be made must be observed with particularity." It must further be conceded that the assessor had no power to make any change in the assessment after he delivered his roll to the board of equalization, unless such changes were authorized by the board of supervisors under sections 3679 and 3681 of the Political Code, or with the written consent of the city and county attorney under section 3881 of the same Code. It is not contended that any change was made with the consent of the city and county attorney. Learned counsel for plaintiff are, however, in error in stating that there was no issue upon the point as to whether the changes were authorized by the board of supervisors. While the allegations in the complaint upon this subject are much more specific than the denials of the answer, the defendant did deny "that said item of solvent credits was added * * * without any authorization or direction by any board of supervisors or any board of equalization." This was sufficient to put the matter of authorization in issue, and to justify the finding of the probative facts in regard thereto. If the probative facts so found compel the conclusion that the particular changes made could be and were authorized by the board of supervisors, it appears to us the plaintiff's case must fail. Mr. Cooley says that the idea on which a suit for taxes paid is predicated is that the municipality has received that which, in justice, it ought not to retain, and that, therefore, where the proceedings have been simply irregular, the action will not lie. There must be something further. The tax must be void, a mere nullity. Cooley (3d Ed.) p. 1493.

It is provided by section 3885, Pol. Code, that "no assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law," and this section is applicable to proceedings before the board of supervisors sitting as a board of equalization. Buswell v. Board of Supervisors, 116 Cal. 351, 353, 48 Pac. 226; La Grange Min. Co. v. Carter, 142 Cal. 560, 564, 76 Pac. 241.

Section 3681 of the Political Code provides that the board of equalization "may direct the assessor to assess any taxable property that has escaped assessment," or "to make and enter new assessments (at the same time canceling previous entries), when any assessment made by him is deemed by the board so incomplete as to render doubtful the collection of the tax"; the statute further providing that the clerk shall notify the person interested by letter, at least five days before action taken, of the day fixed when the matter will be investigated, and also that the clerk of the board shall keep a record of all such changes. See section 3682, Pol. Code. This court has said: "Section 3681, Pol. Code, simply extends the power and duty of the assessor, enabling and requiring him, at the request of the board, to list and assess property which he had failed to assess, notwithstanding the time for assessments had passed, and the roll was no longer in his possession. And the exercise of this power is directly in accord with the policy and express provisions of the Constitution, which requires all property not exempt from taxation to be taxed." Farmers', etc., Bank v. Board, 97 Cal. 318, 323, 32 Pac. 312, 313.

There can be no doubt that, so far as the changes made are material here, viz., the change in the designation of the kind or quality of a portion of the personal property from "bonds" to "solvent credits," or from a specific kind of solvent credits to the general terms including them, they could have been made by the assessor under the direction of the board of equalization under the provisions of section 3681, Pol. Code. It is entirely immaterial in this connection whether the effect of such a change would be an "addition" to the assessment of property that had escaped assessment or simply a correction in the description of property already assessed, with an insufficient and incomplete description. This section would have authorized such a change in either event. This being so, the question is as to whether the change was authorized. The presumption in cases of this character is in favor of the assessment. It was incumbent upon plaintiff to allege and prove a case showing that the acts relative to this assessment for solvent credits were unauthorized by law. See San Francisco v. Flood, 64 Cal. 504, 508, 2 Pac. 264. It was in accord with this theory that plaintiff alleged an unauthorized addition of this item of solvent credits. We are of the opinion that the finding of the court in this regard establishes a case of a change made under the direction of the board of equalization. The procedure was somewhat informal, it may be conceded, but, as we have seen, mere informality will not invalidate. The change was made by the assessor while the roll was in the custody of the board. It was brought to the notice of the board, and the assessment, so changed, was allowed by the board to remain as the assessment against the plaintiff, notwithstanding the claim made to the board by plaintiff that the change had not been authorized. Although at the moment when actually made upon the roll the change may not have been authorized, the board could undoubtedly subsequently authorize and require such change, and it would be entirely unnecessary to go through the manual work of restoring the original entry and again making the same change. And where the board acquiesced in the change under the circumstances here appearing, and allowed the assessment to stand as changed, it, in effect, directed and required such change, and what up to that moment may have been absolutely unauthorized and void became valid.

The contention that the board was without power to authorize the change in this case for want of notice to the taxpayer is not well founded. According to the allegations of its complaint and the finding of the court, it appeared before said board in response to a citation to show cause why its assessment should not be increased; and from the findings it appears that it was then and there informed, in the presence of the board, of the changes that had been made. It did not take advantage of the opportunity afforded to urge and show that it did not own and should not be assessed for solvent credits in the amount stated, but contented itself with the claim that the change had not been authorized, and was void. The taxpayer had, however, voluntarily appeared before the board in response to a citation to show cause why its "assessment" should not be increased. This notice implied not only that the valuation of the very property assessed might be increased, but also that the subject of taxation might be increased by the addition of other property. Farmers', etc., Bank v. Board, 97 Cal. 318, 325, 32 Pac. 312. By its voluntary appearance the objection that five days' notice had not been given was waived (Farmers', etc., Bank v. Board, supra), and the board had jurisdiction to proceed. The provision as to notice is designed solely to give the taxpayer an opportunity to appear and contend against any improper changes being made; and when he is in fact before the board, with full opportunity to be heard in his own behalf, the fact that notice has not been given to him by the clerk for the prescribed time, or that a notice given lacked something as to the exact details of the proposed changes, cannot affect the jurisdiction of the board. Upon the appearance of the taxpayer here it was informed specifically as to the proposed changes, changes entirely within the power of the board to sanction. The only objection was, in effect, that such changes had not as yet been authorized.

We have fully considered the contention of defendant to the effect that certain findings are inconsistent with allegations of the complaint admitted by the answer and with certain allegations of the answer. So far as the particular matter which we have discussed is concerned, we have already indicated our opinion that the issue was made by the pleadings. The fact that the defendant had denied that any addition was made to the assessment by the change, and alleged that the plaintiff had originally been assessed for its solvent credits, did not bar it from also denying that, if any change had been made, such change had not been authorized by the board of equalization. The finding upon this issue is not inconsistent with any admission made by the pleadings. This is sufficient for the purposes of this decision, for the finding that the $349,844 solvent credits were originally included in the item of "Bonds $569,952," is not material to the judgment. The assessment of the solvent credits was a valid assessment, because made in compliance with law, under the direction of the board of equalization. We may say, however, that we do not consider the findings as to the composition of the item of "Bonds $569,952" to be without the issues. Whether or not this finding could stand in the face of the specific finding as to what the assessment was as it originally appeared upon the roll is another question, which also is immaterial here, in view of the conclusion we have reached upon the other branch of the case. It may well be contended that where the description in an assessment is clear and unambiguous as to the property to be assessed, it cannot be shown by extrinsic evidence that it was intended to include other property. It has often been said that the assessment roll, when completed and certified to the board of supervisors, is the only evidence of the acts and intentions of the assessor. People v. S. F. Sav. Union, 31 Cal. 132; The People, etc., v. The S. & C. R. Co., 49 Cal. 414; People v. Hastings, 34 Cal. 571, 574; Allen v. McKay, 139 Cal. 94, 100, 72 Pac. 713. While, too, under our statute (Pol. Code, § 3650, subd. 4), an assessment of personal property which did not show the number, kind, amount, and quality would not be invalid (San Francisco v. Pennie, 93 Cal. 465, 469, 29 Pac. 66; Dear v. Weineke, 94 Cal. 322, 29 Pac. 646; San Francisco v. Flood, 64 Cal. 504, 2 Pac. 264; People v. McCreery, 34 Cal. 432, 441; Cooley on Taxation [3d Ed.] 644; 27 Am. & Eng. Ency. of Law [2d Ed.] 682), the statute contemplates such a showing (Pol. Code, § 3650, subds. 4, 10, 11), and where the assessment does show the kind of property there is certainly room for the contention that the description thus given in pursuance of law cannot be treated as surplusage and wholly disregarded, and that the assessment thus made cannot be held to include property of a kind not suggested by the description given. But, as already said, it is not necessary here to decide these questions.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

146 Cal. 667

McDONALD v. PACIFIC DEBENTURE CO.

(S. F. 3,166, 3,314.)*

(Supreme Court of California. May 3, 1905.)

LOTTERIES—CONTRACT—CONSTRUCTION—BREACH OF CONTRACT—RECOVERY—ACTION—EVIDENCE.

1. A complaint for money had and received, alleging that defendant was on a certain date indebted to a certain person in a specified sum for money had and received by defendant for the use and benefit of such person, while not strictly in compliance with the Code provision that the complaint shall consist of a statement of facts constituting the cause of action, is nevertheless sufficient.

2. An answer to such a complaint denying that defendant was indebted to the person in question in the sum alleged, or any other sum, for money had and received for the use and benefit of such person, or upon any account at all, was sufficient.

3. A contract between plaintiff and a corporation requiring it to pay certain coupons attached to the contract, in accordance with a table given, during the time that plaintiff was making certain required monthly payments to the corporation, the time or order of payment not appearing from the contract to have been based on any chance or hazard, did not amount to a lottery.

4. Civ. Code, § 1689, subd. 2, provides that a party may rescind a contract, if, through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part. Section 1691, subd. 2, provides that one rescinding a contract must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same on condition that such party shall do likewise, unless the latter is unable or positively refuses so to do. After plaintiff had made several payments, the corporation refused to receive any more payments, stating that it had decided to go out of business, whereupon plaintiff brought an action for the amounts that he had paid; producing on the trial his contract, and offering to cancel it or deliver it to defendant. *Held*, that plaintiff was entitled to recover; a return or offer to restore the contract not being a condition precedent to the bringing of the action.

5. It was proper to refuse to allow an inquiry in regard to the disposition of monthly payments to the corporation.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by John McDonald against the Pacific Debenture Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. C. Cavitt and C. A. Elliott (D. E. Alexander, of counsel), for appellant. Louis S. Beedy and John T. Pidwell, for respondent.

SHAW, J. These two cases present appeals from a judgment and from an order denying the defendant's motion for a new trial in the same case. No. 3,166 presents the appeal from the judgment, and No. 3,314 an appeal from the order denying the motion for a new trial.

The complaint sets forth a cause of action in 29 separate counts for money had and received. The plaintiff sues in the first count for money had and received on his own account by the defendant for his use, and in the subsequent counts upon similar demands by others, assignors of the plaintiff.

It is admitted by the respondent that, by reason of certain clerical errors in the computation of the amount, judgment was rendered for $52 in excess of the amount actually due to the plaintiff, and the judgment must be modified to that extent.

The respondent claims that the answer admits all of the allegations of the complaint, except the allegations of the assignment by the respective original claimants to the plaintiff in the action. The allegations in respect to the counts of the complaint, and the denials thereof in the answer, are all in the same form, and can best be shown by setting forth in full the portions thereof relating to the second count of the complaint. That portion of the complaint was as follows: "(2) That said defendant was indebted on the 2d day of July, 1901, to Withold Friedman in the sum of $218, lawful money of the United States, for money had and received by said defendant for the use and benefit of said Withold Friedman." The remaining portion of this count consisted of an allegation of the assignment, and a statement that the amount was unpaid. The answer as to this part of the second count of the complaint is as follows: "Denies that on the 2d day of July, 1901, or upon any day, or at all, it was indebted to Withold Friedman in the sum of $218, or in any sum or at all, for money had and received for the use and benefit of the said Withold Friedman, or for or upon any account or at all."

Although it is not strictly in compliance with the Code provision that the complaint shall consist of the statement of facts constituting the cause of action, yet it has been settled by repeated decisions that a complaint for money had and received, in the language contained in the complaint in this action, is sufficient. We are of the opinion that, where this form of complaint is used by the plaintiff, the defendant is not required to deny the allegations in any more specific language than that in which they are set forth in the complaint. The particular criticism of the respondent is that the answer does not deny that the defendant did in fact have or receive money for the use of Withold Friedman. The same criticism might be extended to the complaint in the form used by the respondent. It does not directly allege that the defendant had actually received money for the use of Withold Friedman. We can perceive no good reason for holding the defendant to a more strict rule of pleading than that allowed in favor of plaintiff. The cases cited by the respondent upon this proposition do not go so far as we are asked to go in this case, to hold the answer insufficient. Moreover, it appears from the record that the answers were treated in the court below, both by the court and by all the parties, as sufficient to raise an issue upon all the allegations in the complaint.

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*Rehearing denied May 31, 1905.

A considerable portion of the argument on both sides is devoted to a discussion of the question whether or not, conceding that the transaction between the defendant and the respective original holders of the demands sued on constituted a participation in a lottery scheme, the plaintiff is entitled to recover; it being claimed by defendant that the parties are in pari delicto in an unlawful contract, and that a court will not aid either, but will leave them as it finds them, and by the plaintiff that the holders of the contracts are not equally guilty with the company, and that plaintiff may recover, notwithstanding the fact that the money was paid for a share in a lottery scheme. We do not find it necessary to consider this question. There is no sufficient evidence that the enterprise was a lottery. The only evidence on the subject consists of the contents of one of the contracts or debentures issued by the defendants, which is set forth in full. It shows that, in consideration of the payment by the holder of $2 monthly for 120 consecutive months, the defendant agreed to pay the holder $400 in the manner provided in the contract. Eight coupons, for $50 each, payable to bearer, and numbered consecutively from 14,537 to 14,544, were attached to the particular contract set forth. These were to be surrendered and paid whenever "called for redemption" by the company. Fifty per cent. of the monthly payments and other receipts of the company was to be put into a "maturity fund," and used "for the payment of coupons under the redemption privilege as shown by the table of payments," and the other moiety was held for payment of such of the coupons as should not be called in during the 120 months, and to pay for the services of the company. The "table of payment of coupons" was, so far as necessary to give it, as follows:

1 then 4 then 8 then 16 then 24 then 32 then 40 then 48 2 then (paid) then 56 then 64 then 72 then 80 then 88 then 96 3 then 12 then 104 then 112 then 120 then 128 then 136 then 144

And so on indefinitely, using four as a multiple and paying six terminal coupons after each multiple until the terminal number shall exceed the number sold, when payment shall revert to the numerals and multiples.

There is no further explanation of what this "table of payment" means. Whether the puzzle can be solved with or without extrinsic aid not afforded by the record, we need not decide, for it is at least clear that on its face it does not make the time or order of payment of any coupon depend on chance or hazard. The effect of the contract is that the defendant will pay the coupons in accordance with the table given, whatever it may mean, during the time that the holder is making the monthly payments, and that at the expiration of that time (that is, 10 years after the monthly payments begin) it will pay whatever then remains unpaid of the $400 promised. We do not perceive in this contract anything which partakes of the nature of a lottery, and consequently the discussion concerning the rights of the respective parties upon the theory that the enterprise was illegal is not pertinent to the case.

Upon the facts as presented in the evidence, the case is comparatively simple. In the case of the contract executed by the defendant to the plaintiff himself, for instance, after the plaintiff had paid the sum of $54.50 in monthly payments, in accordance with the contract, he offered on July 1, 1901, to make the monthly payment then due under the terms of the contract. The defendant refused to receive the payment, and stated that the company had decided to go no further with its business; that it proposed to liquidate its outstanding indebtedness, and would no longer carry on or continue the performance of the contract on its part. The plaintiff was ready and willing to pay the installment then due, but the defendant not only refused to receive the same, but its agent refused further conference, and left the presence of the plaintiff without allowing him to make further tenders or demands. Thereupon, treating his contract as rescinded, the plaintiff brought the action to recover the sum of money which had been already paid in pursuance of the contract. The same transactions occurred with reference to each claimant who subsequently assigned his claim to the plaintiff, and which constitute the causes of action set forth in the complaint. The court was justified, from this evidence, in finding that the defendant refused to go on with the contract, that the consideration for the previous payments had failed by the fault of the defendant, and that the plaintiff had the right to rescind, and its conclusion that the plaintiff was entitled to recover is correct. Duncanson v. Walton, 111 Cal. 516, 44 Pac. 174; Civ. Code, § 1689, subd. 2. It was not necessary to return or offer to restore the contract, as a condition precedent to the right to recover the money paid. The defendant's conduct was in effect a positive refusal under any circumstances to return the money already received, and this positive refusal relieved the other parties from the necessity of offering to return or cancel the contract prior to beginning the action. Civ. Code, § 1691, subd. 2. Upon the trial the plaintiff produced all the contracts involved, and offered to cancel them or deliver them to defendant. This was sufficient to entitle plaintiff to recover.

Exceptions were taken to the refusal of the court to allow an inquiry in regard to the disposition of the monthly payments. We cannot perceive any theory upon which such evidence would be admissible. The liability of the defendant did not depend upon its ability to pay the demand, nor upon the disposition of the money it had received, but upon its refusal to proceed with the undertaking, and the consequent right of the holders of contracts to rescind.

There are no other questions in the record which we think worthy of notice.

The judgment of the court below is modified by deducting therefrom the sum of $52, allowing the same to stand as a judgment in favor of the plaintiff against the defendant for $2,112.50, with interest from its date; and as so modified the judgment is affirmed, without costs to the respondent. The order denying a new trial is also affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

CREED et ux. v. McCOMBS et al. (L. A. 1,231.) (Supreme Court of California. Nov. 11, 1904.) In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge. Action by Jeremiah Creed and wife against C. L. McCombs and others. From a judgment for defendants, plaintiffs appeal. Submission of appeal set aside and cause resubmitted. Haas & Garrett, for appellants. Dunn & Crutcher, for respondents.

PER CURIAM. This case presents questions of importance and of general interest to many parties not here represented. In the case of Chase v. Trout (L. A. 1,217) 80 Pac. 81, recently submitted to the court in bank, after rehearing, the questions involved were more fully argued, and for the purpose of fuller consideration of both cases the submission herein is set aside, and the cause resubmitted as of this date.

PEOPLE v. HOWARD. (Cr. 1,128.) (Supreme Court of California. April 8, 1905.) In Bank. Appeal from Superior Court, Santa Clara County. Wilson R. Howard appeals from a conviction. Affirmed. George W. Waldorf and James P. Sex, for appellant. U. S. Webb, Atty. Gen., and James H. Campbell, Dist. Atty., for the People.

PER CURIAM. The defendant was convicted of murder in the first degree, and sentenced to death. He appeals from the judgment. No argument, oral or written, has ever been made in support of the appeal, and upon motion of the Attorney General the case was submitted upon the record, which contains no bill of exceptions and discloses none of the evidence. We can discover no error in the judgment, and it is therefore affirmed.

WILKES v. THOMAS (McCOY, Intervener). (S. F. 4,027.) (Supreme Court of California. April 6, 1905.) In Bank. Appeal from Superior Court, Kern County; M. L. Short, Judge. Action by Albert R. Wilkes against Mary J. Thomas. Charles B. McCoy intervened. From the judgment rendered, and from an order denying a new trial, intervener appeals. Dismissed. Charles G. Lamberson, for appellant. Galpin & Bolton, for respondent. James F. Peck, Solinsky & Wehe, and Chas. C. Boynton, amici curiæ.

SHAW, J. This is a motion to dismiss the appeals of the intervener from the judgment and from the order denying his motion for a new trial. The appeals referred to are docketed on the Los Angeles calendar as L. A. No. 1,542. The case involves the respective rights of Albert R. Wilkes and Mary J. Thomas to purchase a part of the same lands as are involved in the case of Youle v. Thomas (S. F. No. 4,026) 80 Pac. 714, in which a similar motion was this day decided. In all material particulars the facts and questions of law are the same in this case as in that case. Upon the authority of that case, the appeals of intervener Charles B. McCoy from the judgment and order denying his motion for new trial, which appeals are docketed as L. A. No. 1,542, are dismissed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

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146 Cal. 681

WYCKOFF v. PAJARO VALLEY CONSOL. R. CO. (S. F. 3,167.)

(Supreme Court of California. May 6, 1905.)

1. Appeal—Order Granting New Trial—Presumption.

Where an order granting a new trial does not disclose the ground on which it was granted, and the record nowhere discloses that the motion for a new trial was not in part based on grounds which, under Code Civ. Proc. §§ 657, 658, require the use of affidavits on the hearing, or that affidavits in support of one or more of such grounds were not in fact used on the hearing, it will be conclusively presumed on appeal from the order that the motion was in part based on some ground on which affidavits could be used, that affidavits were in fact used, and that they were sufficient.

2. Same—Bill of Exceptions.

A party desiring to appeal from the grant of a new trial is entitled to show what was used on the hearing of the motion by bill of exceptions settled as authorized by Code Civ. Proc. § 651.

Department 1. Appeal from Superior Court, Monterey County; N. A. Dorn, Judge.

Action by M. Isabel Wyckoff, as administratrix, against the Pajaro Valley Consolidated Railroad Company. From an order granting a new trial, plaintiff appeals. Affirmed.

Lindsay & Netherton, for appellant. S. F. Geil and C. F. Lacey, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from an order granting defendant's motion for a new trial. The order granting the motion does not disclose the ground upon which it was granted, and the record on appeal nowhere discloses that the motion for a new trial made by defendant was not, in part, based upon grounds requiring the use of affidavits upon the hearing, such as irregularities, misconduct of the jury, accident, or surprise, and newly discovered evidence (Code Civ. Proc. §§ 657, 658), or that affidavits in support of one or more of such grounds were not, in fact, used on the hearing of such motion. The case is in no respect different from that of Skinner v. Horn, 144 Cal. 278, 77 Pac. 904, and 79 Pac. 597. In that case it was said by this court, speaking of an appeal from an order granting a new trial, "The burden is on him [the appellant] to show error in the action of the trial court. The presumption is that the order granting a new trial was properly made, and, in the absence of a bill of exceptions showing what was used on the motion, unless the record on appeal establishes the contrary, it will be conclusively presumed in favor of the order that the motion was in part based upon some ground upon which affidavits could be used, that affidavits were in fact used on the hearing, and also that such affidavits were sufficient to justify the court in the making of the order appealed from." 144 Cal. 280, 77 Pac. 905. It was further pointed out in that case that the party desiring to appeal from an order granting a new trial may always show what was used on the hearing of the motion by a bill of exceptions settled as authorized by section 651, Code Civ. Proc.

It is unnecessary to notice the other points made by respondent in support of the order appealed from, as such order must be affirmed for the reason already stated.

The order granting a new trial is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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146 Cal. 699

BELL v. STANDARD QUICKSILVER CO. (S. F. 3,416.)

(Supreme Court of California. May 8, 1905.)

1. Corporations — By-Laws—Construction—Officers—Powers—Directors' Meetings.

The by-laws of a corporation provided that the directors should elect a president, and, if the president should be unable to act, the vice president should take his place and perform his duties, and, if both should be unable to act, they should appoint some other member of the board to do so, in whom should be vested for the time being all the duties and functions of the office; that the president, or, in his absence or inability to act, the vice president, or, in the absence or inability of both to act, the director appointed as provided should call the directors together, etc.; and that the president or two of the directors might call special meetings of the directors at any time, notice to be given in the manner prescribed. *Held*, that the last clause of the introductory paragraph should be applied separately to each subsequent clause and paragraph, so that the vice president had power to call special meetings; the power given to two of the directors to call such meetings being independent of that vested in the president, or the person acting as such in his absence.

2. Same—Special Meetings.

Where the by-laws of a corporation authorized the vice president to call a special meeting of the directors in the absence of the president, and it did not appear that it was conditional to the vice president's right to act that an effort to procure the president's presence was necessary, or that there was any fraudulent intent or purpose to take advantage of his absence, the call of a meeting by the vice president while the president was absent at his usual place of business, in another county than the domicile of the corporation, was not objectionable because the president, if notified, might have reached the corporation's principal place of business and acted on the call within four or five hours.

3. Same—Notice—Sufficiency.

Notice of a special meeting of the board of directors of a corporation, signed by its vice president, and mailed by him personally to the directors, constituted a sufficient written declaration of the necessity of such meeting to make a legal call thereof.

4. Same.

Where the by-laws of a corporation did not prescribe any form of notice of directors' special meetings, a notice directed to directors, and stating that a special meeting of the board of directors of the corporation would be held at the office of the company, in a certain room in a building in a specified city, on a specified date, and at a specified hour, signed by the vice president, who was also secretary, though failing to state the object of the meeting, constituted a sufficient compliance with the corporation's by-laws, requiring written or printed notice of such meetings to be given by mail, etc., and with Civ. Code, § 320, requiring that notice of special meetings, when no provision is otherwise made in the by-laws, must be in writing, and be given by the secretary.

5. Same—Powers of Vice President.

The by-laws of a corporation authorized the vice president, who was also secretary, to act in the absence of the president, and required the secretary to issue notices of directors' special meetings. On an issue as to the validity of a notice signed by the vice president, it was found that he was both vice president and secretary, that the president was absent, and that the vice president made the call and mailed the notices, which were set out in full. *Held*, that it would be presumed, in support of a judgment finding that such notice was valid, that the cause of the vice president's assumption of the functions of the office of the president in making the call was the absence of the president from the office, and that in mailing the notices the vice president was then acting in his capacity as secretary.

6. Pleading—Amended Complaint.

Where, in an action to set aside a stock assessment, it was alleged that more than one-fourth of the stock had been sold, paid for, and certificates issued prior to the assessment, as required by Civ. Code, § 331, in order to authorize the levy of an assessment, it was not an abuse of the trial court's discretion to deny plaintiff leave to file a second amended complaint, alleging that one-fourth of the capital stock of the corporation had not been subscribed at the time the assessment was made.

7. Same.

Where, in an action to set aside a corporate stock subscription, it did not appear that plaintiff did not know that the assessment was not levied for the purpose of paying expenses, debts of the corporation, or conducting its business at the time the original complaint was filed, and there was no claim that such contention could be proved, it was not error for the court to refuse to permit an amendment of the complaint containing an allegation of such fact.

8. Corporations — Stock Assessment — Action to Vacate.

Where, in an action to vacate a corporate stock assessment, the proof showed that notice of the directors' meeting at which the levy was made was mailed by T. in his capacity as secretary, instead of vice president, as the answer alleged, it was proper for the court to permit an amendment of the answer to conform to the proof.

9. Same—Evidence.

Where, in an action to set aside a corporate stock assessment, proof was introduced showing that the presence of the president at the office of the corporation to call the meeting could have been obtained within a few hours if an effort had been made in that behalf, and there was no allegation of fraud in the fact that the meeting was called by the vice president in the president's absence, it was not error for the court to refuse to compel the president to answer questions with reference to the corporation's ability to have obtained his presence to call the meeting if desired.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Teresa Bell, special administratrix of the estate of Thomas Bell, deceased, against the Standard Quicksilver Company. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

T. Z. Blakeman, for appellant. John Flournoy, for respondent.

SHAW, J. This is an appeal by the plaintiff from a judgment in favor of the defendant, and from an order denying plaintiff's motion for a new trial. The object of the action was to obtain a decree declaring invalid an assessment of less than 10 per cent. upon the stock of the defendant corporation, and to set aside a sale under said assessment of 17,000 shares of the stock belonging to the estate of the deceased. The case was tried by the court, findings were filed, and judgment was entered for the defendant.

The principal point relied on by the plaintiff is that the assessment is void for the reason that it was made at a special meeting of the board of directors which was not regularly called. The board of directors consists of five members, of whom Thomas Derby was president, and H. H. Taylor the vice president and secretary. The by-laws contained the following provisions with respect to the calling of meetings of the directors:

"Article 7. President. The board of directors shall, at their first regular meeting, elect one of their number to act as president; and if at any time the president shall be unable to act, the vice president shall take his place and perform his duties; and if both the president and vice president, from any cause, shall be unable to act, they shall appoint some other member of the board to do so, in whom shall be vested for the time being, all the duties and functions of his office. The president, or in his absence or inability to act, the vice president, or in the absence or inability of both to act, the director, appointed as above provided:

"(1) Shall preside over all meetings of the stockholders and directors, and shall have the casting vote.

"(2) He shall sign, as president, all certificates of stock and all contracts and other instruments of writing which have been approved by the board of directors, and he shall draw checks upon the depositary of the company.

"(3) He shall call the directors together whenever he deems it necessary, and shall have, subject to the advice of the directors, direction of the affairs of the corporation, and generally shall discharge such other duties as may be required of him by the by-laws of the corporation.

"The president, or two of the directors, may call special meetings of the directors at any time, and notice shall be given of such called meetings by mailing a written or printed notice at the last known place of business or of residence of each director forty-eight hours prior to the time of meeting. Such service of notice shall be entered on the minutes of the corporation; and the said minutes, upon being read and approved at a subsequent meeting of the board shall be conclusive upon the question of service."

Upon a consideration of all the provisions of this article of the by-laws, it is clear that in the absence or inability to act of the president, the vice president is substituted for him, occupies his place, and possesses for the time being all the powers therein mentioned which the president would have if personally present and capable of acting. The last clause of the introductory paragraph of the article must be applied separately to each subsequent clause and paragraph, so that the power of the vice president to call special meetings is the same as if the article in that respect read as follows: "The president, or, in his absence or inability to act, the vice president, or, in the absence or inability of both, the director thereunto appointed by the board, shall call the directors together whenever he deems it necessary, and may call special meetings of the directors at any time, or two of the directors may call such special meetings." The power given to two of the directors to call special meetings is independent of that vested in the president, or the person who may be acting as such in his absence. The last paragraph of the article cannot reasonably be construed as a limitation of the power to the president personally, or to two of the directors, to the exclusion of the person who by the previous provisions may be for the time acting as president.

On the 3d day of August, 1898, Taylor, the vice president and secretary, made and sent through the mails to each director, properly addressed, a written notice in the following language:

"San Francisco, Aug. 3, 1898. Dear Sir: A special meeting of the board of directors of the Standard Quicksilver Co. will be held at the office of the company, Room 1, 2nd Floor of the Mills Building, San Francisco, Cal., on Wednesday, the 10th day of August, 1898, at half past one o'clock p. m.

"H. H. Taylor, Vice President."

During all of the year 1898 the president of the corporation was residing at New Almaden, in Santa Clara county, and was engaged in business there; and during the entire day on which this notice was made and sent to the directors he was actually in New Almaden, and absent from San Francisco. At this time the principal place of business of the corporation was in San Francisco, and its office was the room designated in the above notice. The fact that the president was absent in New Almaden at the time this meeting was called was a sufficient absence, within the meaning of the by-laws, to authorize the vice president to act in his place. It is true that it appears from the evidence that if he had been requested or notified to do so, and had been so minded, he could have traveled from New Almaden to the office of the corporation in San Francisco in four or five hours, for the purpose of considering the matter of the call. But there is nothing in the by-laws to the effect that the vice president cannot act for and in place of the president in his absence until after the president has been requested to attend, or notified of the importance of some act to be done, and has refused or neglected to attend for that purpose. Nor is there anything appearing in the case which would make such an effort to procure his presence necessary to the valid action of the vice president in his place. It is not claimed that there was any fraudulent intent or purpose to take advantage of his absence to make a call which he would not have made if he had been present. And indeed he acquiesced in the call, and attended the meeting without protest or objection, and voted for the assessment in question. It is not necessary, under the provisions of the by-laws, that the president shall be out of the state, or beyond the reach of mail or other communication, in order to authorize another to act in his place or exercise his power. This would not be claimed in regard to a check made in his absence. It might possibly be that temporary absence through some part of the day, where there was no emergency demanding immediate action before his return, even in the absence of fraud, might not be sufficient to authorize the vice president to act in calling a meeting. As to this we express no opinion. All that is necessary to decide upon this phase of the case is that where the president of a corporation resides and is engaged in business in another county, many miles distant from the place of business of the corporation, and is actually absent from that place of business, there being no claim that he customarily was in daily or frequent attendance at such place of business, and it would require several hours to procure his attendance, the vice president can, under these circumstances, and under the provisions of this by-law, act in his place during such absence.

Vice president Taylor was also the secretary of the corporation, and the findings show that he personally made and mailed to the respective directors the notice of the meeting above set forth. This was a sufficient compliance with the law and the by-laws in question. Conceding, for the purposes of the case, that some written declaration by the vice president was necessary to make a legal call, this instrument, being signed by him as vice president, was a sufficient official statement or order to answer that purpose. Section 320 of the Civil Code provides that notice of special meetings, when no provision otherwise is made in the by-laws, must be in writing, and must be given by the secretary. It does not, however, nor do the by-laws in question, prescribe any form of notice, nor require that it shall be signed by the secretary. Hence any form or manner of written notice sufficient to inform the directors that a special meeting of the directors is called, and of the exact time and place where it is to be held, will be valid. Granger v. Original E. M. & M. Co., 59 Cal. 682. Where the call is signed by an officer authorized to make it, as in this case, and contains in itself all the essential requisites of a notice, it will answer all the purposes of a notice under section 320 aforesaid. That section merely devolves upon the secretary the duty of giving the notice. To give a written notice is not to write or sign the paper expressing the information constituting the notice. It implies only that the person charged with that duty shall by some means see to it that the necessary notice is delivered to the person who is to receive it. It is the equivalent of the service of papers, and involves only a delivery of sufficient notice to the proper person. This duty Taylor, as secretary, performed when he mailed the notices in question to each director, properly addressed and postpaid.

The notice need not state the object or purpose of the meeting. Neither the by-laws nor the Code requires that it should. Granger v. Original, etc., Co., supra.

It is objected that there is no finding that Taylor acted as vice president because of the absence of the president in calling the meeting, nor that as secretary he gave the notice. The finding is that Taylor was both vice president and secretary, that the president was absent, and that Taylor made the call and mailed the notices; setting out the notice in full, as above set forth. It will be observed that the notice itself purports to be signed by Taylor in his capacity as vice president. We think these findings were sufficient. It was unnecessary to find except upon the ultimate facts. The findings must be construed strongly in support of the judgment. Private transactions are presumed to be regular, and the ordinary course of business is presumed to have been followed. It will therefore be presumed from the facts found that the cause of Taylor's assumption of the functions of the office of president was the absence of that officer from the office, and that in mailing the notices he was then assuming to act in his capacity as secretary—the capacity which required him to perform that duty. When a person holding an office which requires him to perform a certain act is found to have performed that act, it will not, for the purpose of defeating the judgment, be presumed that he did it otherwise than in his proper official capacity.

Upon examining the record, we think that all the findings are fully supported by the evidence. It would serve no useful purpose to discuss the evidence in detail upon this branch of the case.

We find no ground upon which the assessment could be declared invalid.

The court did not abuse its discretion in denying the plaintiff leave to file a second amended complaint. The statement that one-fourth of the capital stock of the corporation had not been subscribed at the time the assessment was made, which is one of the allegations not found in the previous complaint, is shown to be a mere conclusion and absolutely without foundation by the subsequent averments that at least three-fifths of the stock had been sold, paid for, and certificates issued therefor many years prior to the assessment. The issuance of the certificates for the stock disposes of all questions regarding the subscription therefor. The provision of the Code (Civ. Code, § 331) that one-fourth of the capital stock must be subscribed before an assessment can be levied is completely satisfied by the issuance of, and full payment for, certificates for more than one-fourth of the stock. The only other new matter in the proposed amendment was an allegation that the assessment was not levied for the purpose of paying expenses, conducting business, or paying debts of the corporation. There was, however, no showing that the plaintiff did not know of the facts involved in this allegation at the time the original complaint was filed, nor was there any claim that any evidence could be procured to prove the averments if the amendment had been allowed. The court, under these circumstances, might, in its discretion, have either allowed or refused the amendment, and in either case this court would not interfere.

It was clearly within the discretion of the court to allow the defendant after the trial to amend his answer so as to make it appear therefrom that the notices of the meeting of the directors in question had been mailed by Taylor in his capacity as secretary, instead of in his capacity as vice president, as the answer had previously alleged. The proof had indicated that his action in this particular was in his capacity as secretary, and it was proper to allow an amendment to conform to the proof.

Prior to the trial the deposition of the president, Derby, was taken, and in giving his deposition he declined to answer some questions intended to elicit the fact that his presence at the office of the corporation to call the meeting in question could have been obtained within a few hours if an effort had been made in that behalf. Error is assigned upon the refusal of the court to compel him to answer these questions. We do not see how the plaintiff could have been injured by this action of the court. The answers given by the witness, and which were introduced in evidence upon the trial, sufficiently showed this to be the fact, and there does not seem to have been any serious dispute upon it at any time. The questions intended to show that he had not been requested to attend were immaterial to the cause of action set forth in the complaint, there being no allegations tending to show any fraudulent purpose or intent.

Several rulings at the trial upon the questions arising upon the admission of evidence were excepted to, and are assigned as error, but they all relate to questions already discussed, and come within the principles already laid down. It is therefore unnecessary to mention them specifically.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

146 Cal. 721

RAISCH v. HILDEBRANDT et al. (S. F. 3,171.)

(Supreme Court of California. May 10, 1905.)

MUNICIPAL CORPORATIONS — STREET ASSESSMENTS — FORECLOSURE — ACTIONS — PRIMA FACIE CASE—PLEADINGS—ADMISSIONS.

Where, in an action to foreclose the lien of a street assessment, the allegations of the complaint that the assessment, warrant, diagram, certificate of city engineer, demand of payment, nonpayment, return of the warrant, etc., had been made and recorded, which, by St. 1885, p. 157, c. 153, § 12, is made prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings, etc., were not denied, plaintiff was not bound to introduce formal proof of such proceedings to establish a prima facie case under Code Civ. Proc. § 462, declaring that every material allegation of the complaint not controverted by the answer filed must, for the purposes of the action, be taken as true.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1281.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by A. J. Raisch against Hulda Hildebrandt and others. From a judgment for defendants, plaintiff appeals. Reversed.

J. C. Bates, for appellant. **Otto tum Suden**, for respondents.

McFARLAND, J. This is an action to foreclose the lien of a street assessment. The complaint contains all the averments necessary to a complete cause of action on the lien, and, among other things, averments of the making and recording of the assessment, warrant, diagram, certificate of city engineer, demand of payment, nonpayment, return of the warrant, etc., which, by the terms of the statute, are "prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram, are based, and like evidence of the right of the plaintiff to recover in the action." These averments as to the assessment, warrant, diagram, certificate, etc., were not denied in the answer, although the answer does contain denials of preceding averments in the complaint—as, for instance, that the resolution of intention to do the alleged work was duly or at all passed by the board of supervisors; that the clerk printed for the required time a notice of the nature and character of the work to be done, inviting sealed proposals for doing the same; that the board opened the bids or awarded any contracts for the work; that plaintiff was the lowest bidder; that the superintendent entered into any contract with plaintiff to do the work, etc. At the trial plaintiff rested his case without introducing any evidence, upon the theory that, as his said averments of the making and recording of the assessment, diagram, etc., and the return and recording of the warrant were not denied in the answer, and must be taken to be true, therefore those averments made a prima facie case for plaintiff. Thereupon the defendants moved for a nonsuit upon the ground that plaintiff had failed to introduce any evidence tending to prove those allegations of the complaint which are denied in the answer. The court granted the motion for a nonsuit, and rendered judgment for defendant. From this judgment plaintiff appeals.

We think that the court erred in granting the nonsuit. It was evidently granted upon the theory that the admission in the answer of alleged facts which, under the statute, constituted a prima facie case for plaintiff, was not the equivalent of the proof of these facts, and that the warrant, assessment, diagram, certificate, etc., should have been formally introduced in evidence by plaintiff, notwithstanding their admission by the pleadings. But the case of Oakland Bank v. Sullivan, 107 Cal. 428, 40 Pac. 546, declares the law to be otherwise, and we see no good reason for not following it. That was an action to foreclose a mortgage, but it involved the validity of a street assessment set up in the cross-complaint of certain defendants. The cross-complainants introduced some evidence to sustain their lien, and defendant Sullivan, the owner of the land, moved for a nonsuit as to cross-complainants on the ground of the insufficiency of the evidence to support the lien, which motion was denied, and Sullivan appealed. The court said: "The court did not err in refusing to grant such motion, though the evidence offered may have been insufficient to make out a case for the plaintiffs in that cross-complaint had it been incumbent upon them to offer any proof at all. The act (St. 1885, p. 157, c. 153, § 12) provides that the 'warrant, assessment, and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment * * * and of the right of the plaintiff to recover in the action.' Here the cross-complaint of Bannister & Lewis averred the delivery to them of such warrant, assessment, and diagram, and exhibited the character of the same with sufficient particularity to show that they were made in conformity with sections 8 and 9 of the act. It also alleged the making and return by their agent of the affidavit of demand and nonpayment, as required by the succeeding section 10. None of such averments were denied in appellant's answer. They were material allegations (Himmelman v. Danos, 35 Cal. 441), and, being undenied, stand as established facts in the case. It was therefore unnecessary to produce in evidence the documents thus alleged and described, and the prima facie effect imputed to them by the statute operated to cast upon appellant the burden of proof. He might, if he could, have disproved any statement of the cross-complaint put in issue by him, but it seems he made no attempt to do so." And after some allusion to a ruling in Himmelman v. Danos the court said: "But it does not compel formal proof of matters which, being alleged, are admitted either expressly or impliedly. Such cases are subject to the general rule of procedure prescribed by the Code (Pacific Paving Co. v. Bolton, 97 Cal. 9, 31 Pac. 625), among which is that every material allegation of the complaint not controverted by the answer filed must, for the purposes of the action, be taken as true. Code Civ. Proc. § 462. See City of Stockton v. Dahl, 66 Cal. 377, 5 Pac. 682." The principle might not apply to immaterial allegations, but the allegations here in question, as was stated in the Bank of Oakland v. Sullivan, were material. They were essential to plaintiff's cause of action.

The judgment appealed from is reversed.

We concur: LORIGAN, J.; HENSHAW, J.

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146 Cal. 718

CRAIG v. BOONE, Tax Collector. (S. F. 3,192.)

(Supreme Court of California. May 9, 1905.)

TAXATION—INVALID TAX—TAX COLLECTOR—PAYMENT—RECOVERY—ACTIONS.

Where a tax collector, on receiving payment of a tax levied for the maintenance of a high school, paid the same into the county treasury, as required by Const. art. 11, § 16, Pol. Code, § 3753, he, being a mere agent for the collection and payment of the tax, was not liable to be sued in assumpsit by the taxpayer to recover the same on the ground that the tax was illegal.

Commissioners' Decision. Department 2. Appeal from Superior Court, Lake County.

Action by Joseph Craig against P. T. Boone. From a judgment for defendant, plaintiff appeals. Affirmed.

T. B. Bond and T. J. Sheridan, for appellant. McNab & Hirsch, for respondent.

SMITH, C. This is a suit to recover from the defendant the sum of $391, the amount of tax, with penalty, levied on the plaintiff's property for the maintenance of a pretended union high school. This was paid by the plaintiff under protest, and it is claimed by him, on the facts alleged in the complaint, that the tax was void. A demurrer to the complaint was sustained, and judgment thereon entered. In support of the demurrer, one of the grounds urged is that the suit cannot be maintained against the tax colector, and this contention we think should be sustained. Whether the tax was void or the contrary, it was the duty of the defendant, on receiving this money, to pay it into the county treasury (Const. art. 11, § 16; Pol. Code, § 3753; San Francisco v. Ford, 52 Cal. 199); and having done so—as, in the absence of allegations in the complaint to the contrary, it is to be presumed he did—it has been said by the court, "It would violate all principles of justice to hold him liable to the plaintiff therefor" (Phelan v. San Francisco, 120 Cal. 5, 52 Pac. 39); and accordingly in a later case it is said: "He (the tax collector) was but the agent of the county for the collection of the tax. * * * He was not concerned with the validity of the tax. If he failed to collect it because of its illegality, he was not responsible to the county; and if he collected it, and it subsequently proved to have been illegally assessed, he was not responsible to the aggrieved taxpayer." Bailey v. Johnson, 121 Cal. 563, 54 Pac. 80. In the latter case, indeed, what was said was not necessary to the decision, and in the former there was another ground on which the case may have been disposed of. But, however this may be, we concur in the views expressed by the court. For the suit is in the nature of assumpsit for money had and received by the defendant to the plaintiff's use (Cooley on Taxation, 1482 N. and authorities cited), which cannot be maintained against a mere agent or servant after he has paid over the money to his principal (1 Chitty on Pleading, 365; Guy v. Washburn, 23 Cal. 113; Greenway v. Heard, 4 T. R. 553; Sadler v. Evans, 4 Burr. 1985, and other cases cited; Frye v. Lockwood, 4 Cow. 454; 2 Cooley on Taxation, 1482–3). Had the asesssment been void on its face (Cooley on Tax., 1477 et seq.), or were the money still in the hands of the defendant, or were the suit against the county treasurer into whose hands the money had passed (Id. 1482), the case might be different; but on these points it is unnecessary to express an opinion. Several cases are cited by the appellant in which suits of this kind were maintained against the tax collector. But none of these seem to have any application, unless it be McCabe v. Carpenter, 102 Cal. 469, 36 Pac. 836, which was in some respects different, and in which the point was not considered.

We advise that the judgment be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

146 Cal. 708

GOLDBERG v. BRUSCHI. (S. F. 3,004.)

(Supreme Court of California. May 8, 1905.)

1. Quieting Title—Mineral Lands.

In a suit to quiet title to mining land, when plaintiff made his proof of citizenship and of discovery of gold-bearing quartz on the premises, and had shown a location according to the requirements of law, he established his case prima facie, and it was not necessary for him to make further proof that the land was unoccupied mineral land of the United States.

2. Same—Forfeiture—Evidence.

Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], provides that on a failure to comply with the conditions imposed for acquiring mineral land the claim or mine on which such failure occurs shall be open to relocation in the same manner as if no location had ever been made. *Held*, that a forfeiture under the statute cannot be established except upon clear and convincing proof.

3. Same—Burden of Proof.

In a suit to quiet title to a mining claim, defendant having proved his location, it was plaintiff's right to assume the burden of showing defendant's failure to do the required amount of work on the claim, although he had not alleged any such forfeiture in his complaint.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 101.]

4. Mining Lands—Relocation of Claim.

Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], in relation to mining claims, provides that on a failure to comply with the conditions of the statute (among them being a requirement for a certain amount of annual work) the claim shall be open to relocation, as if no location had ever been made. *Held*, that where a locator failed to do the required work the land became subject to relocation, although the original locator remained in possession.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 57.]

Commissioners' Decision. Department 2. Appeal from Superior Court, Mariposa County; John M. Corcoran, Judge.

Action by Max Goldberg against Demetrio M. Bruschi. From a judgment in favor of defendant, plaintiff appeals. Reversed in part and in part affirmed.

Leon Samuels (J. J. Trabucco, of counsel), for appellant. J. B. Curtin and Congdon & Congdon, for respondent.

CHIPMAN, C. Action to quiet title to mining land. The cause was tried by the court, and defendant had judgment, from which plaintiff appealed on bill of exceptions.

The findings are made up largely of probative rather than of ultimate facts. It was found: (1) That one Francisco Bruschi, on March 15, 1885, located a quartz mining claim, the Quail quartz mine, 600 feet wide and 1,500 feet long, in Mariposa county, particularly described in the findings; that by mesne conveyances afterward, to wit, October 13, 1897, the said mine became the property of defendant. (2) That defendant on January 1, 1897, located a quartz mining claim of the same extent as the said Quail quartz mine, and adjoining it on the southerly end thereof, called the "Last Chance Quartz Mine," particularly described in the findings. (3) That prior to the month of December, 1899, defendant "did let, bond, and agree to convey" said two mines "to the Quail Mining Company," and that during all of said month of December and the month of January, 1900, said company was in possession of said mines, and "did cause to be erected upon said Quail quartz mine improvements consisting of hoisting works, barn, and blacksmith shop, and other buildings of the value of more than three thousand dollars, and had extended two tunnels and drifts that were on the said Quail quartz mine." (4) That during the month of December, 1899, one Barion entered upon a portion of said Quail quartz mine referred to in the foregoing paragraph 3, and attempted to make a location under the name of the "East Quail Quartz Mining Claim" by including a portion thereof together with other lands, thus conflicting with said Quail quartz mine to the extent of 7.34 acres, particularly described in the findings. (5) That plaintiff, through the said Barion, in the said month of December also entered upon said Last Chance quartz mine, and made a location named the "Indian Creek Quartz Mining Claim," a part of which so located embraced a portion of said Last Chance mine, and conflicted with said Last Chance mine to the extent of about 12.94 acres, and also conflicted with said Quail quartz mine to the extent of 0.093 acres. (6) That at the time said Barion made said locations he well knew that defendant was the owner of said Quail quartz mine and said Last Chance quartz mine, and knew that defendant had agreed to sell the same to said corporation, and knew that said company was in possession of each of said claims, and had expended large sums of money in working the same. As conclusions of law the court found: (1) That the defendant was, at the time the locations were made under which plaintiff claims, the owner of the said Quail quartz mine and the said Last Chance mine. (2) That in the absence of any issues raised by the pleadings, and in the absence of any proof by plaintiff that the work required to be done under section 2324 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1426] was not done on defendant's said claim for the year 1899, he (defendant) "is entitled to the presumption of law that the law had been complied with, and that the amount of work required to be done upon each of said quartz mines * * * was done during the year 1899." (3) That plaintiff has no right to or interest in the portions of his said claim which lie within the exterior boundaries of defendant's said claims. Defendant had judgment in accordance with the foregoing, and it was also adjudged that plaintiff has no right to or interest in the said locations of plaintiff outside of the exterior lines of the said locations of defendant.

The pleadings were verified. Plaintiff did not, in his complaint, allege that defendant had forfeited his title to the mines, or either of them, claimed by him—i. e., did not plead forfeiture—nor did he offer any evidence of forfeiture in his opening case. After defendant had submitted his evidence of ownership, plaintiff in rebuttal sought to prove that as to the Last Chance mine defendant had forfeited his location by failure to do the work required by the Revised Statutes of the United States. Defendant objected on the ground that plaintiff had not pleaded abandonment or forfeiture. The court ruled that it would admit no testimony showing forfeiture or abandonment of the Last Chance by defendant. Plaintiff thereupon moved the court for leave to amend his complaint by alleging that "defendant has failed to perform any assessment work on or for the Last Chance claim either in the year 1897, 1898, or 1899, or at any time since the location thereof, and that said defendant has forfeited his said claim." The ground urged for the amendment was "that plaintiff was taken by surprise by the ruling of the court," and that plaintiff had relied upon his view of the law that "no proof of forfeiture could be made until defendant had shown the nature of his title, and that until then plaintiff was not called upon to plead or prove forfeiture." The court denied the motion. These rulings are urged as error.

Plaintiff specified numerous other errors, particularly as to the insufficiency of the evidence to support certain of the findings. The principal question presented by the appeal arises out of the rulings of the court above stated. The view taken by counsel for defendant, and apparently followed by the trial court, seems to have been that plaintiff could recover only on the strength of his own title, and that, if he expected to show that the title of defendant, whatever it might be, was for some reason forfeited, he should have so alleged in the complaint and proved it in his opening case; and that, not having done so, the refusal of the court to allow him to amend the complaint was not error, for the evidence would not be proper in rebuttal. It is true that in an action to quiet title to land the burden rests upon the plaintiff to show title in himself, failing which he is not entitled to recover. San Francisco v. Ellis, 54 Cal. 72; Winter v. McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; Heney v. Pesoli, 109 Cal. 53, 41 Pac. 819; McGrath v. Wallace, 116 Cal. 548, 48 Pac. 719; Weed v. Snook, 144 Cal. 439, 77 Pac. 1023; Schroder v. Aden Gold Min. Co., 144 Cal. 628, 78 Pac. 20. This rule, however, does not require that plaintiff shall, in opening his case, show that the title which the defendant may plead in his answer has been for some reason forfeited. Plaintiff may not, and often does not, know what the adverse interest of defendant is against which plaintiff seeks to quiet his title. How, then, can he be expected to anticipate defendant's answer and plead forfeiture? When the answer came in, it was deemed to be denied. Of course, if plaintiff has shown no title or right of possession, and defendant is in possession, it is immaterial by what right defendant holds possession, and plaintiff cannot recover. Defendant's mistake and the error of the court probably arose from the mistaken belief that plaintiff should have shown, as part of his case, that defendant's pretended title was invalid, and that he could not do this in rebuttal. When plaintiff made his proof, as he did, of citizenship, and that he had made a discovery of gold-bearing quartz in the land, and had shown a location according to the requirements of the law, he established his case prima facie, and he was not called upon to make further proof that the land was unoccupied mineral land of the United States. It was shown to be public land, and the presumption is that all public land is unoccupied. Plaintiff's claims were located in December, 1899, and he had all of the year 1900 in which to do assessment work, and the action was brought in January, 1900. The burden was then put upon defendant to show that the location under which he claimed title was prior in time and superior in right. It was held in Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246, that "evidence of abandonment may be given without a special plea under a denial of title"; and in Contreras v. Merck, 131 Cal. 211, 63 Pac. 336, it was held not necessary for plaintiff to plead a forfeiture or abandonment of a prior location made by defendant. Defendant contends that the contrary rule was held in Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040, and in Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708. In the first of these cases the question was as to the burden of proof where forfeiture is claimed, and what was said related to the defendant who disputed the validity of plaintiff's title and alleged forfeiture. Whether a defendant in such case as the present one is required to allege forfeiture before he will be permitted to prove it as a defense to plaintiff's title, is not the question here. The point decided in Harris v. Kellogg was as to the burden of proof. The rule of pleading now before us was not involved. The Revised Statutes of the United States (section 2324 [U. S. Comp. St. 1901, p. 1426]) do not use the word "forfeiture." The provision is: "Upon a failure to comply with these conditions [among them to do the required annual work] the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made." Treating this provision as, in effect, working a forfeiture, the courts have held that it cannot be established except upon clear and convincing proof of the former owner to have had work performed or improvements made to the amount required by the law (Hammer v. Garfield M. & M. Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964); and, as we have seen, the burden of proving failure to comply with statutory conditions is upon the one who asserts it. When, therefore, defendant proved his locations, it was plaintiff's right to assume the burden of showing defendant's failure to do the required work, and this he was not allowed to do.

As to the Quail quartz mine, we can see no ground whatever for questioning the conclusions of the trial court or the findings in respect of it. So far as the East Quail location of plaintiff and his Indian Creek location conflicted with the Quail claim of defendant, they were invalid. Plaintiff knew when he made his said locations that defendant had made a valid prior location of the Quail mine, was in actual possession through the company that held a bond on the mine and was then actively carrying forward development work, and had done work and had made improvements thereon of the value of $5,000. As to the Last Chance mine, defendant showed a valid location in January, 1897. There was no evidence submitted by defendant, or at all, of any work done on this claim from the time the location was made to the time plaintiff made his locations of the East Quail and Indian Creek claims. The only testimony of defendant's possession of the Last Chance claim was that given by himself. When asked if he continued in possession of the Quail mine, he replied: "Yes, sir. Up to the time I gave the bond to the Quail Mining Company and since the time that I located the Last Chance, I have continued in possession of the same." Whether this was actual possession—pedis possessio—or only the constructive possession which follows location, does not appear. It is not disputed that plaintiff's locations were valid as to land not embraced in defendant's Last Chance location, and as to this it was valid if the land was then unoccupied mineral land, and open to relocation. The position of the parties, briefly stated, was this: Defendant's claim was located in 1897. He remained in possession thenceforward, and was in possession at the time of plaintiff's location in 1899, but had done no assessment work, and was not at that time engaged in doing any work thereon. Plaintiff thereupon made locations including a portion of defendant's said claim, and, so far as it appears, it was accomplished peaceably, and without disturbing defendant's possession, such as it was. Clearly defendant's location of the Last Chance could not be the source of a valid claim after the close of the year 1898, unless he had done the required assessment work by that time, or unless he had in the year 1899, before plaintiff made his locations, begun development work, and prosecuted it diligently. But he did no work on his claim at any time, and it therefore ceased to have any validity as against a valid relocation. Defendant's counsel seem to hold the view that his possession was enough to remove the land from the category of unoccupied land, or at least that it was sufficient to prevent plaintiff from making a valid location. The case of Belk v. Meagher, 104 U. S. 285, 26 L. Ed. 735, is cited. We do not think that case supports, or that any case can be found supporting, such contention, if that be defendant's view. Such a construction of the statute would permit a locator of mineral land to hold it against all the world for an indefinite time without doing any development work whatever. We think the findings that defendant is the owner of the portion of the Last Chance mine which is in conflict with plaintiff's locations is not supported by the evidence. It is not necessary to notice other points raised by the appeal.

It is advised that the judgment, so far as it affects the Quail quartz mine of defendant, be affirmed, and so far as it affects defendant's right to the ground in conflict in the Last Chance quartz mine of defendant it be reversed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment, so far as it affects the Quail quartz mine of defendant, is affirmed, and so far as it affects defendant's right to the ground in conflict in the Last Chance quartz mine of defendant it is reversed: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

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146 Cal. 690

CUTTEN v. PEARSALL. (S. F. 2,912.)*

(Supreme Court of California. May 6, 1905.)

1. Contract—Action for Breach—Execution.

Where the complaint contained a copy of the written contract sued on, and the genuineness and execution thereof were not denied by verified answer, as required by Code Civ. Proc. § 447, its execution and genuineness were admitted.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 864.]

2. Brokers—Action for Commissions—Evidence.

Where a contract provided that plaintiff should be paid $7,500 commissions for services when a sale of certain lands was consummated, a written contract of sale entered into between defendant and a third person was admissible to show consummation of a sale.

3. Same—Performance.

In an action on a contract for broker's services, evidence *held* to show performance by plaintiff of the conditions of his contract, and that the sale of the land had been consummated by defendant as provided by the contract for compensation.

4. Same—Instructions.

Where a contract for broker's compensation provided that plaintiff should be entitled thereto when the sale was consummated, and there was evidence that a sale had been made, defendant was not prejudiced by an instruction submitting plaintiff's right to compensation under the contract, without regard to the party to whom the lands were sold, which was objectionable as submitting the interpretation of the written contract to the jury.

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*Rehearing denied June 5, 1905.

5. Trial—Instructions.

Refusal of an instruction substantially covered by another instruction given for defendant was harmless.

6. Appeal—New Trial.

In the absence of facts showing an abuse of discretion, an order denying a new trial, on the ground that the evidence is insufficient to justify the verdict, will not be reversed on appeal.

Department 1. Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by David Cutten against C. E. Pearsall. From a judgment for plaintiff, defendant appeals. Affirmed.

J. N. Gillett and F. A. Cutler, for appellant. Ernest Sevier and Denver Sevier, for respondent.

VAN DYKE, J. The complaint in the action under consideration contains three counts. The first is upon an express contract, a copy of which is set forth; the second is a common count in assumpsit; the third is a common count for money had and received. The contract set forth in the first count of the complaint is as follows:

"Eureka, California, Dec. 29th, 1899.

"It is agreed by C. E Pearsall and David Cutten, that his commissions for services rendered in securing lands in T 8 N, R 1 E and T 8 N, R 2 E, Humboldt Meridian, and for all services heretofore rendered by him, and for all services hereafter to be rendered by him in the sale of the tract of land on Little River and Maple Creek, known as the Pearsall deal, shall be the sum of $7,500.00, when the sale is consummated.

"[Signed] P. E. Pearsall.

"I approve the contract. B. F. Durphy."

It is also alleged in the complaint that the plaintiff had duly performed all the conditions of said contract to be performed by him, that the sale mentioned in said contract has been duly consummated, and that the defendant had not paid plaintiff said sum of $7,500, or any part thereof. The complaint is unverified, and the answer, which is also unverified, contains simply a general denial. The case was tried before a jury, and a verdict rendered in favor of the plaintiff for the sum mentioned, to wit, $7,500, with interest thereon at the rate of 7 per cent. per annum from January 24, 1901. The defendant thereafter moved for a new trial, which was denied, and he appeals both from the judgment and from the order denying his motion for a new trial.

In support of the appeal, the appellant relies upon certain alleged errors committed by the trial court in the admission and exclusion of certain evidence, and in giving and refusing to give certain instructions. The main contention, however, appears to be, and is so admitted by counsel in the oral argument, that the evidence does not support the verdict.

It is claimed that the evidence fails to support the verdict, on the assumption or theory that the contract set forth in the complaint as the basis of the action is not the entire contract between the parties, but that it must be taken in connection with a prior written contract between the parties on the same subject. It appears that in the summer of 1897 plaintiff and defendant were engaged as brokers in the selling of lands in Humboldt county under an oral agreement. The plaintiff in his testimony stated: "I was to get the land together, assist in getting the land together, get it as cheap as possible, and at that time we had an understanding that we would divide the profits equally up to $12 an acre. * * * I did not know who the purchaser was to be until we started in. * * * In November, 1897, Mr. B. F. Durphy came; he was the supposed purchaser or promoter. * * * Mr. Durphy had parties in the East who were going to purchase it. * * * Through the year 1898 the sale was still being made to Mr. Durphy and the men he represented. I understood that he had men in the East who were going to take the land. I didn't care who Mr. Pearsall sold this land to. * * * During all this time Mr. Pearsall was still making the sale to Mr. Durphy, and I expected right along through the year 1898 and 1899, every month or two, that this sale would be closed. Mr. Durphy told us his plans, and what progress he was making." Finally, the parties entered into the following written contract:

"This agreement made this 17th day of March, 1899, between C. E. Pearsall of the County of Humboldt, State of California, the party of the first part, and David Cutten of the same County and State, the party of the second part, witnesseth:

"That it is hereby agreed by and between the parties hereto that the said party of the second part shall aid and assist the said party of the first part in securing titles to, deeds, assignments, transfers, and all other work requisite in selling a tract of 10,000 acres more or less of redwood or other lands, situate in Humboldt County, California, on Little River and Maple Creek in Township 8 North, Ranges 1 and 2 East, Humboldt Meridian, to B. F. Durphy, of Boston, Massachusetts, or to his agent, or to any other person or corporation through him or suggested by him, and in consideration for said services, it is agreed between the parties hereto, that the party of the first part shall pay to the party of the second part after the said lands are sold one-half of the product of what remains after deducting all necessary local expenses in making such sale together with the amount paid for said lands, from an average total of $12.00 per acre for each acre sold of the whole amount, and such payment is to cancel all claims the party of the second part may have against the said party of the first part. * * * And it is further agreed between the parties hereto that if for any reason this sale cannot be made, the party of the second part shall have no claim against the party of the first part for services rendered in this matter."

Prior to the execution of the foregoing contract, the parties, Cutten and Pearsall, had been operating under an oral agreement, as already stated. Subsequently, it appears that there was some misunderstanding or hitch in the contemplated deal between defendant and Durphy, and the plaintiff became dissatisfied with the terms of the agreement entered into on his part, fearing that in case the lands should be turned over by defendant to some other parties he might lose his commissions, or the value of his services, entirely. He testifies: "In the fall of 1899 Mr. Durphy and Mr. Wandesforde and Mr. Pearsall were quarreling among themselves, and the price of the land kept going up until I became alarmed that if the sale was made my profits would be cut out by reason of the increased price of the land, and I wanted Mr. Pearsall to give me a specified sum instead of the commission that I was to receive. This sum was $7,500." He further testifies: "I said: 'You folks have your difficulties among yourselves. I want a contract for a stipulated sum.' * * * I told him I wanted a contract signed now, before I went any further with the thing, or else I would see about it, and I wrote up the contract and he signed it, and Mr. Durphy was there, and I said to Mr. Durphy: 'You approve this contract; you see that I will get my money.' That is what he approved it for; that is all I cared about. * * * I wanted Mr. Pearsall to sell the lands to anybody."

It will be seen by reference to the two contracts that the one sued upon is different in two very important points from the contract of March, and the latter was evidently intended between the parties to be substituted for the former. The compensation to the plaintiff for his services was to be a definite sum instead of commissions, and the qualification in the former contract, that the sale contemplated was to be "to B. F. Durphy, of Boston, Massachusetts, or to his agent, or to any other person or corporation through or suggested by him," was entirely omitted from the last contract, and in lieu thereof the payment was to be made "when the sale is consummated." This last contract is the one sued upon, and the complaint contains a copy thereof, and the genuineness and due execution of such instrument is admitted by the failure of the defendant to deny the same by a verified answer. Code Civ. Proc. § 447. The terms of the last instrument between the parties, to wit, the one in suit, having been reduced to writing, there can be no evidence of terms other than the contents of the writing, except in certain specified cases, none of which are applicable here. The validity and genuineness of the instrument are admitted by the pleadings, as already shown, and there is no mistake or imperfection in the writing which appears or has been put in issue by the pleadings. Code Civ. Proc. § 1856. The intention of the parties is to be ascertained from this writing alone. Civ. Code, § 1639. The only part of the agreement in suit about which there can be any doubt, and in reference to which oral testimony would be permissible at all to explain it, is what is understood as the "Pearsall deal." The plaintiff testifies that the sale of this land was known as the "Pearsall deal," and the witness Durphy testified: "The words 'Pearsall deal' refer to the Little river and Maple creek tract of land." The witness Wandesforde's testimony is similar.

The complaint, after setting forth the contract—the genuineness and due execution of which are admitted—alleges that the plaintiff has duly performed all the conditions of said contract to be performed by him, and that the sale of the lands mentioned in said contract has been duly consummated, and that the defendant has not paid the plaintiff the sum of $7,500, or any part thereof. The only issues presented by the pleadings to be passed upon by the jury were, first, whether the plaintiff had performed the conditions of this contract—and there seems to be no question as to that—and, second, whether the sale of the land mentioned in the contract had been consummated. In the oral argument on behalf of the appellant, counsel says: "It appears that, nearly two years after the original contract was entered into, the defendant did effect a sale of the lands to parties other than B. F. Durphy. This fact appears from a contract of sale in writing, entered into between Pearsall and one Henry;" and counsel complains that this evidence was introduced against the objection of the appellant. It being an issue to be proved whether the sale had been consummated, it was proper for the plaintiff to introduce any competent evidence to support that issue on his behalf, and it makes no difference whether the evidence was obtained from the defendant or from any other party. The evidence shows that the plaintiff did fully perform the contract on his part to be performed, and that he has not been paid for his services according to the contract is quite evident from the protracted contest on the part of the defendant to resist such payment.

Defendant's motion for a nonsuit, under the circumstances, was properly denied.

As already stated, the court did not err in permitting the plaintiff, over defendant's objection, to offer in evidence the contract bearing date August 21, 1900, between the defendant and J. E. Henry & Sons. The purpose of the evidence was in support of the allegation of the complaint, which was denied by the defendant, that the sale of the lands mentioned in the contract sued upon had been duly consummated.

Appellant takes exception to a portion of the instruction given at the request of the plaintiff, as follows: "That a sale of said lands was either made to B. F. Durphy or to the person suggested by or through him, or, if not made to such a person, that it was understood and agreed between the parties that the plaintiff should receive such compensation, no matter to whom such lands should be sold." Appellant claims that there is no evidence to warrant such an instruction. By the terms of the written contract sued upon, the plaintiff is entitled to his compensation "when the sale is consummated," and, as already stated, the limitation in the former contract is entirely omitted. The only objection that can be made to the portion of the instruction complained of is that it submitted to the jury the question that was proper for the court to determine as matter of law, to wit, the interpretation or meaning of the written contract sued upon. Code Civ. Proc. § 1858. It is not apparent, however, that the action of the court in this respect could have prejudiced the defendant.

The appellant further assigns as error the refusal of the court to give defendant's instruction No. 6, but the court did give defendant's instruction No. 5, as modified, in the following language: "If a party to a contract breaks it, and fails thereby or refuses to carry out its terms, the other party may treat the contract as at an end, and the party causing a breach thereof cannot maintain an action thereon against the other party. Therefore I instruct that if you find from the evidence that the plaintiff under the contract set forth in his complaint was to render certain services to the defendant in the sale of the tract of land mentioned in the said complaint, and which consisted in part of securing deeds of said land to be made in the name of the said defendant and placed in escrow, to be delivered to him upon the payment of the price of the land conveyed thereby; and if you further find that after the execution of the said contract the said plaintiff, without the consent of the defendant, abandoned the contract between them, and, in pursuance of such abandonment, went to different owners of said land and induced them not to leave their deeds in the defendant's name, but to make new deeds in favor of one H. W. Wandesforde, and in pursuance of which, and for the purpose of preventing the said defendant from consummating such sale, deeds to said land were so made in favor of the said Wandesforde—then I instruct you that the said plaintiff cannot recover in this action, and your verdict should be for the defendant." This instruction as given substantially covers the ground embraced in the sixth instruction, and therefore the refusal to give it was harmless; and the same may be said of defendant's instruction No. 7, given by the court as modified.

The main ground on which the motion for a new trial was based was the alleged insufficiency of the evidence to justify the verdict.

"The granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion." Domico v. Casassa, 101 Cal. 413, 35 Pac. 1024.

The judgment and order appealed from are affirmed.

SHAW, J. (concurring). I concur in the judgment. The contract of December 29, 1899, provided that the plaintiff should receive $7,500 for his services in "the sale of the tract of land on Little river and Maple creek, known as the 'Pearsall deal,'" and that the money should become due when the sale was consummated. The complaint avers that the sale had been consummated before the action was begun. The answer denies this allegation. It therefore became a material issue in the case whether or not the sale referred to in the agreement had been consummated at the time the action was begun. The above-quoted clause is ambiguous, and for this reason it was competent to introduce parol evidence of the circumstances under which the agreement was executed, for the purpose of determining therefrom what was meant by the phrase "Pearsall deal." Upon this question the evidence was conflicting. The theory of the plaintiff was, and there was evidence in support of it, that, prior to the execution of either of the contracts referred to, the plaintiff and the defendant, with others, were engaged in the enterprise of obtaining options from a large number of owners of small tracts of timber land for the purpose of obtaining control of a large body of such land and making a sale thereof to some third person, and that this particular enterprise was what was known as the "Pearsall deal," and that in the light of this testimony the sale of the tract known as the "Pearsall deal," mentioned in the contract sued on, meant any sale of the particular tract which was then under the control of the parties to any person. The theory of the defendants, on the other hand, was that at the time the contract of December 29th was executed the only deal in contemplation between the parties, and the one referred to in the contract sued on was the sale to B. F. Durphy of the particular tract of land upon which they had previously obtained options, being the sale referred to in the agreement of March 17, 1899, set forth in the opinion of Mr. Justice VAN DYKE, and that, as this sale had never been consummated, the plaintiff was entitled to no compensation. It was a question for the jury to determine which of these two interpretations of the ambiguous phrase of the contract was the real expression of the intention of the parties. Upon this point the court instructed the jury that the contract could be explained by reference to the circumstances under which it was made, and the matter to which it relates, in case the intention could not be ascertained from the writing alone; and that if they found that it was understood by the contract that the plaintiff should have no claim against the defendant for services in the sale of the land unless the same should be sold to Durphy or his agent, or some person suggested by him, and that the sale was not made to such person, then they should find for the defendant; but that if they found that it was the intention of the parties that plaintiff should receive the compensation specified, no matter to whom the lands should be sold, and that thereafter the defendant sold the land to third persons, then the verdict should be for the plaintiff for the sum sued for. This is undoubtedly correct, and the only criticism to be made is that it directs the jury more to the ultimate conclusion to be reached by it than to the particular facts which it should find in order to arrive at the conclusion. It would have been better, for instance, if the court had instructed the jury to ascertain from the circumstances the meaning of the phrase "Pearsall deal" as used in the contract sued on, and that if they found it was meant by the parties to refer to the particular sale of the land to Durphy or his agent, or to some one suggested by him, as provided in the previous agreement of March 17, 1899, and that such sale had not been made, then they should find for the defendant; but that if they found that the parties customarily used the phrase "Pearsall deal," not to designate any particular sale of lands, but to designate a particular tract or aggregation of tracts of land upon which they had procured options for the purpose of making a sale thereof in one body to any purchaser who could be found at a satisfactory price, and that it was used in this sense in the contract sued on, and that thereafter a sale of said lands had been made by the defendant, then the plaintiff should recover. But the instructions given were in substance to the same effect, and I do not think they could have been misleading to the jury.

There was evidence sufficient to sustain the verdict upon the theory contended for by the plaintiff.

I concur: ANGELLOTTI, J.

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146 Cal. 714

FRASER v. CALIFORNIA STREET CABLE R. CO. (S. F. 3,391.)

(Supreme Court of California. May 9, 1905.)

1. Street Railroads—Injuries to Passenger—Contributory Negligence.

In an action against a street railroad company for injuries to a passenger who came in contact with a vehicle while he was standing on the running board of defendant's car, evidence *held* sufficient to support a finding that plaintiff was guilty of contributory negligence.

2. Same—Instructions.

In an action against a street railroad company for injuries to a passenger, instructions that defendant was not responsible for injuries which were the proximate result of plaintiff's negligent failure to use his natural senses for his own safety were proper.

3. Appeal—Exclusion of Evidence—Harmless Error.

In an action for personal injuries, error, if any, in excluding X-ray photographs of plaintiff, and evidence that he was permanently injured, was harmless, where the jury found that plaintiff was guilty of contributory negligence.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Alexander Fraser against the California Street Cable Railroad Company. There was judgment for defendant, and from an order denying motion for a new trial plaintiff appeals. Affirmed.

Gavin McNab, for appellant. Deamer & Stetson and P. F. Dunne (William H. Hamilton, of counsel), for respondent.

GRAY, C. Action for injury to the person of plaintiff through the negligence of defendant while the former was a passenger on a street car of the latter. The defendant had a verdict and judgment in its favor, and the plaintiff appeals from an order denying him a new trial.

Appellant's first and principal contention is that the verdict is contrary to evidence because the evidence shows that the defendant's negligence was the proximate cause of plaintiff's injury. Without substantial conflict the evidence shows that the plaintiff as a passenger boarded defendant's car going west on California street at the northwest corner of California and Sansome streets. The car at that time was well loaded with passengers, the seats being all taken, with three or four standing inside the middle or inclosed section of the car, and one standing on the rear platform at the front of the rear open section, and with his back against the right hand rear window of the closed or middle section. Plaintiff, a young man, 20 years of age, with some two years' experience in riding on these same cars, took a standing position on the right hand rear "foot or running board just above the ground that passengers use in getting on and off the cars," holding to the stanchion with one or both hands. At this time there were no persons standing on the platforms or footboards of the front open section, and plaintiff seems to have been the only one standing on the footboards of the rear open section. There was but one person standing on the platforms of the rear open section of the car so far as the evidence discloses. It is apparent that the plaintiff was not forced to ride on the footboard of the car, but might have taken a more secure position thereon if he had seen fit to do so. He rode in this position across Leidesdorff street, a distance altogether of one short block, when his body came in collision with the front footboard, otherwise called the dashboard, of a heavy wagon that was standing stationary back into the curb, "not exactly square," on the north side of California street, just west of Leidesdorff, the horses hitched thereto turned west up California street at right angles with the wagon. The motorman saw this wagon just west of Sansome street and approached it at half speed. He passed it without any part of it coming in contact with the car, and estimates that the dash or footboard in question came no nearer than 12 or 14 inches from the closed section of the car. Another witness familiar with the measurements of the car says that the footboard on which plaintiff stood extends but four inches beyond the outside line of the inclosed part of the car. It appears then that the foot or dash board of the wagon which injured the plaintiff must have been at least 8 inches outside of the outer edge of the footboard upon which plaintiff stood when injured. If the jury believed this evidence—and we must in support of the verdict presume that they did believe it—they were probably satisfied that the plaintiff negligently failed to keep a lookout in front, and negligently swung his body farther out from the stanchion than was necessary or compatible with safety. We do not mean to say that it is negligence per se for a passenger to ride where the plaintiff rode; but we do think that common prudence required that he should while riding there either keep his body well within the lines of the car, or if he was disposed to swing out beyond those lines he should have kept a diligent lookout to avoid coming in contact with other vehicles. There is no evidence that there was any irregularity in the track or any lurching of the car or moving of the wagon. It is common knowledge that on the streets of a city like San Francisco the street cars are continually passing other vehicles even closer than 12 inches and the plaintiff must have known of that fact. The facts and conclusions to be drawn therefore were for the jury, and we cannot say as a matter of law that they were not warranted in finding from the evidence that plaintiff's injury was the proximate result of his own negligence.

The cases of Lee v. Market Street Ry. Co., 135 Cal. 295, 67 Pac. 765, Esrey v. S. P. Co., 103 Cal. 541, 37 Pac. 500, and other cases cited by appellant bear very little analogy to the case in hand. The principle that "he who last has a clear opportunity of avoiding an accident by the exercise of proper care to avoid injuring another must do so" cannot be applied to the facts of this case. There is no evidence here that the employés of defendant at any time had any notice that plaintiff was occupying a dangerous position or was conducting himself in a negligent manner. They had a right to assume that persons riding where plaintiff rode would use reasonable care, and at least not allow themselves to come in collision with objects that came no nearer than a foot from the body of the car.

Several instructions of the court to the effect that defendant is not responsible for any injuries to plaintiff which were the proximate result of his negligent failure to use his natural senses for his own safety are complained of. It is well-settled law that if the negligence of the plaintiff contributes proximately to the injury of which he complains he cannot recover. The instructions complained of are within that rule, and in no way do they conflict with the other rule already referred to, that he who has notice of another's danger, and a clear opportunity to prevent his injury, must take advantage of that opportunity or be liable for his negligence in failing so to do, even though the other person may have been placed in the position of danger by his own negligence.

The alleged error of the court in excluding the X-ray photograph of plaintiff offered by him in rebuttal did not harm the plaintiff. The verdict for defendant must have been based on the ground that the injury to plaintiff was the result of his own contributory negligence, and not on any ground that he had not suffered injury, for the evidence without conflict shows that he did suffer serious injury. The X-ray photograph could have thrown light on nothing but the extent of the injury suffered, and this becomes immaterial in view of the verdict that plaintiff is not entitled to recover at all. The same thing may properly be said of the question asked as to whether the plaintiff was permanently injured. We see nothing further in the case requiring special notice.

We advise that the order appealed from be affirmed.

We concur: CHIPMAN, C.; HARRISON, C.

For the reasons given in the foregoing opinion, the order appealed from is affirmed: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

146 Cal. 686

HUMBOLDT LUMBER MILL CO. v. CRISP et al. (S. F. 3,263.)

(Supreme Court of California. May 6, 1905.)

MECHANICS' LIENS—DESTRUCTION OF BUILDING—LIEN ON LAND.

Under Code Civ. Proc. §§ 1183, 1185, giving a mechanic's lien upon property upon which labor is bestowed or for which materials are furnished, and declaring that the land upon which the building is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, shall also be subject to the lien, one furnishing material for a building which is destroyed by fire without the fault of the owner, before completion and before the claim of lien is filed, is not entitled to a lien on the land.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 413.]

Commissioners' Decision. Department 2. Appeal from Superior Court, Marin County; F. M. Angellotti, Judge.

Action by the Humboldt Lumber Mill Company against Edward Crisp and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Samuel Rosenheim, Alex. G. Eells, and H. K. Eells, for appellant. E. C. Chapman and Adams & Adams, for respondents.

GRAY, C. This action was brought to enforce mechanics' liens upon three acres of land owned by defendant upon which a house in course of construction had been destroyed by fire, without any fault of the owner, before it was completed, and before the claim of lien was filed. The defendant had judgment, and the plaintiffs appeal therefrom.

We are of opinion that under the peculiar language of our mechanic's lien law the lien has nothing to which it can attach if filed after the destruction of the building. Section 1185 of the Code of Civil Procedure provides: "The land upon which any building, improvement, well, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment is also subject to the lien, if at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, well, or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in said land, then only his interest therein is subject to such lien." If there is no building, it will be impossible for the court to determine that any land "may be required for its convenient use." In this case it was essential that the findings should dispose of all questions as to the land that might be necessary for the convenient use of the building, and accordingly the court did find "that the said land is not, nor is any part thereof, required for the convenient use and occupation of the building for and upon which plaintiffs furnished labor and material." This finding was the logical deduction from the other findings of the court to the effect that before the building was completed, before it was delivered to the owner, and before any lien was filed, it was destroyed by fire without any fault of defendant. In view of these findings and the above-quoted statute, the court could enter no judgment decreeing a lien upon any land. It would not fit the language of the Code, nor answer the requirements thereof, to confine the findings to "such portion of the land as was necessary for the convenient use and occupation of the building designed," as contended by appellant, for the Code says "so much as may be required for the convenient use and occupation thereof." This language looks to an existing house that can be occupied in the future, and not to a vacant lot upon which no house exists.

In addition to the foregoing considerations, our mechanic's lien law proceeds upon the theory that the laborer and materialman has an equitable right to follow his labor and material into the building of which it has become a component part, and have a lien on the building because it contains in it such labor and material, and that it is not just that the owner should succeed to that labor and material without seeing to it that compensation is rendered therefor to the persons furnishing such labor and material. In Tuttle v. Mountford, 7 Cal. 358, it is said: "The lien of the mechanic, artisan, and materialman is more equitable and more favored in law, because these parties have, at least in part, created the very property upon which the lien attaches." In Avery v. Clark, 87 Cal. 628, 25 Pac. 921, 22 Am. St. Rep. 272, it is said: "The principle upon which liens are allowed in favor of mechanics and materialmen is that their labor and materials have given value to the buildings upon which they have been expended, and that it is inequitable that the owner of the land who has contracted with them for such improvement, or who has stood by and seen the improvement in progress without making objection, should have the benefit of their expenditures without making compensation therefor." In Henderson Lumber Co. v. Gottschalk, 81 Cal. 641, 22 Pac. 860, it is said: "The owner is not made personally liable to the materialman, but his property is made liable for the material which he has actually received and retains in his building. This it seems to us is eminently just and right." The decisions in this state seem to regard the benefit conferred upon the owner by placing the labor and materials in his building as the true consideration for conferring the right of lien upon the parties furnishing such labor and materials. It cannot be said that this consideration exists where, as in this case, the building is destroyed before completion and before delivery to the owner. Here the owner has not derived, and can never derive, any benefit from the labor and materials furnished.

A further reason why the lien should not apply to the land in this case is found in a consideration and comparison of sections 1183 and 1185 of the Code of Civil Procedure. The first of these sections gives a lien "upon the property upon which they have bestowed labor or furnished materials." The second section cited says that certain land "is also subject to the lien." In these provisions we see an intention of the Legislature to make the lien on the building the principal thing, and the lien upon the land on which it is situated an incident of the completion of the building, and that, when the building is destroyed before completion, there can be no lien against the land on which it was being erected; "that the lien shared the fate of the building, and that the reason for binding the land ceases with the destruction of the building." Goodman et al. v. Baerlocher, 88 Wis. 287, 60 N. W. 415, 43 Am. St. Rep. 893; The Presbyterian Church v. Stettler, 26 Pa. 246; Wigton & Brooks' Appeal, 28 Pa. 163; Civ. Code, § 3540; Bouvier's Law D. "Accession."

The above and foregoing constructions of our mechanic's lien law also find support in the following well-considered cases: Coddington v. Dry Dock Co., 31 N. J. Law, 477; Wood & Co. v. Wilmington Conference Academy, 1 Marv. (Del.) 419, 41 Atl. 89; Holzhour v. Meer, 59 Mo. 434; Shines, Executrix, v. Heimburger, 60 Mo. App. 174.

The courts of several of the states undoubtedly hold that the mechanic's lien extends to the land, even though the building be destroyed before completion; but an examination of these cases discloses that in many instances they turn upon the peculiar language of the statute there under consideration, charging the land primarily with the lien. It will be unnecessary to review the cases from those states which adhere to the doctrine last referred to. It is sufficient to say that we concur in the reasoning of those cases cited from Pennsylvania and Wisconsin. The mechanic's lien statutes of these two states seem to accord most nearly with our own. There are, however, stronger reasons to be found in our statutes why the lien should not apply to the land, the building being destroyed, than are to be found in the statutes of any other state. One of these reasons is already adverted to, and consists in the fact that the land to which the lien is to apply must be designated by the court, and is limited to the convenient occupation of the building.

We advise that the judgment be affirmed.

We concur: COOPER, C.; SMITH, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

146 Cal. 683

THRASHER v. MORAN. (S. F. 3,235.)

(Supreme Court of California. May 6, 1905.)

1. MORTGAGES — FORECLOSURE — ATTORNEY'S FEES.

Where a complaint to foreclose a mortgage alleged that it provided that, in case of foreclosure, plaintiff should be entitled to 10 per cent. on the amount due, as "counsel fees," and that the mortgagor and the mortgaged property should be liable to plaintiff for "counsel fees," and prayed judgment for the amount due on the mortgage, "with interest, disbursements, costs, and counsel fees," a judgment by default allowing an "attorney's fee" was not objectionable on the ground that the complaint did not demand judgment therefor.

2. SAME—CAUSE OF ACTION.

A mortgagee's right to attorney's fees provided for in a mortgage in case of foreclosure is not a cause of action, but, like the costs, is a mere incident thereto.

3. SAME—COMPLAINT—INTEREST.

Where a complaint to foreclose a mortgage prayed for interest on the note, according to its terms, from its date, it was not necessary to allege, as a separate allegation, that interest was claimed at the rate specified in the note from the date of filing the complaint to the entry of judgment.

4. SAME—JUDGMENT.

Where a note secured by a mortgage drew 10 per cent. interest, a judgment authorizing foreclosure, with interest from the date thereof at the rate of 10 per cent., was erroneous as to the interest after judgment; the legal rate being but 7 per cent.

5. APPEAL—TRIVIAL ERROR—COSTS.

Where a judgment foreclosing a mortgage, appealed from, was erroneous only in that it allowed interest at 10 per cent. after judgment, instead of 7, such error was trivial and insufficient to entitle appellant to the costs of the appeal.

Commissioners' Decision. Department 2. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by William P. Thrasher against Thomas Moran. From a judgment for plaintiff, defendant appeals. Modified.

T. Z. Blakeman, for appellant. Jas. P. Sweeney, for respondent.

COOPER, C. This is an appeal from a default judgment of foreclosure, on the judgment roll, without a bill of exceptions.

It is claimed that the prayer of the complaint did not ask for attorney's fees, and that, as the relief granted against a defendant by default cannot exceed that prayed for in the complaint, the judgment is erroneous as to attorney's fees. The law is as stated by appellant, and the question is as to whether or not the complaint, in effect, did pray for attorney's fees. As a copy of the complaint, with a copy of the summons, was served upon appellant, he must be held to have had notice of all that the complaint stated to him, without regard to imaginary or technical criticism. He appeared by his attorney, and, as he did not answer the complaint, this court will not look with favor upon technical questions that in no way affect the merits. The defendant, with a copy of the complaint in his hand, and his attorney in court, allowed judgment to go against him by default. Therefore his position is such that this court does not feel inclined to relieve him unless the positive mandates of the law entitle him to relief.

The complaint alleges that the mortgage provides that in case of foreclosure the plaintiff shall be entitled to 10 per cent. upon the amount found to be due, as "counsel fees," and that the mortgagor and mortgaged property shall be liable to plaintiff for such "counsel fees." In the prayer of the complaint, after asking for judgment for the amount due on the promissory note, with interest, plaintiff asks that the property be sold, "and the proceeds applied to the payment of the amount due on said note and mortgage, with interest, disbursements, costs, and counsel fees." We think appellant understood the meaning of the above language. The fact that the decree provided for an attorney's fee of $50 did not take him by surprise. In O'Neal v. Hart, 116 Cal. 69, 47 Pac. 926, this court held that a provision in a mortgage to the effect that in a suit for its foreclosure the decree may be had for the sale of the mortgaged premises, and out of the proceeds there might be retained the costs and charges of making such sale, including counsel fees, authorized the court to include such counsel fee in its decree as a part of the obligation secured by the mortgage. In Alexander v. McDow, 108 Cal. 28, 41 Pac. 24, where the complaint contained no allegation as to attorney's fees, but the promissory note set forth in the complaint provided for them, and the prayer of the complaint asked for them, this court said: "It is fairly deducible from the complaint, therefore, that plaintiff asks an allowance of a specific sum as being reasonable and due for attorney's fees under the contract." And this court has held that it is not necessary for the complaint to allege that the mortgage provides for attorney's fees. Orange Growers' Bank v. Duncan, 133 Cal. 254, 65 Pac. 469. The attorney's fees are not the cause of action, but, like the costs, a mere incident to it. Carriere v. Minturn et al., 5 Cal. 435; Monroe v. Fohl, 72 Cal. 571, 14 Pac. 514; Rapp v. Spring Valley Gold Co., 74 Cal. 532, 16 Pac. 325; White v. Allatt, 87 Cal. 248, 25 Pac. 420.

The complaint prayed for interest on the promissory note according to its terms from its date. It was not necessary to state, as a separate allegation, that interest was claimed at the rate specified in the note from the date of filing the complaint to the entry of judgment. The case cited by appellant does not lend countenance to such contention. The judgment directs the commissioner out of the proceeds of sale to pay "the costs, taxed at $21.95, and the sum of $50 counsel fees of foreclosure, with interest thereon from this date at the rate of ten per cent. per annum." This part of the judgment is erroneous, as the legal rate of interest after judgment is 7 per cent. The judgment should be modified by striking out the words "ten per cent.," and inserting in lieu thereof the words "seven per cent." As the matter is trivial, and the attention of the court below was not called to it, the appellant should not recover the costs of this appeal. We advise that the judgment be modified by striking out the words "ten per cent.," and inserting in lieu thereof "seven per cent." and, as thus modified, it be affirmed; the respondent to recover costs of this appeal.

We concur: GRAY, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment is modified by striking out the words "ten per cent.," and inserting in lieu thereof "seven per cent.," and, as thus modified, it stands affirmed; the respondent to recover costs of this appeal: HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

146 Cal. 777

MASKEY v. LACKMANN, Sheriff, et al. (S. F. 3,377.)

(Supreme Court of California. May 20, 1905.)

1. APPEAL — RULING ON DEMURRER — FACTS NOT ALLEGED.

In reviewing a ruling on a demurrer, facts not alleged cannot be considered, although both parties admit that they exist.

2. SHERIFF'S SALE — APPARENT VALIDITY — CLOUD ON TITLE—ATTACHMENT—RELEASE.

In an action to recover a sum paid under protest to redeem land from a sale on execution, which sale, it was alleged, was in fact invalid, but apparently valid, so as to constitute a cloud on plaintiff's title, it appeared that plaintiff acquired title from the judgment debtor before the judgment was rendered, but after an attachment had been levied on the land. It was alleged that the attachment was issued and levied on the day the action was begun, and that some three months thereafter the sheriff accepted an undertaking for the release of the attachment, and on the next day released it of record. It was not alleged that, at the time the undertaking was accepted and release executed, the sheriff had previously returned the attachment, nor that the writ was not then in his possession, nor that no summons was issued, nor that he did not receive the writ of attachment with the summons, nor that he did not make due and correct return to the writ. *Held*, that it must be assumed that the return to the writ would have shown that the attachment had been released, and that hence the sale did not constitute a cloud on plaintiff's title.

Department 1. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Frank Maskey against John Lackmann and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Olney & Olney, for appellant. George D. Squires, for respondent Lackmann. Marcus Rosenthal, for respondents Whyte and Hesser.

SHAW, J. A general demurrer to the complaint was sustained, judgment entered accordingly, and the plaintiff appeals.

The complaint attempts to state a cause of action against the defendant to recover the sum of $1,061.50, paid by the plaintiff to Lackmann as sheriff, under protest, to redeem certain real estate belonging to plaintiff from a sale thereof on an execution issued on a judgment in favor of A. C. Whyte against Hilley Rosencrantz, a former owner of the real estate, from whom, by mesne conveyances, the plaintiff obtained his title. The contentions of the plaintiff are that the sheriff's sale was a cloud on his title and valid on the face of the record, though invalid in fact, and that money paid to remove or prevent a cloud upon the title to land is paid upon compulsion and may be recovered by action. We think the complaint does not show that the sheriff's sale was a cloud on the title. In considering this question we are confined to the facts alleged in the complaint. We cannot consider facts not alleged, although both parties admit that they exist. And with respect to any official conduct of the sheriff in the proceedings, as to which the complaint is silent, we cannot, in aid of the plaintiff's case, supply facts not alleged, nor assume that the sheriff officially did otherwise than what the law would require him to do under the circumstances appearing. Maskey acquired title under a conveyance by Rosencrantz, the judgment debtor, made before the judgment in Whyte v. Rosencrantz was rendered, but after an attachment issued in the action had been duly levied on the land. The title under the sheriff's sale, as against the plaintiff, therefore, depended on the continuance of the lien of the attachment and its subsequent merger in the judgment. The action of Whyte v. Rosencrantz was begun on February 25, 1895, and the attachment was issued and levied on that day. On June 20, 1895, the sheriff accepted an undertaking for the release of the attachment, given in pursuance of section 540 of the Code of Civil Procedure, and released the attachment, and on June 21, 1895, in consideration of the undertaking, he officially executed a release, which was duly recorded in the office of the recorder. The complaint does not state that, at the time this undertaking was accepted and the release executed, the sheriff had previously returned the attachment, nor that the writ was not then in his possession, nor that no summons was issued, nor that he did not receive the writ of attachment with the summons, nor that he did not make due and correct return to the writ. As to these things it is silent. Under section 559, Code Civ. Proc., he may have received the writ with the summons, and in that event he would be required by that section to return it with the summons, an event which could lawfully have been delayed until after the date of the release. This section also requires him to state in his return to the writ his proceedings thereon. It was decided in Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156, that a sheriff has no authority to release an attachment after he has returned the writ. We cannot assume, in the absence of any averment to support the action, that the sheriff had returned the writ before he made the release, nor that his return showed the levy alone without the release. We must, on the contrary, assume that which, for all that appears in the complaint, may have been true, namely, that he made the release before the return, and that his return showed all his proceedings, including the release, as well as the levy.

It follows from this that the record necessary to support the sheriff's sale would also show its invalidity. In order to show the levy of the writ, whereby the lien had attached to the real estate before its conveyance to the plaintiff's predecessor, who purchased before the judgment, it would be necessary for the person claiming under the sheriff's sale to put in evidence the return to the writ of attachment. We must assume that this return recited the fact of the acceptance of the undertaking and the execution of the release of the levy. This would extinguish the lien, and render the sale nugatory against a purchaser from the judgment debtor before judgment. In ejectment against Maskey by the purchaser at the sheriff's sale the action would be defeated upon the evidence of the proceedings upon which the sale was founded, and in such an action Maskey, as defendant, would be entitled to a nonsuit at the close of the evidence for the plaintiff therein. As owner he would not be required to offer any evidence to defeat a recovery. Under these circumstances the record of the sheriff's sale, or the deed thereunder if it had been executed, would constitute no cloud on the plaintiff's title. "If such proof would be necessary, the cloud would exist. If the proof would be unnecessary, no shade would be cast by the presence of the deed." Pixley v. Huggins, 15 Cal. 134. To the same effect, see Lick v. Ray, 43 Cal. 88; Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33; Curtis v. Sutter, 15 Cal. 264; Fulton v. Hanlow, 20 Cal. 485.

It is conceded by the plaintiff that the payment to redeem was voluntary unless the sale would cast a cloud on the title, and that, if it was a voluntary payment, his action must fail. There can be no doubt that this is a correct principle. Having reached the conclusion that the complaint does not show that there was a cloud upon the plaintiff's title, it will be unnecessary for us to consider the question whether or not, if the contrary had been shown, the payment would be recoverable as a payment made under compulsion. The demurrer was properly sustained.

The judgment is affirmed.

We concur: VAN DYKE, J.; ANGELLOTTI, J.

146 Cal. 724

NICKALS v. STANLEY et al. (S. F. 3,138.)

(Supreme Court of California. May 13, 1905.)

1. ADMINISTRATORS — BONDS — LIABILITY OF SURETIES—PERSONAL ACTS OF PRINCIPAL.

Sureties on an administrator's bond, conditioned for the faithful performance of their principal's duties as administrator of the estate of the deceased, are not responsible for the misapplication by their principal of the proceeds of an insurance policy paid to him as trustee for the widow and for her use, and not as assets of the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2393.]

2. SAME—MISAPPLICATION OF ASSETS—FIXING OF LIABILITY.

Sureties on an administrator's bond are not liable for misapplication by their principal of the assets of the estate until the administrator's liability is determined and fixed by an order or decree of the probate court.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 2453, 2454.]

3. SAME—ACTIONS AGAINST ADMINISTRATORS.

Where an administrator appeared to an action, and demurred solely as administrator, and the judgment entered after sustaining his demurrer ran in his favor solely as administrator, and he, as an individual, was not brought within the jurisdiction of the court, and plaintiff's counsel in their brief treated the action as one against the administrator as such, the action would be deemed on appeal to have been one against the estate, and the judgment would be sustained if no cause of action was alleged against it.

4. SAME—TORTS OF ADMINISTRATOR—LIABILITY OF ESTATE.

The estate of a decedent is not liable to the widow for the misapplication by the administrator of the proceeds of an insurance policy paid to the administrator for the widow.

Department 1. Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Action by Julia Nickals, an incompetent person, against James Stanley, as administrator of the estate of William W. Nickals, deceased, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Welles Whitmore and Frank Little, for appellant. Thomas C. Huxley, for respondents.

ANGELLOTTI, J. Plaintiff brought this action against James Stanley, as administrator of the estate of her deceased husband, and the sureties on his official bond as public administrator, to recover the sum of $4,895.65, proceeds of a policy of insurance on the life of decedent, which policy, according to the allegations of the complaint, was payable "to his executors or administrators, * * * for the benefit of his wife, the said Julia A. Nickals, if she should survive him." It was alleged that he had, as administrator, collected said amount on said policy, and had used and expended all of the same "in paying the debts of said William W. Nickals, deceased, and the expenses of his last illness and funeral, and costs of administration of said estate," instead of paying the same to plaintiff. This was the sole ground of plaintiff's action. It may be assumed that Stanley applied for letters of administration of this estate as public administrator, and that his official bond as public administrator stood in lieu of the ordinary administrator's bond required by law. Section 1727, Code Civ. Proc. Such bond was conditioned to the effect that said Stanley should faithfully execute the duties of public administrator of Alameda county, Cal. No final account of his administration of said estate has ever been filed by Stanley. It is not alleged that any account has ever been presented by said Stanley as administrator, or that the court in probate has ever made any order of distribution, or any order setting apart any property or money to the widow. Stanley, as administrator, and two of the defendant sureties, demurred to an amended complaint on various grounds, and the demurrers were sustained with leave to amend. Plaintiff failing to amend, judgment went in favor of said defendants, and from this judgment plaintiff appeals.

It is clear that no cause of action is stated against the defendant sureties. Under the terms of their contract, they were responsible only for the faithful performance of such duties as were imposed by law upon Stanley, as administrator of the estate of the deceased. If the proceeds of the insurance policy were received by Stanley as a trustee for the widow, and solely for her use, because of the terms of the agreement between deceased and the insurance company, such proceeds were in no sense property of the estate, and were not received by him in the discharge of any official duty as administrator. The property was, in such event, the property of the widow, and Stanley was simply her agent or trustee in regard thereto. The sureties on his bond as administrator had not undertaken to be responsible for the faithful performance of his duties as such agent or trustee, or for the faithful performance of any duties except those relating to the administration of the decedent's estate. If the proceeds of the policy did become assets of the estate, there could be no liability on the part of the sureties in regard thereto prior to an order or decree of the court in probate fixing the liability on the part of the administrator. It does not appear that there has been any such order or decree. An administrator holds all of the assets of an estate subject to the control of the court having jurisdiction of the estate, and that court has sole and exclusive jurisdiction to settle the accounts of the administrator, and to determine to whom the property of the estate shall be set apart or distributed. The liability of the administrator, arising from his dealings with the property of the estate, can, during the pendency of the administration and the lifetime of the administrator, be determined only by the judgment or order of such court, and until such determination has been made no action can be maintained upon the administrator's bond. It has been repeatedly held that an action cannot be maintained against the sureties of an executor, administrator, or guardian for breach of the bond until the amount of indebtedness has been determined by order of the probate court. See Cook v. Ceas, 143 Cal. 221, 225, 77 Pac. 65, and cases there cited; Reither v. Murdock et al., 135 Cal. 197, 67 Pac. 784; Chaquette v. Ortet, 60 Cal. 594. These decisions are applicable here.

As to the defendant Stanley, the action has apparently been treated as an action against him in his official capacity as administrator only. It was so limited in the title of the action as given in the complaint, but the allegations of the complaint make it somewhat uncertain as to whether it was intended to sue him individually or as administrator solely. The fact that the sureties on his bond were joined with him as defendants indicates an intention to sue him individually, for they would not be proper parties defendant in an action against him purely as administrator. However this may be, he appeared, and demurred solely as administrator, and the judgment is in his favor solely as administrator, and it does not appear that James Stanley individually was ever brought within the jurisdiction of the court in this action. It may be added that counsel for plaintiff in their brief treat the action as one against Stanley in his official character only. The question as to whether the complaint stated a cause of action against Stanley individually is therefore not involved in this appeal. We must take the action against Stanley as one against him in his representative capacity only, and therefore as simply an action against the estate of his intestate. Sterrett v. Barker, 119 Cal. 492, 494, 51 Pac. 695; Schlicker v. Hemenway, 110 Cal. 579, 42 Pac. 1063, 52 Am. St. Rep. 116. The demurrer interposed by defendant Stanley as administrator was the demurrer of the estate only. If the complaint failed to state a cause of action against the estate, the demurrer of the representative thereof was properly sustained. Plaintiff has cited some cases from other jurisdictions in which it is held that, where the property of another has been appropriated to the use of an estate by an administrator or executor, the estate may be held liable. It is well settled here that an estate cannot be held liable for a tort committed by an administrator or executor. Sterrett v. Barker, supra; Melone v. Davis, 67 Cal. 279, 282, 7 Pac. 703; Eustace v. Jahns, 38 Cal. 3, 21, 23. The foundation of this action is the alleged personal tort of Stanley, viz., the conversion by him of personal property of the plaintiff. He could not, by any such wrongful act on his part, bind the estate, but, if guilty thereof, would be personally liable therefor. As said in Eustace v. Jahns, supra: "The very nature of the action imports the culpable delinquency of a sentient being, and a personal liability in consequence thereof, a delinquency or misfeasance which cannot be affirmed of an estate; and when such liability is established, and the extent thereof determined by the judgment of a competent court, it is enforced against the individual perpetrator of the wrong." If sued individually, Stanley could have defended under his claim as administrator, and put in issue the question as to whether the money was the property of plaintiff or of the estate, but, if he had failed in substantiating his claim, judgment must necessarily have been against him, and could not be against the estate. Sterrett v. Barker, supra. The fact that persons interested in the estate may have profited by reason of the wrongful act of the administrator cannot affect the question as to the liability of the estate. It may be that, where the property of another has been actually used for the benefit of an estate, an action in equity may, under some circumstances, be maintained against the estate and those interested in the property thereof to have the claim of the owner made a charge against such assets of the estate as may properly be held chargeable therewith. It is, however, unnecessary to express any opinion on this question. This is not such an action. There is no allegation intimating that there is any property of the estate, and the action is simply an action at law against the estate, based upon the alleged personal tort of the administrator. As we are satisfied that the complaint failed to state a cause of action against any of the respondents, it is unnecessary to consider any of the other points made by the demurrers.

The judgment is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

146 Cal. 728

WEAVER v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 3,351.)*

(Supreme Court of California. May 17, 1905.)

1. JUDGMENTS — CONCLUSIVENESS — RESTRICTION AS TO SCOPE.

Where the Supreme Court reversed a general judgment for plaintiff, and directed the entry of a restricted judgment to be satisfied out of certain funds, and plaintiff acquiesced therein, and had judgment entered in the superior court in accordance with the form prescribed by the Supreme Court, the judgment as so entered became conclusive upon the parties, and could not be altered or modified, and a general judgment procured, by the bringing of another action founded thereon.

2. MUNICIPAL CORPORATIONS — PAYMENT OF CLAIMS—DISCRETION.

Const. art. 11, § 18, as amended in 1900, providing that the city and county of San Francisco may at any time pay the unpaid claims, with interest thereon, for materials furnished and work done during specified years, out of the income and revenue of succeeding years, is permissive, only, and gives the city a discretion in allowing and paying the claims.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by D. S. Weaver against the city and county of San Francisco. From a judgment for plaintiff, defendant appeals. Modified.

See 43 Pac. 972.

Percy V. Long, City Atty., and John P. Coghlan, Asst. City Atty., for appellant. J. C. Bates, for respondent.

VAN DYKE, J. This appeal is taken by the defendant, the city and county of San Francisco, from a judgment rendered against defendant in favor of the plaintiff upon the pleadings. The record consists of the amended complaint, demurrer to the same, order overruling the demurrer, answer on the part of the defendant, notice of motion to take judgment upon the pleadings, and the so-called findings, and the judgment entered in accordance with the motion, and notice of the appeal.

The complaint counts upon a former judgment rendered in the superior court of the city and county of San Francisco, April 24, 1896, which judgment, it is alleged, was rendered in favor of the plaintiff herein and against the defendant herein, for the sum of $2,226.69 principal, $511.31 interest, and $108 costs of suit, amounting in the aggregate to $2,846. The said judgment so given was rendered and entered, it is alleged, in pursuance of and in obedience to the direction of the Supreme Court of California on appeal by said plaintiff from a judgment rendered and entered against him on the first trial of the case. The complaint further alleges that part of said judgment, to wit, the sum of $2,226.70, was paid by the defendant on the 8th of October, 1901, and that no other sum of money had been paid thereon, and that said judgment so rendered and entered was for material furnished, work done, and labor performed for defendant by the plaintiff during the fiscal year ending June 30, 1893. It is further alleged in the complaint that under the amendment of the state Constitution the said defendant is authorized and empowered to pay such demands, with interest thereon at the rate of 5 per cent. per annum, and that the amount of interest due, owing, and unpaid on said judgment so given, rendered, and made, at the rate of 5 per cent., is $775.30, and the balance of the principal unpaid is $1,619.30. In the answer the judgment counted upon in the action is set out in full. Said judgment recites that the cause having been appealed to the Supreme Court of the state of California on the 25th day of March, 1895, and remittitur from said Supreme Court having been filed in the clerk's office, reversing the judgment appealed from, with directions to render judgment for plaintiff for $2,226.69, but limiting its payment to the funds of said city and county for the fiscal year ending June 30, 1893, coming on regularly for hearing, etc., thereupon, in accordance with said direction, enters judgment accordingly. "Said judgment to be paid out of the income and revenue of said defendant provided for the fiscal year ending June 30, 1893."

The appellant contends, first, that said judgment entered April 24, 1896, in pursuance of the directions of this court, became res adjudicata, and could not be modified or amended by bringing another action founded upon said judgment; second, that the amendment of section 18 of article 11 of the Constitution in November, 1900, referred to and relied upon by the plaintiff, removing the restriction contained in said section as it originally stood, and allowing the city and county of San Francisco to pay claims accruing during certain fiscal years is permissive, merely.

In the opinion of this court on the appeal from the former judgment it is said: "Whoever deals with a municipality does so with notice of the limitations of its powers, and with notice, also, that he can receive compensation for his labor or materials only from the revenues and income previously provided for the fiscal year during which his labor and materials are furnished, and with the knowledge, too, that all other persons dealing with the municipality have the same rights to compensation and are subject to the same limitations as he is. Even though at the time of making his contract there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city, and, if others whose claims have accrued subsequent to his are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim." But it is added by the court: "In the present case it appears from the findings of the court that the whole amount of the tax that was levied for the fiscal year ending June 30, 1893, has not been collected, and it may be that in the future there will be received into the treasury from this tax a sufficient amount of money from which the plaintiff's claim may be satisfied. At all events, he has the right to a judgment against the city for the amount of his claim, with the limitation that it shall be satisfied out of the income and revenue provided for the fiscal year ending June 30, 1893, after the payment of such other demands against such income as are properly payable in preference to his own. The judgment is reversed, and the superior court is directed to enter a judgment in favor of the plaintiff and against the defendant for the sum of $2,226.69, and directing that the same be satisfied out of the income and revenues of the defendant provided for the fiscal year ending June 30, 1893, in accordance with the foregoing opinion." Weaver v. San Francisco, 111 Cal. 325, 43 Pac. 972. No petition for rehearing or other modification of said judgment was asked on the part of the plaintiff, as might have been done, had the plaintiff desired a general judgment instead of the one directed to be entered. In the case of Higgins v. San Diego Water Co., 118 Cal. 527, 45 Pac. 824, 50 Pac. 670, involving a similar question of liability of a city, after a rehearing granted, this court in bank in that case said: "On a former hearing of this cause judgment in favor of the city of San Diego was reversed, with direction to the superior court to enter judgment in favor of the water company for the reasonable value of the use of its distributing plant, etc.; said judgment to be payable only out of the revenue of those fiscal years during which the city held possession of the plant. A rehearing was ordered principally upon the question as to the proper form of the judgment. Upon further consideration of the case, we have reached the conclusion that the water company should have an ordinary general judgment for whatever amount shall be found due it, without any direction as to the revenues out of which the judgment shall be satisfied." Accordingly in that case a general judgment was ordered to be entered, and the same might have been done in this case, had the plaintiff been dissatisfied with the judgment containing the limitation in question. But the plaintiff acquiesced in the form of the judgment and the limitation contained therein, and upon the going down of the remittitur, on April 24, 1896, upon his motion, judgment was rendered and entered in his favor in the superior court in the manner and form as directed by this court, as already shown. The judgment so rendered and entered in the superior court in accordance with the direction of this court was, however, never modified, and therefore became res adjudicata binding upon both parties. As said in Wallace v. Eldredge, 27 Cal. 498, "A judgment is a contract, in the highest sense of the term, and, as an obligation, it possesses a force superior to that of a specialty or simple contract. Chit. Cont. 1a; Black. Com. 382; 1 Pars. on Cont. 7." "In fact, the court had no power or authority to modify or change the judgment as directed to be entered by this court. No provision can be ingrafted upon it, nor can any be taken from it." Elliot on Appellate Procedure, § 576. "The judgment of this court concludes the parties, and it is too late now to change it." Argenti v. Sawyer, 32 Cal. 414. In Chafoin v. Rich, 92 Cal. 471, 28 Pac. 488, it is said: "Where the Supreme Court directs a particular judgment to be entered, the court below must not retry the cause, but must enter the judgment directed, and the entry of a different judgment is void."

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*Rehearing denied June 12, 1905.

After the adoption of the amendment to section 18, art. 11, of the Constitution, modifying the limitation contained in said section as it originally stood, the defendant herein, as appears by the admission of the amended complaint, paid the amount of the principal for which said judgment was rendered, to wit, $2,226.69, leaving the interest and costs of suit unpaid; and it is for the recovery of these unpaid amounts, with accruing interest thereon, that the present suit is brought, and for which a judgment absolute in terms was rendered by the court below. We think the contention of the appellant that the former judgment had become the law of the case is correct, and that its terms and conditions cannot be altered or modified by bringing another action founded upon it.

The amendment to section 18 of article 11 of the Constitution adopted in 1900, already referred to, consisted of a proviso added to said section as follows: "Provided, however, that the city and county of San Francisco may at any time pay the unpaid claims, with interest thereon at the rate of five per cent. per annum, for materials furnished to and work done for said city and county during the forty-first, forty-second, forty-third, forty-fourth, and fiftieth fiscal years, and for unpaid teachers' salaries for the fiftieth fiscal year, out of the income and revenue of any succeeding year or years, the amount to be paid in full of said claims not to exceed in the aggregate the sum of five hundred thousand dollars, and that no statute of limitations shall apply in any manner to these claims." And also containing another provision in reference to the indebtedness of the city of Vallejo, in Solano county. The amendment, it will be seen, removes the limitation formerly imposed upon the city in reference to the payment of certain claims of indebtedness applicable to certain fiscal years, and up to a certain aggregate amount. In the construction of a Constitution or statute, words and phrases are construed according to the context and approved usage of the language. Civ. Code, 13; Code Civ. Proc. 16. From its very terms, the amendment in question is permissive only, giving the city some discretion in allowing and paying the claims referred to, up to the limit prescribed. The plaintiff himself does not pretend that the city is bound to pay his claim, but alleges in his complaint that under the constitutional amendment in question "said defendant is authorized and empowered to pay such demands." It is alleged in appellant's brief, and not controverted by respondent, that under this amendment money was raised by the city and county of San Francisco to pay certain back indebtedness, and that a portion was set aside to pay the bills of the fiscal year ending June 30, 1893, and that of that the respondent received the amount of his original claim; this being considered at the time his fair proportion of the money allowed for the indebtedness of that year.

It is ordered that the judgment appealed from be, and the same hereby is, modified by adding thereto the proviso contained in the original judgment, to wit, "Said judgment to be paid out of the income and revenues of said defendant provided for the fiscal year ending June 30, 1893," and that, as so modified, said judgment is affirmed. Further ordered that appellant recover its costs on appeal.

We concur: ANGELLOTTI, J.; SHAW, J.

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147 Cal. 1

PETERSON v. GIBBS et al. (S. F. 3,281.)

(Supreme Court of California. May 20, 1905.)

1. QUIETING TITLE—NONSUIT—WHEN PROPER.

Under Code Civ. Proc. § 738, authorizing the bringing of an action to determine adverse claims to real property, the court should, in its decree, declare and define the interests of the respective parties as established by the evidence; and a judgment of nonsuit is improper where plaintiff establishes any legal interest in the property, although he fails to establish that his land is free of the claim asserted by defendant.

2. DEEDS — CONVEYANCE OF TIMBER — CONSTRUCTION.

An instrument by which the owners of land "grant, bargain, sell and convey" all the timber standing or lying on certain lands, and give the vendees 10 years in which to remove the timber —the vendees agreeing that, if the timber is not removed within 10 years, they will pay a yearly rental for the privilege of removing the same—and providing that each of the parties will pay one-half of the taxes upon the land until that time, constitutes an agreement for the absolute sale of the timber, whether removed within the 10 years or not, and the only effect of a failure to so remove it is to give rise to the obligation of the vendees to pay the annual rental.

3. QUIETING TITLE—PROTECTION OF DEFENDANT'S RIGHTS.

Since, under Civ. Code, §§ 658, 660, standing timber is, in effect, declared to be real property, and since title thereto may be transferred to and held by one who is not the owner of the land, a decree quieting title to land, the timber standing on which has been conveyed to another than the owner of the land, should protect the rights of the owner of the timber by reserving or excepting the timber from its operation.

Department 1. Appeal from Superior Court, Mendocino County; J. M. Mannon, Judge.

Action by Andrew Peterson against J. H. Gibbs and another. From a judgment of nonsuit, and from an order denying a new trial, plaintiff appeals. Reversed.

McGarvey & Bledsoe, for appellant. McNab & Hirsch, for respondents.

ANGELLOTTI, J. This is an appeal from the judgment and an order denying a motion for a new trial. The trial court granted the defendants' motion for a nonsuit, and judgment was thereupon entered that the plaintiff take nothing by his action, and that defendants recover their costs.

The principal question presented is as to the action of the court in granting defendants' motion for a nonsuit.

The action was commenced July 19, 1901, to quiet plaintiff's title to certain land in Mendocino county. Plaintiff alleged in his complaint that on July 18, 1891, one Oppenlander was the owner in fee simple of said land; that on said day Oppenlander sold and conveyed the same to him; and that he ever since has been, and now is, the owner in fee simple and in possession of all thereof. He further alleged that the defendants claim an interest therein adverse to him, but that such claim was without any right whatever. He asked that the defendants be required to set forth all adverse claims asserted by them, that such claims be determined by the decree, and that it be adjudged that defendants have no estate or interest in the property. The defendants, by their answer, filed January 15, 1902, denied that plaintiff was the owner in fee or in possession of any part of said land, and admitted and alleged that they claimed an interest therein, to the extent that they are the "absolute owners of all the timber upon the above-mentioned premises, whether standing, lying, or growing," with the right to do all things on said land which might be necessary for the purpose of manufacturing the timber and removing the same, and to make roads and build camps thereon, and the right of ingress and egress upon and across the land, and also full rights of way for the purpose of removing said timber as the defendants might acquire upon the adjoining land or lands in the vicinity of the lands described in the complaint. They asked for a decree that plaintiff take nothing by his action, that it be decreed that defendants are the owners of all the timber upon the said land, "whether said timber be lying, standing or growing," and that they are entitled to remove the same. Upon the trial it was shown by plaintiff that, subject to such rights as were possessed by defendants under an instrument executed by the owners of the land on December 28, 1887, purporting to grant and convey the timber thereon and on other lands, he was the owner of all the land in dispute; under a deed of grant executed on July 18, 1891, by Oppenlander, the then owner, subject to defendants' rights, and also that he had been in possession of all the land ever since the date of his deed. The said instrument of December 28, 1887, was one whereby the then owners had purported to "grant, bargain, sell and convey" to the defendants "all the timber now standing, lying or being on" certain lands of the grantors, including the land in controversy, and, in addition to such purported grant, contained the following provisions:

"And the parties of the first part promise and agree to and with the parties of the second part, that they shall have a period of ten years in which to remove the timber from the above described lands, and they do covenant and promise to allow and empower the parties of the second part, their agents and servants, to enter in and upon the real estate upon which the timber hereby conveyed is growing or situate as above described, to cut such timber, manufacture the same into lumber, and do all things upon such land which may be necessary for the purpose of manufacturing such timber into lumber and the removal thereof, as well as the right to make roads and build camps upon such land, and also full ingress and egress have over such land for the removal of the timber hereby conveyed, and also such timber as the parties of the second part may acquire upon adjoining land or lands in the vicinity of the lands of the parties of the first part as described herein. The parties of the second part hereby covenant and agree to and with the said parties of the first part, that if the timber is not removed from the above described lands within a period of ten years that they will pay a yearly rental to the parties of the first part, of two hundred dollars a year thereafter for the privilege of removing such timber from the lands of the parties of the first part, with the covenants and agreements of the parties of the first part herein to continue until all of the timber is removed, and it is agreed between the parties hereto that all the privileges granted herein are to continue until such timber is removed, subject to the provisions of this agreement.

"It is further agreed by and between the parties hereto, that each of the parties hereto are to pay one-half the taxes upon all of the foregoing described real estate that may be levied upon such land for state, county or municipal purposes during each and every year from the date hereof until all the timber is removed from such real estate."

This instrument, in consideration for the execution of which the defendants paid $7,000 in cash, was the sole basis of defendants' claim. It had been duly recorded, and plaintiff had full notice thereof. The deed to him contained this provision, viz.: "Excepting and reserving, however, for the benefit and use of a former grantee of mine, the standing and down timber on the hereinafter granted land, and the privilege to work it up and to remove it from said land." At the time of the commencement of this action, defendants had not commenced to remove any timber from the land. The defendants, who had never been notified of the transfer of the land by Oppenlander, to plaintiff, had, acting under their agreement, paid Oppenlander, each year after the year 1897, the sum of $200. Plaintiff had paid all the taxes on the land, but it did not appear that any demand for reimbursement had ever been made upon defendants. This, aside from some evidence going to show that it was the expressed intention of defendants at the time of the negotiations resulting in the agreement of December 28, 1887, to commence cutting and removing the timber in not to exceed three years from such date, was substantially the case made by plaintiff.

Even if it be conceded that the case shows all that is claimed for it by defendants, we are of the opinion that the motion for a nonsuit was improperly granted. At most, the plaintiff had simply failed to establish that his land was free of all valid claim on the part of defendants. He had, however, clearly shown that he was the owner in fee of the land, subject only to the interest held by defendants in the timber "standing, lying or being" on said land on December 28, 1887, with such rights of entry, rights of way, etc., as were given by the contract of that date. Although he had not come up to the full measure of the allegations of his complaint as to the invalidity of the claim asserted by defendants, he had shown a legal title in himself, sufficient to enable him to maintain the action to quiet his title to the land, such as it was, and to have the adverse claim of defendants in regard thereto, fully defined and determined. The mere fact that a defendant in an action brought under the provisions of section 738, Code Civ. Proc., is shown to have some valid interest or estate in the property in controversy, does not warrant the denial of all relief to the plaintiff, who has also shown a valid interest therein. Such an action is brought, as authorized by the statute, "for the purpose of determining" any adverse claim that may be asserted therein by a defendant to the land in controversy; and this does not mean that the court is simply to ascertain, as against a plaintiff shown to have a legal interest, whether or not such defendant has some interest, but also that the court shall declare and define the interest held by the defendant, if any, so that the plaintiff may have a decree finally adjudicating the extent of his own interest in the property in controversy. The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to. Of course, if the plaintiff fails to show any legal interest in the property in controversy, and as to which he asserts title, he must fail altogether, and could not complain of a judgment of nonsuit, but where he shows any legal interest he is entitled to have that interest declared by the court. See, generally, upon the nature and object of the statutory action to quiet title, Stoddart v. Burge, 53 Cal. 394; People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398; Castro v. Barry, 79 Cal. 443, 21 Pac. 946; Bulwer C. S. Mining Co. v. Standard S. M. Co., 83 Cal. 589, 23 Pac. 1102; Quint v. McMullen, 103 Cal. 381, 37 Pac. 381. By the order granting a nonsuit the plaintiff was, in effect, declared to have no legal interest whatever in the property in controversy. This was, of course, erroneous.

As the case made by plaintiff showed him to be the owner of the land in controversy, subject only to such interest in the timber thereon and such rights of entry and rights of way as defendants may be determined to have under their contract, the motion for a nonsuit should have been denied. The judgment must therefore be reversed, in order that the conflicting claims of the parties to the land in controversy may be fully and finally determined and settled by a decree.

Counsel have on this appeal discussed the question as to the proper construction of the written instrument under which defendants claim an interest in the real property involved in this action. It was upon the theory that this instrument showed an absolute sale of all the timber "standing, lying and being" on the land at the date thereof, that the learned judge of the court below granted the motion for a nonsuit. It is proper that we should say, for the guidance of the court on a new trial, that, in our judgment, this was a correct construction of the instrument. It is true that the timber was sold in contemplation of its removal from the land, and that it was the understanding of all parties that it should be so removed. While there is much apparent conflict in the decisions as to the proper construction of a contract for the sale of standing trees to be removed, it is well settled that such a sale may be absolute, and the agreement to remove within a specified or reasonable time merely a covenant, in which case the timber remains the property of the purchaser, although not removed within the specified time. See 28 Am. & Eng. Ency. of Law, 541 (2d Ed.); Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119. The question in each case is as to what is the contract between the parties. Here there is absolutely nothing in the terms of the agreement which can be construed as making the removal of the timber a condition precedent to the passing of title, or as causing delay in such removal, beyond the period of 10 years from the date of the instrument, or failure to pay the rental reserved or one-half the taxes, to operate as a divesting of the title conveyed. The terms of the instrument literally signify an absolute conveyance of the timber, and there is nothing in the provisions relied upon by plaintiff to impair the force of the plain words of present grant. The provision to the effect that the vendees should have a period of 10 years in which to remove the timber that they had purchased must be read in connection with the provision to the effect that, if it is not removed within 10 years, the vendees "will pay a yearly rental to the parties of the first part, of two hundred dollars a year thereafter for the privilege of removing such timber," etc. This provision, together with the provision for the payment by the vendees of one-half of all taxes that may be levied upon the land from the date of the agreement until all of the timber has been removed, both of which are mere covenants in no way affecting the title, must be held to express the agreement of the parties as to the effect of any failure of the vendees to remove the timber within the designated period of ten years.

Much reliance is placed by plaintiff upon certain evidence claimed to be admissible for the purpose of showing that it was the intention of the parties that the vendees should commence to remove the timber within three years from the date of the agreement. At most, this evidence only tended to show that the vendors entered into this agreement relying upon the statements of the vendees that they expected to commence the work of removing the timber within three years. It in no degree affects the contract entered into, or assists in the construction thereof. There is nothing therein that is at all inconsistent with the clear and unambiguous provisions of the contract.

There can be no doubt that at the time of the transfer of the timber the same was a part of the realty. Sections 658, 660, Civ. Code. Nor can there be any doubt that the title to the standing timber could be transferred to and held by one who was not the owner of the land. See Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171. Whether, by a conveyance of standing timber to be removed, the timber is, in contemplation of law, severed from the land and transformed into personal property (see Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119; Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591), or continues to be an interest in the realty, it is clear to us that, so long as it remains actually affixed to the land, a decree quieting plaintiff's title to the real property, without reserving or excepting such timber from its operation, would cut off all rights of the defendants therein. Defendants are therefore entitled to have their rights in relation to the timber fully reserved from the effect of any decree that may be made.

The judgment and order are reversed, and the cause remanded.

We concur: SHAW, J.; VAN DYKE, J.

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146 Cal. 766

TOWNE v. UNITED ELECTRIC GAS & POWER CO. (L. A. 1,430.)

(Supreme Court of California. May 19, 1905.)

1. MASTER AND SERVANT—SAFE APPLIANCES—USE OF DEFECTIVE APPLIANCE.

Defendant, an electric light company, furnished its linemen with several pike poles (long poles having an iron ferule and an iron pike in the end) of the character and construction customarily used in bracing electric light poles while removing the same. One of these pike poles had become dull at the point and unfit to be used with safety. While plaintiff was on an electric light pole, stripping the wires, one of his fellow servants picked up and used the blunt pike pole, which did not fix the electric light pole so as to properly hold the same, and it in consequence fell, whereby plaintiff was injured. *Held*, that defendant had properly fulfilled its duty of furnishing suitable tools and appliances, and the injury was in no way the result of its negligence.

2. SAME—NEGLIGENCE OF FELLOW SERVANT.

The injury was the result of the negligence of the fellow servant, who picked up the defective pole without observing its patent defect.

Beatty, C. J., and Angellotti, J., dissenting.

Commissioners' Decision. In Bank. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Amos A. Towne against the United Electric Gas & Power Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Cochran, Williams & Phillips and Hunsaker & Britt, for appellant. Waters & Wylie, for respondent.

COOPER, C. Plaintiff recovered judgment for $2,500, damages alleged to have been sustained by reason of the negligence of defendant while in its employ as a lineman. Defendant has appealed from the judgment and the order denying its motion for a new trial. The controlling question here is as to whether or not the injury was proximately caused by defendant's negligence.

The facts as shown by the findings are substantially as follows: At the time of the injury plaintiff was, and for several months had been, in the employ of defendant in its construction and repair department as a lineman. He was one of a gang of four men under the superintendency of one Bevans, who had directed the men to strip the wires from and remove certain electric light poles, situated in the streets of Santa Monica, which by reason of their long use were believed to be decayed and unsafe. Plaintiff knew the character of the work required of him, the dangers attending it, and the fellow servants employed to assist him. It is not claimed that defendant was negligent in the selection of the fellow servants. The men were furnished, among other appliances, with two or three pike poles (which were about 10 or 12 feet in length, about 2 inches in diameter, one end having an iron ferule on it, and an iron pike in the end, about 1½ inches in length) to be used in bracing the electric light poles to be removed, and to keep them from falling while the man engaged in removing the wires was up the pole from which the wires were being removed. This was the method employed to safeguard the pole from falling and to prevent accidents, all of which plaintiff knew. All of the said pike poles were of the character and construction usually and customarily used for such purpose, but one of said poles had become dull at the point and unfit to be used safely. The evidence does not show that any of the other pike poles had become dull or out of repair, nor is there any evidence showing that Bevans or any of the men knew that the pike pole was dull, but the condition of the pole could have been ascertained by an examination thereof. On the morning of the accident, plaintiff was directed by Bevans to climb and clear the wires from one of said poles, which was 25 feet in height. Bevans also directed one of the men to brace the electric light pole with a pike pole on the unprotected side. The man took from the pike poles, which were then and there on the ground within reach, the pike pole which had become dull and worn at the point, and forced the barbed portion thereof into the electric light pole, about eight feet from the ground, and rested the other end of the pike pole upon the ground, for the purpose of forming a brace and holding the pole in place after the wires should be removed therefrom. There was also attached to the top of the electric light pole a rope, the other end of which was held on the ground by one of the gang of men, for the purpose of holding the electric light pole in place and keeping it from falling. While the electric light pole was thus supported, plaintiff, pursuant to the directions of Bevans, climbed it for the purpose of stripping the wires. While plaintiff was at the top of the pole after he had stripped the electric wires from it, it fell, and caused him to fall to the ground and receive serious injuries by reason thereof. The electric light pole fell because it was decayed at the ground, and because the pike pole, being dull, did not penetrate the electric light pole a sufficient depth to hold, but broke out or slipped, thus letting the pole fall to the ground.

The court found that the injury to plaintiff was caused by reason of the use of the pike pole, which had become dull at the point, and was not caused by the negligence of a fellow servant. The burden was upon plaintiff to prove his allegation that the injury was caused by the negligence of the defendant. The only act of negligence claimed is that the defendant allowed the pike pole to become dull or blunt at the point. If the defendant was guilty of negligence or want of ordinary care, it is liable; otherwise not. Negligence is the breach or omission of a legal duty. Donovan v. Ferris, 128 Cal. 54, 60 Pac. 519, 79 Am. St. Rep. 25. It was the duty of the defendant to furnish suitable tools and appliances to plaintiff and his fellow servants for the work which they had in hand. The court found that the pike poles furnished "were of the character and construction usually and customarily used for the purpose for which the same were furnished." Therefore there was no negligence in furnishing tools with which the work was done. If the pike pole became dull by reason of use, it was as much the duty of the plaintiff and his fellow servants as it was of defendant to have had it sharpened and repaired, provided the means were furnished by defendant with which such repairing could be done. It is the duty of the employé to use ordinary care and skill, and it certainly is the duty of the employé to know whether the tools with which he is working have become dull or in need of sharpening. Having eyes, he must use them, and, being informed, he must act upon the information. If one of the pike poles furnished by the defendant had had the point broken off by the plaintiff and his fellow servants in taking down the very first pole they came to, and they had used such pike pole with the broken point on the next electric light pole, and damage had been caused thereby, would it have been the negligence of the defendant? Would defendant have to have one man employed for the special purpose of watching the points of each pike pole, another for the purpose of watching each guy rope, and another for the purpose of watching the steel points attached to the shoes of the climber of the poles? We think that a reasonably prudent employer would have performed his duty by furnishing proper pike poles, and that a reasonably prudent employé would not use a pike pole after the point had become dull and blunt.

In the case of Webber v. Piper, 109 N. Y. 496, 17 N. E. 216, where the injury was caused by a circular saw, dull from use, the court said: "A master builder might furnish proper tools to his workmen, but it would not be his duty to sharpen every chisel as it became dull, or set every saw when the need arose."

In Cregan v. Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854, it was said to be the duty of the master to furnish safe appliances, and "that is the master's right and duty; but the servant who uses them can and should keep them in order for their proper and safe daily use, when furnished with the necessary means of so doing, and when perfectly capable of correcting the defect."

In Bailey's Personal Injuries, vol. 1, § 259, it is said: "The general rule does not apply to defects arising in the daily use of an appliance which are not of a permanent character, and do not require the help of skillful mechanics to repair, but which may easily be and usually are repaired by the workmen, and to repair which proper and suitable materials are supplied."

In the late case of Helling v. Schindler (filed November 11, 1904) 78 Pac. 710, in which the injury was alleged to have been caused by the reason of the dullness of the knives of a buzz planer, the cases referred to above were cited with approval by this court, and it was there said: "We are of the opinion that it is clear that any such mere dullness of the knives in the planer in question, produced by the ordinary use thereof, as might be sufficiently remedied by the use of a file in the hands of one of the employés, was a defect of such a nature that the employer could not be held responsible therefor, in the absence of other circumstances."

It was the duty of the fellow servant using the pike pole to have selected and used, from "said pike poles then and there on the ground," one fit and proper to be used. In picking up, selecting, and using the dull pike pole, without looking at the point, when others were within reach, the fellow servant by his negligence caused the injury to plaintiff. It is said in Sherman and Redfield on Negligence (5th Ed.) § 195: "The master performs his whole duty by using as much care in furnishing instrumentalities for the use of his servants as a man of ordinary prudence, in the same line of business, acting with a prudent regard to his own safety, would use in supplying similar things to himself, if he were doing the work. He is not in fault without proof of notice of the defect, nor as to repairs and replacements, until he has had a reasonable time after, or constructive notice, to perform his duty. The master is not expected to stand over each servant every moment, to discover instantly a defect in good materials and tools, caused by their careless use. Nor is he bound to keep such a close watch over the details of the work as to enable him to repair every deterioration in instrumentalities of work, resulting from a servant's use thereof, as soon as it occurs. * * * A master who has provided an ample supply of proper appliances ready at hand is not necessarily responsible to a servant for the neglect of a fellow servant to use such appliances."

In the late case of Amburg v. Paper Co., 97 Me. 327, 54 Atl. 765, the plaintiff was injured by the falling of a heavy iron press roll, caused by a fellow servant selecting and using an inch rope, which broke in lowering the roll, instead of using a larger and stronger one which was within his reach. The court held the master not at fault, and the negligence to be that of a fellow servant. The court said: "It is to be assumed in such case, and the master has a right to assume, that the servants will use the means for renewal and repair which the master has placed at their hands, and that, if ropes become worn and unsuitable, others will be selected in their stead out of the supply furnished for them by the master; and if the servant whose duty it is to make the selection is negligent in so doing, and selects an unsuitable or unsafe one, it is not the negligence of the master, but it is the negligence of a servant, for which the master is not responsible."

In Hefferen v. Northern Pacific Railroad Co., 45 Minn. 471, 48 N. W. 1, 526, it was held that a father could not recover damages for injury to his minor son caused by the use of a worn and battered side set, from which a thin scale of steel flew into the son's eye. The side set was selected and used by a fellow servant when others were provided. The court said: "The defect and whatever risk there may have been were perfectly apparent; and if a workman should, of his own choice and unnecessarily, use a tool thus plainly defective, when others were provided for his use, he is not absolved from the consequences of his own choice. It cannot be said to be the duty of a master, under ordinary circumstances, who provides and keeps proper tools for the use of his servants, to see to it that all such as from use become obviously unfit for service are removed beyond the reach of his servants. The servant is no less bound to be careful concerning his own safety than is the master, and where proper instruments are provided for the use of the servants, and their ordinary duties require and enable them to select such as are suitable, they must act with reasonable discretion. Under such circumstances, it is a want of reasonable discretion for them to act blindly upon the assumption that none of the implements will ever become dull or worn, or otherwise obviously defective. All human experience is to the contrary."

The above case was followed and approved in Ling v. St. Paul M. & M. Ry. Co., 50 Minn. 160, 52 N. W. 378, where it was held that the master was not responsible for damages caused by the falling of a heavy flue sheet, which fell by reason of a fellow servant selecting and using a defective iron hook when proper ones were within reach and accessible.

Where damages were caused to a servant by a sledgehammer that had become cracked and battered by use, and there were other sound and safe ones at hand, which the servant might have selected and used, the master was held not liable, and the negligence that of the servant. Rawley v. Colliau, 90 Mich. 31, 51 N. W. 350. So where a molder was injured by the escape of heated metal from a mold, caused by the selection and use by a fellow servant of a defective flask in making the mold, where numerous flasks were on hand for use that were not defective, the master was held not liable. Kehoe v. Allen, 92 Mich. 464, 52 N. W. 740, 31 Am. St. Rep. 608. And where plaintiff was badly injured by a defective rope breaking while lifting a heavy piece of machinery, the rope being selected by a fellow servant, when proper ones were within reach, the defendant was held not liable. Prescott v. Ball Engine Co., 176 Pa. 459, 35 Atl. 224, 53 Am. St. Rep. 683. The court there said: "We see no reason to doubt that the rigger was a vice principal, and as such charged with the duty of keeping ropes on hand, some of which should be at all times suitable for use. But it was not his duty to select the rope to be used on each occasion when a rope was wanted. If good ropes were in stock, and a poor one was used because of haste or carelessness or mistake of judgment, it was not the fault of the rigger as vice principal, but of the workmen themselves, and the injury suffered because of the unsuitable rope could not give the injured person a cause of action against his employer. In the nature of things, the ropes will wear from using. * * * If a poor one was used when a good one was within reach, this was negligence, and, whether chargeable to the plaintiff or to a co-employé, it relieves the defendant from all liability for the injury sustained."

A case directly in point is Carroll v. Western Union Telegraph Co., 160 Mass. 152, 35 N. E. 456. There the plaintiff was injured by the falling of a telegraph pole, caused by the use of a shovel in supporting the pole, instead of using a proper appliance called a "deadman." The end of the deadman broke, and, instead of getting another like implement, the fellow servant picked up and used a shovel. The defendant was held not liable, and the court said: "The short answer is that there is no evidence that the defendant did not furnish a sufficiency of proper tools at the depot from which those which were used were taken, or within convenient reach, and that, when proper appliances of this sort are furnished by the employer within convenient reach in a case like the present, he has done his whole duty, and is not bound to see that every gang of workmen takes as many tools as the event may show to have been desirable." See the following authorities in support of the same principle: Thyng v. Fitchburg Railroad, 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425; New Omaha Thomson-Houston Electric Light Co. v. Rombold (Neb.) 97 N. W. 1030; Cregan v. Marston et al., 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017.

In the late case of Kerrigan v. Market St. Ry. Co., 138 Cal. 506, 71 Pac. 621, the plaintiff was injured by the falling of a lot of ties in front of defendant's car, which carried plaintiff with them under the car, the falling being caused by the sudden stoppage of the car, and the stakes in front of the ties being too short and not of sufficient strength to hold the ties. Defendant had plenty of proper stakes on hand, within reach of plaintiff and his fellow servants, which they could have selected and used, but did not do so. It was held that it was not the duty of defendant to adjust and place the proper stakes on the car in front of the ties. The case of Wall v. Marshutz, 138 Cal. 522, 71 Pac. 692, is not in conflict with the rule as adopted in this case. In that case there was evidence tending to show that the appliance, an iron clamp, was defective, and that the injury was caused by such defective appliance. It was there said, in speaking of the selection of tools or appliances by fellow servants, that the rule applies "only to cases where the selection of the tools used in the work devolves upon the employés engaged in the work generally, one of whom is the person injured, and not where it devolves exclusively upon the foreman of the work." In the case at bar the selection of the pike pole devolved upon the employés generally. It was not the duty of the foreman to go from one squad of men to another, simply for the purpose of picking up a pike pole from the ground and handing it to the man about to use it. The men using the pike poles were fully as competent as the foreman to select and use proper ones. Defendant performed its duty when it furnished the usual proper and safe appliances.

Respondent places much stress upon Silveira v. Iversen, 128 Cal. 187, 60 Pac. 687. In that case the contention of plaintiff was that "the reefing pennant was rotten, and that it broke, to his injury; and that in this respect defendants failed in their duty, as his employers, to provide safe appliances with which to do his work." The question as to the selection of a defective implement by a fellow servant where proper ones are furnished and on hand is not discussed. We have found no case that sustains the plaintiff's contention here.

The judgment and order should be reversed.

We concur: HARRISON, C.; CHIPMAN, C.

For the reasons given in the foregoing opinion, the judgment and order are reversed: VAN DYKE, J.; HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

SHAW, J. I concur. The case of Wall v. Marshutz may be further distinguished. In the case at bar the employer did actually furnish to the employés a number of pike poles to be used when required. The points of the pikes would gradually become blunt by use, and it was manifestly the duty of the employés generally, and an implied condition of the contract of each, first, to observe when one became too blunt to be safely used, and either to repair them in that respect or return them to the employer for that purpose; and, secondly, when selecting one for use, to examine their condition and select one that was fit. In these respects the case is similar to Helling v. Schindler, cited in the principal opinion. In Wall v. Marshutz the different kinds of clamps for use were not furnished to the employés generally, but were kept in a place apart from the place of use, and were selected by the foreman, and it was his particular duty to select the sort of clamp best adapted for the work in hand. The other employés were under no duty in respect of such selection.

ANGELLOTTI, J. I dissent. This case is clearly distinguishable from Helling v. Schindler and kindred cases cited in the opinion. Those were cases where the implement became defective during the use thereof by certain employés, and the defect was incident to and caused by the use thereof by them, and was of such a nature that the employés actually using the implement were bound to contemplate and take notice thereof. Such cases are not applicable where, as here, the tools and implements used by the men were delivered by the employer to his employés on the morning of the accident, and, at the time of such delivery by the employer, one of them was defective and unfit for use. The trial court found this to be the condition of affairs here, and that the accident was due to such defective condition. It further appears from the findings that the defect was of such a nature that it would be observed only on a careful examination. We have thus simply a case where the employer furnished to his employés an appliance defective and unfit for use, and the defect was not obvious. The fact that other appliances of a similar character in good condition were furnished at the same time cannot affect the question here presented. The employés had the right to assume that all the tools and implements delivered to them by their employer for immediate use by them were, at the time of such delivery, in a reasonably safe condition for such use, unless the defect was obvious. To hold otherwise appears to me to seriously encroach upon the rule as to the duty of the employer to furnish implements reasonably sufficient for the purposes intended.

BEATTY, C. J. I dissent. According to the findings of the superior court, Bevans was not simply the foreman of the gang of men engaged in removing the pole which fell; he was foreman of defendant's construction and repair department, and "all of said pikes and poles were under the charge and care of said Bevans, whose duty it was, among other things, to see that the same were kept in repair." As I understand the other findings, the two or three pike poles furnished this gang of men were issued by him as being all of them fit for use as braces. There is no evidence and no finding that any one of them was in better condition than the one used, and the fact that it was dull could only have been ascertained by a careful examination. By this I do not understand that it required any prolonged or critical inspection of the point of the pike to discover its actual condition, but rather that it required some nicety of judgment to decide when one of these pikes had reached that degree of dullness to cause it, after being "forced into the pole," to slide along the grain of the wood and splinter out, instead of penetrating further when the weight of the pole was thrown against it. If it did require such nicety of judgment to determine that the appliance was unsafe, it is an unwarranted assumption to say the plaintiff and his fellow servants were bound to take notice of the fact, when the foreman especially charged with the custody and repair of the pikes had issued it for his use. I find no distinction in principle between this case and Wall v. Marshutz. Bevans here, as much as Walsh in that case, was specially charged with the duty of selecting the proper appliance for the work in hand, and when he delivered three pikes to plaintiff and his fellow servants, to be used in the work to be done, it was an assurance, not that among them they would find one or two fit for use, but that they were all fit for use; and, considering his position and his duties, they were justified in trusting to his judgment, unless his mistake was apparent, and that does not appear.

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146 Cal. 739

LEAN v. GIVENS. (S. F. 3,118.)*

(Supreme Court of California. May 17, 1905.)

1. EXECUTION—LEVY—LIEN OF LEVY—HOMESTEAD—LIEN ON EXCESS.

Code Civ. Proc. § 681, so far modifies the common law that the only means of enforcing a judgment is by execution; and, under section 688, land may be taken, as well as personal property, in the same manner as upon a writ of attachment, but it is not affected by the execution until there is a levy. The levy is by section 688 made in the same manner as upon an attachment, by filing with the county recorder a copy of the writ, with a notice, etc. Civ. Code, § 1240, declares that the excess in value of the homestead property over and above the exemption allowed is subject to execution. Sections 1245–1261 provide a plan whereby the excess may be subjected to sale, but the levy on the property covered by the homestead declaration must be made, as the first step in the proceeding to subject the excess to the payment of the judgment. *Held*, that where an execution levy is made on land embraced in a valid declaration of homestead, the judgment not being a lien, the levy creates a lien conditionally, to become absolute in the event that it is determined in proceedings under sections 1245–1261 that an excess exists, and a purchaser after the levy takes subject to such lien.

2. HOMESTEAD — EXECUTION — EXEMPTION—DETERMINATION OF EXCESS—REPORT OF APPRAISERS—NOTICE.

Civ. Code, §§ 1245–1261, provides a plan whereby, when land claimed as a homestead is levied on, the excess of value over the exemption may be subject to sale on execution; and section 1254 provides that, on the report of the appraisers, if it appears that the land exceeds in value the exemption, and that it cannot be divided, the court must direct its sale under execution. *Held*, that where a homestead claimant was not the head of a family, and the appraisers reported that the property could not be divided, there was no necessity for a notice of the hearing of the report of the appraisers.

3. SAME—ABANDONMENT OF PROCEEDINGS.

The fact that there was 16 months' delay after the levy of an execution on a homestead before proceedings were taken under Civ. Code, §§ 1245–1258, providing a method for subjecting to execution the excess of value over the exemption, did not show an abandonment; a part of the delay being explainable by the pendency of a suit to enjoin execution sale.

Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Walter J. Lean against J. A. Givens. From an order in a proceeding under Civ. Code, §§ 1245–1258, directing a sale of certain lands on execution, defendant appeals. Affirmed.

A. H. Jarman, for appellant. Chas. W. Davison and J. H. Russell, for respondent.

SHAW, J. This is an appeal by the defendant from an order of the superior court in a proceeding under the provisions of sections 1245 to 1258, inclusive, of the Civil Code, directing the sale on execution of certain lands held by the judgment defendant as a homestead. The judgment defendant, Juliet H. Stark, was not the head of a family, and consequently the amount of the homestead exemption was only $1,000. The judgment was entered and docketed on October 23, 1899, and the homestead was selected prior to that date. The appraisement made in the proceeding showed the property comprising the homestead to be worth $4,700. The execution was levied on the property on November 4, 1899, and an attempt was made to sell, upon the claim that the homestead was invalid. This sale was enjoined, and final judgment was made in the injunction suit on May 18, 1900, prohibiting the judgment plaintiff from enforcing the levy otherwise than by proceedings under Civ. Code, §§ 1245–1258, inclusive. On May 2, 1900, the judgment defendant sold and conveyed the land to the appellant, Givens, and on October 12, 1900, the judgment was assigned to the respondent, Walter J. Lean. The petition for the appointment of appraisers under section 1245, Civ. Code, was not filed in the superior court of the county until March 5, 1901.

There is thus presented the question whether or not the levy of an execution on property described in a declaration of homestead, which exceeds in value the amount of the homestead exemption, creates any lien on the land, so far as there is an excess over the homestead exemption. We refer to the lien of the levy as distinct from the judgment lien, because in Lubbock v. McMann, 82 Cal. 230, 22 Pac. 1145, 16 Am. St. Rep. 108, it appears to have been held that a judgment is not a lien on any part, either in extent or value, of the homestead premises, even in cases where there is an excess in value above the homestead exemption. This is contrary to the rule in other states, in which the extent of the exemption of the homestead is measured by a certain limited value. See note to Vanstory v. Thornton, 34 Am. St. Rep. 505. In several other cases in this state, where the fact of there being an excess in value was not apparent, the court has stated in general terms that a judgment is not a lien upon property embraced in a valid declaration of homestead. Dam v. Zink, 112 Cal. 92, 44 Pac. 331; Sanders v. Russell, 86 Cal. 120, 24 Pac. 852, 21 Am. St. Rep. 26; Barrett v. Sims, 59 Cal. 615; Bowman v. Norton, 16 Cal. 213; Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516.

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*Rehearing denied June 16, 1905.

Conceding, for the purposes of this case, that the judgment is not even a provisional or conditional lien on the possible excess in value, we are of the opinion that the levy of an execution on the property establishes a lien thereon to the extent of the excess over the homestead exemption which may ultimately, by proper proceedings under the Civil Code, be determined to exist, and that the substituted defendant, Givens, having purchased after the levy, took the land subject to the right of the judgment plaintiff to have it sold upon such proceedings.

The rule at common law was that an execution was a lien on personal property from the time of its issuance, although there was no levy. 2 Freeman on Ex. §§ 199, 200. But at common law neither a judgment nor an execution was a lien on land, and the method of applying the land of the judgment debtor to the satisfaction of a judgment was by means of a writ of elegit, whereby the officer, after exhausting the personal property, could seize the land, and apply the rents and profits of one-half thereof upon the writ. 3 Freeman on Ex. § 370. The common law is in force in this state, except as modified by statute or the Constitution. Pol. Code, § 4468. It has been so far modified by the Code that the only means of enforcing a judgment for money is by writ of execution (Code Civ. Proc. §§ 681, 683), and that land may be taken on the execution as well as personal property (Code Civ. Proc. § 688). The real estate of a judgment debtor is "liable to execution," and "may be attached on execution" in the same manner as upon a writ of attachment, but it is not affected by the execution until there is a levy. Id. The effect of these provisions, in connection with the common law in force, is to enlarge the execution, by making it enforceable against land, and to make it, when levied, a lien or charge on the land. Where the judgment is a lien on the land there is no real necessity for a formal levy, as it adds nothing to the effect of the sale on execution. Lehnhardt v. Jennings, 119 Cal. 195, 48 Pac. 56, 51 Pac. 195. But where the judgment is not a lien the property is not taken on execution until there is a levy, and the lien does not begin until that act is done. Summerville v. Stockton M. Co., 142 Cal. 540, 76 Pac. 243. The levy of an execution is made in the same manner as upon an attachment (Code Civ. Proc. § 688); that is, by filing with the county recorder a copy of the writ, with a notice that the land (describing it) is attached, and serving a similar notice on the occupant (Code Civ. Proc. § 542). The purpose of a lien is to cut off rights of third persons which might otherwise accrue between the time of levy and the time of sale. The filing of the notice in the office of the recorder is clearly for no other purpose than to give notice to third persons of the prior charge. Section 537, Code Civ. Proc., declares that the plaintiff in an action may "have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered," and section 688 provides that land and other property "may be attached on execution, in like manner as upon writs of attachment." Considering the effect of all these provisions, we think it is clearly shown that the levy of an execution upon land, where the judgment is not a lien, creates a lien on the land from that date, which will charge whatever interest in the land is or may be made to be subject to the execution, including the excess in value of homestead property over the homestead exemption. That a levy creates a lien on land where none exists by the judgment has always been assumed by this court, and it is generally understood in the profession to have that effect. See Blood v. Light, 38 Cal. 657, 99 Am. Dec. 441; Beaton v. Reid, 111 Cal. 486, 44 Pac. 167; Summerville v. Stockton M. Co., supra; Lehnhardt v. Jennings, supra.

Section 1240 of the Civil Code, in effect, declares that the excess in value of the homestead property, over and above the exemption allowed, is subject to execution in the manner provided in the subsequent sections of that chapter. Sections 1245 to 1261 provide a plan whereby this excess may be subjected to sale on the execution where the homestead antedates the judgment. The levy on the property covered by the homestead declaration must be made as the first step in the proceeding to subject the excess to the payment of the judgment. Civ. Code, § 1245. We conclude that by this levy a lien is imposed on the property conditionally, to become absolute in the event that it is determined in the proceeding that an excess exists, and that a purchaser after the levy takes subject to the lien. The statement in Sanders v. Russell, 86 Cal. 120, 24 Pac. 853, 21 Am. St. Rep. 26, that "a levy creates no lien," is qualified by the subsequent language of the opinion, and, when taken in connection with the facts involved, must be understood to mean that it does not create a lien that will continue after the lien of the judgment would have expired, nor a lien which can exist independent of proceedings under the Civil Code to enforce it.

The appellant contends that the proceeding was irregular because there was no time fixed for a hearing upon the report of the appraisers, and the order of sale was made without any notice other than the original notice of the time and place of hearing the petition. The Code does not require any notice or hearing after the report of the appraisers is filed. It seems to contemplate that the order for a sale, where the report is that the land cannot be divided, or for a partition, if it is divisible, is to be made by the court ex parte, from an inspection of the report alone. Section 1254 provides that "if, from the report, it appears to the judge that the land claimed exceeds in value the amount of the homestead exemption, and that it cannot be divided, he must make an order directing its sale under the execution." In the case at bar the court finds that the claimant is not the head of a family, and hence her right to a homestead is entirely of statutory creation, and is subject to the statutory conditions with respect to its sale on execution. As the statute does not require notice of the hearing of the report of appraisers, and the homestead exemption is purely a statutory right limited by statutory conditions, the courts cannot impose restrictions upon the right of the creditor to enforce a sale in addition to those imposed by statute. There can be no occasion for further orders of the court or judge in the matter in cases like the present, where the report is that the property cannot be divided. The value is finally determined by exposing the property to sale. If a bid is not made in excess of the amount of the exemption, the proceedings are ended. If a larger amount is offered, it conclusively proves that the value exceeds the exemption; and in that event the excess is of right applicable on the debt, and the claimant has no just cause to complain. His homestead exemption was from the beginning subject to the contingency which has happened, and his valuation of the property is, by the statute which gives him the exemption, made subject to revision by appraisers appointed upon the petition of a judgment debtor. It may be that where the report is that a division can be made, and the excess set off for sale, there should be further proceedings, hearings, and notices for the purpose of securing the right to a just division, as was held in Brown v. Starr, 75 Cal. 164, 16 Pac. 760. That, however, was a homestead of the head of a family. In any case, however, we perceive no good reason for holding that further notices must be given where the appraisers report that the property cannot be divided. Neither the court nor the judge is given power to revise or set aside the decision of the appraisers as to the possibility of making a fair division. The remarks in Stone v. McCann, 79 Cal. 462, 21 Pac. 863, with respect to further notice upon the hearing of the report of the appraisers, is merely a part of the argument upon another question, and the subject-matter of the notices was not before the court. It is not to be considered as authority, at least with regard to a homestead claim by one not the head of a family.

With respect to the delay of 16 months after the levy before the institution of the proceeding under the Civil Code to obtain a sale on execution in pursuance of the levy, it is sufficient to say that it does not establish the fact that the execution levy was abandoned. Part of the delay is explained by the pendency of a suit to enjoin the sale. If the defendant believed the subsequent delay unreasonable, and had good cause for such belief, she should have proceeded in the superior court by motion to have the levy vacated, and her grantee was entitled to the same remedy.

The order is affirmed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

GIVENS v. LEAN et al. (S. F. 3,029.)*

(Supreme Court of California. May 17, 1905.)

Department 1. Appeal from Superior Court, Santa Clara County; W. G. Lorigan, Judge.

Action by J. A. Givens against Walter J. Lean and others. From an order refusing to enjoin defendants from selling certain property under execution, plaintiff appeals. Affirmed.

A. H. Jarman, for appellant. J. H. Russell and Chas. W. Davison, for respondents.

SHAW, J. This is an appeal by the plaintiff from an order of the court, refusing to enjoin the defendants from selling the property of the judgment defendant on execution in pursuance of an order in the case of Hoyt v. Stark, and it involves the same proceedings considered in the case of Lean v. Givens (S. F. 3,118, this day decided) 81 Pac. 128. Having reached the conclusion in that case that the proceedings involved in this case were in all respects regular, it follows that the order of the court appealed from in this case must be affirmed, and it is so ordered.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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*Rehearing denied June 16, 1905.

146 Cal. 734

PEOPLE v. DELBOS. (Cr. 1,177.)

(Supreme Court of California. May 13, 1905.)

1. Larceny — Distinguished from False Pretenses.

Defendant undertook to buy a lodging house for prosecutrix, who had money in the hands of a trustee. Defendant, on learning of a house that could be bought for $90, made a bargain with the owner for the sale thereof to prosecutrix for $90, and then represented to prosecutrix that she had purchased the house for her for $500. Prosecutrix then said to defendant she would pay $400 down, and the balance in a few days, and requested the defendant to get $400 from the trustee of prosecutrix —at the same time sending instructions to the trustee to deliver it to the defendant—and the trustee delivered it accordingly. Defendant thereupon delivered to prosecutrix a bill of sale, which had previously been signed by the owner of the house, purporting to sell the property to prosecutrix, who thereafter paid the balance of the purchase money to the defendant. From the beginning, defendant's intention was to obtain the money from prosecutrix ostensibly to use in paying for the property, but really to convert all of it to her own use, except the $90. At the time prosecutrix delivered the money or caused it to be delivered to the defendant, she did not intend then to part with her property in the money to any one; her intention being that the defendant should receive the money from the trustee for her, carry it to the owner of the house to be purchased, and then pay it over on behalf of prosecutrix. *Held*, that defendant was guilty of larceny, and not of obtaining money by false pretenses.

2. Same—Cross-Examination.

The theory of the defense was that the defendant had purchased the lodging house, and paid the seller $90 for it with defendant's own money, intending, however, to sell it to prosecutrix for $500; and there was evidence tending to support the theory. *Held*, that where, on cross-examination, prosecutrix answered affirmatively the questions whether defendant told her that the seller wanted $500 for it, and whether it was because defendant told her that that witness turned over the money to defendant, the refusal to permit the witness to answer the further question, "You say now that you did not buy the lodging house from her?" was erroneous, as an undue restriction on cross-examination.

3. Same—Evidence—Admissibility.

The rejection of evidence tending to lay the foundation for proof that the case was instituted by prosecutrix to extort money from defendant was not erroneous, where the prosecutrix was not first asked the direct question whether she had not begun the prosecution for that purpose, though it would have been proper to show such fact to impeach her motives.

McFarland, Henshaw, and Van Dyke, JJ., dissenting in part.

In Bank. Appeal from Superior Court, City and County of San Francisco; F. H. Dunne, Judge.

Angele Delbos was convicted of larceny, and she appeals. Reversed.

A. Ruef, for appellant. U. S. Webb, Atty. Gen., R. C. Van Fleet, and Lewis F. Byington, Dist. Atty., for the People.

SHAW, J. The defendant appeals from a judgment of conviction of grand larceny, and from an order denying her motion for a new trial.

It is claimed that the verdict is contrary to the law and the evidence. We think the evidence was sufficient to sustain the verdict. The charge was that the defendant had on the 12th day of December, 1902, stolen from one Maria Marquet the sum of $400 in money. The particular claim is made that the evidence does not show a larceny of the money, but an obtaining of the money by false pretenses. There was legal evidence tending to show that the defendant and the prosecuting witness, Maria Marquet, were cousins by marriage, and somewhat intimate; that Maria Marquet wanted to buy a lodging house, and defendant undertook to buy one for her; that the defendant learned that one Stalford had a lodging house for sale, which could be bought for $90; that she made the bargain with Stalford for the sale thereof to Maria Marquet at that price, and then represented to Mrs. Marquet that she had purchased the lodging house for her (the prosecuting witness) for the sum of $500; that Mrs. Marquet then said to defendant that she would pay $400 down, and the balance in a few days, and requested the defendant to get the $400 from a Mrs. Janzi, who had that much money belonging to Mrs. Marquet, at the same time sending instructions to Mrs. Janzi to deliver the money to the defendant, which Mrs. Janzi accordingly did, and defendant thereupon delivered to Mrs. Marquet a bill of sale, which had been previously signed by Stalford, purporting to sell the property to Mrs. Marquet; and that Mrs. Marquet afterwards paid the balance of the purchase money to the defendant. The evidence indicated that Mrs. Delbos had, from the beginning of the transaction, intended to obtain the money from Mrs. Marquet, ostensibly to use in paying for the property sold by Stalford to Mrs. Marquet, but really to convert all of the same to her own use, except the $90 actually paid to Stalford. The distinction between larceny and false pretenses sometimes depends on a close analysis of facts and legal principles. It is stated in Harris on Crim. Law (3d Ed.) p. 194: "The most intelligible distinction between false pretenses and larceny has been thus set forth: 'In larceny, the owner of the thing has no intention to part with his property therein *to the person taking it*, although he may intend to part with the possession. In false pretenses, the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud.'" (The italics are our own.) The intention of the owner is described in somewhat different language in other authorities, but the meaning is the same. Thus Bishop says that: "If by fraud a person is induced to part with his goods, meaning to relinquish his property in them, as well as his possession," the person thus obtaining them is not guilty of larceny, but of false pretenses. 2 Crim. Law, § 808. And Clark says: "Where the owner of goods delivers possession, intending to part absolutely with the ownership, there can be no larceny." Clark's Crim. Law. McClain says of this class of cases, where the crime is held to be larceny: "The title remains in the owner, and the subsequent conversion and the original intent to deprive the owner of his property supply the necessary elements of larceny." 1 McClain's Crim. Law, § 562. These authors are here speaking of the intention of the owner with respect to the relation which the person then receiving the goods shall bear to them; that is, the owner's intention as to the effect which the delivery of the possession to the defendant shall have on the title. If such delivery is intended to transfer the title absolutely, there is no larceny, for the goods are then no longer his property, and a subsequent theft of them would be a theft of the goods of the person to whom title was thus transferred; and furthermore the defendant would then be invested with the title himself, and could not be guilty of stealing that which is his own. In the case at bar, at the time Mrs. Marquet delivered the money, or caused it to be delivered, to the defendant, she did not intend then to part with her property in the money to any one. Her intention was that the defendant should receive the money from Mrs. Janzi for her, carry it to Mr. Stalford, the seller, and then pay it to Mr. Stalford on behalf of Mrs. Marquet. If this had been done as intended, the money would have remained in law the property of Mrs. Marquet until its final delivery to Mr. Stalford in payment of Mrs. Marquet's debt on the purchase price of the house. The title thus remaining in Mrs. Marquet, it was subject to larceny as of her property, and the fraudulent appropriation by the defendant to her own use—she having had the intention from the beginning to obtain it for that purpose—constituted, in law, an act of larceny. The distinction has been frequently made by the decisions in this state. People v. Abbott, 53 Cal. 284, 31 Am. Rep. 59; People v. Raschke, 73 Cal. 382, 15 Pac. 13; People v. Rae, 66 Cal. 425, 6 Pac. 1, 56 Am. Rep. 102; People v. De Graaff, 127 Cal. 676, 60 Pac. 429. In People v. Rae the distinction is thus stated: "Where, by means of fraud, conspiracy, or artifice, possession of the property is obtained with felonious intent, and the title still remains in the owner, larceny is established, while the crime is false pretenses if the title, as well as the possession, is absolutely parted with. The evidence was sufficient in this respect to justify the verdict."

It is further to be observed in this connection, in consequence of another point presented in the case, that if the defendant had herself some property interest in the goods sold, and had, by means of criminally false and fraudulent pretenses, made the sale of that interest to Mrs. Marquet for an extravagant price, and thereupon Mrs. Marquet had delivered the money to Mrs. Delbos, not to be carried to the original seller, Mr. Stalford, but to pay upon the price of the sale direct from the defendant to Mrs. Marquet, the crime might have been that of obtaining money by false pretenses, but it would not have constituted larceny, because in that case there would have been an intention on the part of Mrs. Marquet to transfer the title to her money directly to the defendant upon the delivery thereof to the defendant by Mrs. Janzi. The money in that case would not have remained the property of the prosecuting witness after its delivery to the defendant.

This leads us to the consideration of a ruling of the court on the cross-examination of the prosecuting witness, which we think was error. The theory of the defense was that the defendant had purchased the property from Stalford, and paid for it with her own money, intending, however, to sell it again to Mrs. Marquet, the prosecuting witness; that, in pursuance of that intention, she caused the bill of sale to be made out direct from Stalford to Mrs. Marquet; that thereupon she made the sale to Mrs. Marquet, received the $400 as part payment, and delivered the bill of sale. The testimony of the defendant and some corroborating evidence was in harmony with this theory. While the prosecuting witness was on the stand, testifying for the people, after having detailed the transaction, and stating that the defendant purchased the property from Stalford for her (the prosecuting witness), upon cross-examination the following occurred: "Q. You say that Mrs. Delbos told you that Stalford wanted five hundred dollars for this place? A. Yes, sir. Q. And it was because she told you that that you turned over this money to her? Is that right? A. Yes. Q. You say now that you did not buy the lodging house from her?" This latter question was objected to as incompetent, irrelevant, and immaterial, and the objection was sustained, to which defendant excepted. In view of the theory of the defendant, and the testimony in support thereof, and the principle of law to which we have adverted, we think this ruling of the court was erroneous. It tended to elicit from the prosecuting witness a direct statement whether or not she had in fact bought the lodging house from the defendant, instead of from Mr. Stalford. If she had answered that she had done so, the result, as we have seen, would be that the taking of the money would not be larceny. This was the crucial point in the case, and the court should have allowed greater latitude in the cross-examination concerning it.

There were other exceptions to the refusal of some evidence tending to lay the foundation for proof that the prosecution was instituted by the prosecuting witness for the purpose of extorting money from the defendant. It was proper to show this fact to impeach the motives of the prosecuting witness, but the questions asked should have been preceded by a direct question. The prosecuting witness should have been first asked if she had not begun the prosecution for that purpose. The ruling was technically correct.

The judgment and order are reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; LORIGAN, J.

McFARLAND, J. (concurring). I concur in the judgment reversing the order and judgment appealed from. I also concur in that part of the opinion of Mr. Justice SHAW which holds that the court below erred in sustaining an objection to the question asked by appellant of the prosecuting witness—if she had bought the lodging house of appellant. But in my opinion, all the evidence in the case, taken together—as to matters occurring both before and after the delivery of the $400 to appellant—shows that when the money was given to appellant the title to the same passed, and was intended by the prosecuting witness to pass, without any expectation of getting it back, and that, therefore, under the law as both parties assert it to be, the appellant, whether or not she was guilty of any other crime, was not guilty of larceny.

We concur: HENSHAW, J.; VAN DYKE, J.

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146 Cal. 754

EARL v. BOWEN et al. (L. A. 1,663.)

(Supreme Court of California. May 17, 1905.)

1. MUNICIPAL CORPORATIONS — CONTRACTS — EXECUTION—ORDINANCES—ORDERS.

St. 1889, p. 458, c. 1, art. 1, § 2, par. 24, provides that the city of Los Angeles shall have certain enumerated powers, which shall be exercised by ordinance, except "as hereinafter provided." Paragraph 23 declares that the city may exercise all necessary municipal powers, except such powers as are forbidden or controlled by general law. Article 3, § 12, p. 462, provides that all legislative powers shall be vested in the council, subject to the power of veto and approval by the mayor, and shall be exercised by ordinance, and that other action of the council may be by order on motion. Article 3, § 16, p. 462, provides that six members of the council shall constitute a quorum, but no ordinance shall be passed or other act done making any contract, etc., involving the payment of money, except by vote of two-thirds of the members of the whole council, but that all other ordinances may be passed by a majority vote. *Held*, that the making of a contract for city advertising was not an exercise of legislative power, but an administrative act, which the council might perform by order instead of by ordinance.

2. SAME—EXECUTION OF CONTRACT.

St. 1889, p. 506, c. 1, art. 20, § 207, declares that the city of Los Angeles shall not be bound by any contract, "unless the same is made in writing by order of the council, the draft thereof approved by the council, and the same ordered to be, and be, signed by the mayor, or some other person authorized thereto in behalf of the city: provided that the approval of contracts by the city attorney, as required by" article 4, § 49, shall be indorsed thereon before the council shall have power to approve the same. *Held*, that the fact that the city clerk was ordered to sign a contract for public printing by the city before the contract was prepared, and in fact signed the draft before it was approved by the council, did not invalidate the same; the approval by the council, with the clerk's signature attached, being equivalent to the council's approval of the contract before the clerk signed.

3. SAME—AUTHORITY OF CLERK.

Under St. 1889, p. 506, c. 1, art. 20, § 207, providing that the city of Los Angeles shall not be bound by any contract, "unless made in writing by order of the council, the draft thereof approved by the council, and the same ordered to be, and be, signed by the mayor, or some other person authorized thereto in behalf of the city," the council had authority to direct a contract for public printing to be signed by the city clerk.

Commissioners' Decision. Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Bill by Edwin T. Earl against M. W. Bowen and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Anderson & Anderson and Sheldon Borden, for appellant. W. B. Matthews, City Atty., Herbert J. Goudge, Asst. City Atty., and Hunsaker & Britt, for respondents.

CHIPMAN, C. Action to restrain the defendant officers of the city of Los Angeles from giving out public printing and advertising to defendant, the Times-Mirror Company, under a contract between that company and the city. Demurrers to the complaint were interposed for insufficiency of facts, and because of uncertainty and ambiguity in the complaint, and that plaintiff has not legal capacity to bring the action. The demurrers were sustained; and, plaintiff declining to amend, judgment passed for defendants, from which plaintiff appeals.

Briefly stated, the complaint shows: That prior to May 31, 1904, the city council, without passing any ordinance on the subject, secured bids from various newspapers for the city printing for the year commencing June 8, 1904, and received, among others, a bid from the Times-Mirror Company. On May 31, 1904, the council duly and regularly adopted the following resolution, two-thirds of the council voting therefor: "Mr. Davenport moves that the bid of the Times-Mirror Company at sixty cents per inch for publishing the city advertising be accepted, and the city attorney be instructed to prepare and present the necessary contract and bond with the said Times-Mirror Company, and that the city clerk be instructed to sign the same for and on behalf of the city." The city attorney prepared the draft of the contract involved, without further action of the council, and on June 6, 1904, "indorsed thereon in writing his approval of said draft as to form," and thereafter, on the same day, the city clerk signed the contract as follows, "City of Los Angeles, by H. J. Lelande, City Clerk," and the Times-Mirror Company also signed it; and thereafter on the same day the city attorney presented the contract and bond to the council, and by a vote of six of its members the council approved the bond and contract. No further action was taken by the council or by the clerk or by any other officer of the city with reference to the execution of the contract. It was further alleged that city printing has been given out under this contract, and will, unless an injunction issues, continue to be given out, thus creating pretended claims against the city, resulting in a misappropriation of public moneys or necessitating expense and multiplicity of action to defend against them, all to the irreparable injury of plaintiff and the other taxpayers of the city. The only points discussed in the briefs arise on the general demurrer. Questions arising on other grounds of the demurrer are therefore deemed waived.

Plaintiff's contention is that the contract is invalid: (1) Because all powers conferred by its charter upon the city must, in the absence of an express exception, be exercised by ordinance. (2) Because, by the express terms of the charter, all "legislative power of the city," must be exercised by ordinance, and the power to make a contract of this character is a legislative power. (3) Because the charter prescribes certain formalities in the mode of executing a contract after it has been properly authorized by ordinance. That these formalities are mandatory, and no contract is binding unless they are observed, which was not done in this instance. (4) Because the city clerk has no authority and is not authorized to sign a contract on behalf of the city, and the council has no power to authorize or order him to do so, and, if the council could so authorize him, it can only be done by ordinance.

Defendants' position is: (1) That in awarding the contract the council acted in its business or administrative capacity, and not in the exercise of its legislative or governmental powers. (2) That no rule of law, independent of statutory or charter provisions, requires authority to enter into a contract on behalf of a municipality to be conferred by ordinance. (3) That the charter of the city expressly authorizes the council to contract by order. (4) That the mayor is not a component part of the council when exercising the contracting power of the city, and has no power to veto the action of the council relating to contracts. (5) That all formalities required by the charter were observed. (6) That the council had authority to order the clerk to sign the contract on behalf of the city, and no ordinance was required for that purpose. (7) That the facts stated in the complaint are insufficient to entitle plaintiff to injunctive relief.

It is not disputed that the mode of contracting prescribed by the city's charter is the measure of the city's power to contract. The case seems to turn largely upon the question whether the initial steps in the mode prescribed must be taken by ordinance, or may be taken by order of the council. Section 2, par. 24, art. 1 (St. 1889, p. 458, c. 1), provides that the corporation shall have certain enumerated powers, which "shall be exercised by ordinance, except as hereinafter provided." None of these enumerated powers bears directly upon the making of contracts, unless it be paragraph 23, relied on in part by appellant, which declares that the city may exercise all municipal powers "necessary to the complete and efficient management and control of the municipal property and for the efficient administration of the municipal government, * * * except such powers as are forbidden or are controlled by general law." In the enumeration of powers and duties of the council, it is provided by section 12, art. 3, p. 462, that "all legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor, as hereinafter given, and shall be exercised by ordinance; other action of the council may be by order upon motion." An ordinance becomes operative without the mayor's approval unless he returns it to the council with his objections in writing within 10 days after it shall have been presented to him; otherwise his approval is necessary. If he disapproves, he must return it with his objections, and it does not become operative unless passed by three-fourths vote where a two-thirds vote is required to pass the ordinance in the first instance, and in all other cases by a vote of two-thirds. Section 37, art. 3, p. 465. The mayor's veto power does not extend beyond ordinances. Section 16, art. 3, p. 462, is as follows: "Six members of the council shall constitute a quorum for the transaction of business, but no ordinance shall be passed or other act done granting a franchise, making any contract, auditing any bill, ordering any work to be done or supplies to be furnished, disposing of or leasing the city property, or doing any assessment or street improvement, or building sewers, or any other act to be done involving the paying of money, or the incurring of debt by the city, unless two-thirds of the members of the whole council vote in favor thereof. All other ordinances may be passed by a vote of a majority of the whole council." Nine members compose the council. Article 2, § 3, p. 458. Section 20, art. 3, p. 462, is as follows: "The meetings of the council shall be public, and a journal of its proceedings shall be kept by the clerk under its direction, and the ayes and noes shall be taken and entered in the journal in the final action upon the granting of franchises, making of contracts, auditing bills, ordering work to be done, or supplies furnished, disposing of or leasing city property, the passage of any ordinance, the ordering of assessments for street improvements, or building of sewers, or upon any act that may involve the payment of money, or the incurring of debt by the city, and upon the payment of the salaries of municipal officers, and in all other cases upon the call of any other member." Section 207, art. 20, p. 506, entitled "Contracts," is as follows: "The city of Los Angeles shall not be and is not bound by any contract, or in any way liable thereon, unless the same is made in writing by order of the council, the draft thereof approved by the council, and the same ordered to be, and be, signed by the mayor, or some other person authorized thereto in behalf of the city: provided that the approval of contracts by the city attorney, as required by the provisions of art. IV of this charter [section 49, p. 472], shall be endorsed on the draft thereof before the council shall have the power to approve the same; but the council, by an ordinance, may authorize any officer, committee or agent of the city to bind the city without a contract in writing for the payment of any sum of money, not exceeding three hundred dollars." The provision in section 49, art. 4, referred to last above, is that the city attorney "shall approve in writing the drafts of all contracts before the same are entered into on behalf of the city."

The foregoing are the only provisions of the charter pointed out by appellant as having direct reference to contracts. In addition thereto, and as showing the care with which the payment of "claims and demands" is safeguarded, reference is made to article 21 (St. 1889, p. 506, c. 1), from which it will be seen that all claims and demands against the city, except certain claims not now involved, must take a prescribed course before they can be paid. They must not only be approved by the council, but must then go to the mayor for approval or disapproval, which latter action, if taken, may be overruled by a two-thirds vote of the council. Provision is also made by which the auditor has certain supervisory power, and his adverse action may be overruled by the council, as in the case of the mayor. These provisions are instanced by appellant to show a carefully devised procedure to protect the city against improper expenditure, which it is claimed "becomes a mere farce if the six councilmen necessary to approve the claims, in the first instance, and to overrule the objections of the mayor or auditor in case of rejection by either of these officials, have absolute * * * power, subject to no check, * * * to make the contracts on behalf of the city under which the great bulk of the money for claims and demands will be paid out." We cannot see that this feature of the charter throws any light upon the question. The provisions just referred to would apply equally to a claim or demand based upon an ordinance. Under the provisions of section 16, art. 3, supra, the council can do no act "involving the paying of money, or the incurring of debt by the city, unless two-thirds of the members of the whole council vote in favor thereof." The charter makers may have regarded this as sufficient security against improvidence in expenditures. However this may be, we must take the charter as we find it, and construe its provisions as they have been enacted. Electric L. & P. Co. v. City of San Bernardino, 100 Cal. 348, 34 Pac. 819.

The charter does not attempt to define what acts are intended to be embraced by the terms "legislative power," nor does it define the meaning of the term "order" as used in the charter. We may look to the nature or character of the act to be performed to determine whether it should be classified as legislative or as administrative, and we may also look to all of the charter provisions to see whether the intention of its makers was to include the making of contracts, such as we have here, among the powers to be exercised by order. A particular act might very properly be regarded as legislative in its character, and yet the charter might authorize its exercise by order or resolution by a specific provision to that end.

It is noticeable that, in the 38 sections prescribing the powers and duties of the council, in nearly every instance where a power is given it is expressly required to be exercised by ordinance, but in no instance is it expressly stated that contracts entered into or other acts done by the council involving the paying of money shall be authorized by ordinance. The limitation put upon the council by section 16, art. 3, is that no ordinance shall be passed, except by a two-thirds vote, "or other act done granting a franchise, making any contract, auditing any bill," etc. (enumerating many other acts), "unless two-thirds of the members of the whole council vote in favor thereof." It cannot be reasonably claimed that this section requires the "making any contract" to be authorized by ordinance, any more than it requires the "auditing any claim" to be so authorized, and certainly it will not be contended that the auditing of a claim must be by ordinance. Looking to section 20, art. 3, we find "making of contracts" included among the other acts mentioned in section 16, and associated with these is "the passage of any ordinance." No inference can be drawn from these sections that contracts must be authorized by ordinance. Section 37 (page 465) of this article gives the veto power to the mayor only as to ordinances. In matters involving the payment of claims, as we have seen, his power is to approve or disapprove when sent to him. But no implication follows that contracts must be authorized by ordinance, or that the veto power should extend to them. Jacobs v. Board of Supervisors, 100 Cal. 121, 34 Pac. 630. Section 12 of this article, above quoted, vests all "legislative power" in the council, subject to be vetoed by the mayor, and "shall be exercised by ordinance," and it is provided that "other action of the council may be by order upon motion." We do not think that the making of a contract such as the one here is the exercise of "legislative power," in its true sense, as used in the charter.

The distinction between the power of a municipal corporation to contract and the power to legislate, considered apart from any express or implied provision of the charter, is well recognized. The council acts in a double character—in a public and political character, exercising subordinate legislative powers, and in its private character, exercising the powers of an individual or private corporation. S. F. Gas Co. v. City of S. F., 9 Cal. 453, in which case it was said that "the purchase of gas involves only the exercise of a power of a private corporation. It requires the exercise of no political power." So, also, in contracting for water supply, as held in Ill. Trust & Sav. Bank v. City of Arkansas, 76 Fed. 271, 282, 22 C. C. A. 171, 34 L. R. A. 518. Held, also, in Kramrath v. City of Albany, 127 N. Y. 575, 580, 28 N. E. 400, that the leasing or furnishing of a room for the transaction of the city's affairs is a mere business act, and may be delegated to agents or committees, which, it may be remarked, could not be done if purely legislative in its character. See, also, Ukiah v. Ukiah W. & I. Co., 142 Cal. 173, 179, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107; Seward v. Town of Liberty Bank, 142 Ind. 551, 552, 42 N. E. 39; Town of Gosport v. Pritchard, 156 Ind. 400, 404, 59 N. E. 1058; 1 Dillon on Mun. Corps. (4th Ed.) § 66. We do not think Mr. Justice McKee, in Los Angeles Gas Co. v. Toberman, 61 Cal. 199, relied on by appellant, intended to intimate that the distinction above pointed out does not exist, when he spoke of the making of a contract for lighting the streets of Los Angeles as having reference to the legislative power of the council under the charter of 1877 (St. 1877–78, pp. 675, 678, c. 440). The point decided did not turn upon the question we are now considering.

Appellant says in his brief: "The making of a contract may not be, and probably is not, under the authorities, a governmental or legislative function; but a wholly different principle is involved in, and should be applied to, the execution of contracts necessary, and only necessary, 'for the efficient administration of the municipal government.'" Counsel here has reference to subdivision 23, § 2, art. 1 (St. 1889, p. 458, c. 1), supra. This section enumerates the subjects over which the corporation has power, but in none of the subdivisions is the making of contracts mentioned. Subdivision 23 would seem to be little, if anything, more than a statement that the corporation has power to do what would be implied if the statement had not been made. Subdivision 24 declares that all the powers conferred by the article "shall be exercised by ordinance, except as hereinafter provided." To give subdivision 23 the all-embracing interpretation contended for would make an ordinance necessary to the validity of almost every administrative act of the council. The argument proves too much. But if the making of a contract is the exercise of the "municipal powers necessary * * * for the efficient administration of the municipal government," as is urged, it is to be "exercised by ordinance except as hereinafter provided." Subdivision 24. And this brings us to notice article 20, § 207, supra. If this section has the meaning contended for by respondent, the provisions of article 1 and subsequent provisions referred to in article 3 must give way to it. The section stands alone, as article 20 and its provisions relate to a particular subject, namely, the making of contracts, and, we think, "must govern in respect to that subject as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the particular provisions relate." Endlich on Interpretation of Statutes, p. 288, cited in Frandzen v. San Diego, 101 Cal. 317, 35 Pac. 897; State ex rel. Lutfring v. Gœtze, 22 Wis. 363; Healy v. Superior Court, 127 Cal. 659, 60 Pac. 428. Appellant contends that there is neither an express nor an implied exception in section 207 to the requirement of section 2, subd. 24, that all powers of the municipality "shall be exercised by ordinance"; that, on the contrary, it is perfectly consistent with that provision, and "merely provides a mode for exemplifying contracts after they have been duly authorized by ordinance." We cannot so restrict the meaning of the section. If the making of the contract in question was essentially a "legislative" act, and therefore to be exercised by ordinance, there might be force in the suggestion that section 207 merely provides a mode or means of exemplifying the contract. But as we cannot regard the making of the contract to be purely a legislative act, and as there cannot be found in any previous provision of the charter either an express or implied direction that contracts must be authorized by ordinance, we are of the opinion that section 207 plainly authorizes the council, by order, to enter into the contract. In saying that the city "shall not be, and is not, bound by any contract * * * unless the same is made in writing by order of the council," etc., it was equivalent to saying that it could be bound by order, subject, of course, to the observance of the provisions of the section. The last paragraph of the section gives support to this construction, for it says: "But the council, by an ordinance, may authorize any officer, committee, or agent of the city to bind the city without a contract in writing for the payment of any sum of money not exceeding three hundred dollars." In the particular now being considered the provisions of section 207 are the same as section 1, article 12, of the charter of 1878 (St. 1877–78, p. 675, c. 440), cited by appellant on another point, next to be noticed.

Appellant contends that the order in which the acts prescribed by section 207 are to be done is material, and that because the clerk was ordered to sign the contract before it was prepared, and signed it before the draft was approved by the council, the contract is invalid. Citing Frick v. Los Angeles, 115 Cal. 512, 47 Pac. 250, and Times Pub. Co. v. Weatherby, 139 Cal. 618, 73 Pac. 465. In the Frick Case, section 207 was before the court, but the point decided was that because the mayor, who was directed to sign the contract, did not do so, the section was violated. In the other case a similar section (167, art. 13, c. 5, p. 398, St. 1895) in the charter of the city of Eureka was involved, but there the council did nothing but invite proposals and accept the bids. There was no compliance with the charter provision. In the present case the contract was prepared by the city attorney, and his approval was indorsed thereon. It was then signed by the Times-Mirror Company and by the clerk of the city. It was then presented to the council, and was approved by it. All these acts were done on the same day (June 6, 1904). In Goodyear Rubber Co. v. Eureka, 135 Cal. 613, 67 Pac. 1043, the court said: "It is immaterial whether the city attorney's approval was before or after the mayor had signed the contract." Appellant replies that the Eureka charter differed from the Los Angeles charter in this: that the Los Angeles charter provides that the city attorney's approval shall be indorsed on the contract "before the council shall have power to approve." This provision was complied with in the present case. But the Eureka Case applies, since the order in which the city attorney was to approve was the same as the order in which the clerk here was to sign. However this may be, we think, when the council approved the contract with the clerk's signature attached for the city, it was in every essential equivalent to approving it before the clerk signed. The essential thing to be done was the preparation and indorsement of the draft by the city attorney, and its approval by the council. Whether the clerk signed for the city before or after the approval of the council was of no material consequence. The only requirement of the charter as to the order in which the contract is to be signed is that the city attorney's approval as to form must be indorsed on the contract before the council can approve. Estate of Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; Derby v. City of Modesto, 104 Cal. 515, 38 Pac. 900. But it is more seriously argued that the clerk had no authority to sign the contract, because he is not a person authorized to sign contracts for the city, and the council had no authority to order him to do so, except by ordinance. This contention is also based on the claim that the words "authorized thereto" introduce a vitally different feature from the provision in the old charter which did not contain those words. As to the point that it is not one of the duties of the clerk to sign contracts, the same may be said of the mayor, and the argument would result in showing that the council has no power to cause a contract to be executed. The signing of the contract by the clerk was but a ministerial act, involving the exercise of no discretionary power, and could be delegated. 1 Dillon's Mun. Corp. § 96; Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659. In Los Angeles Gas Co. v. Toberman, supra, it was said: "As the signature of contracts in writing is no part of the duties of the mayor, authority to sign comes from the council; and when that body, by its order, directed its clerk to sign the contract under consideration, and he signed it, it was well executed, and, if otherwise made according to the charter, it is valid and binding on the city." The order designating the clerk to sign the contract was also his authority for signing it. We cannot agree with appellant that the addition to the old charter of the words "authorized thereto," embraced in the new charter, has introduced a vital difference, and must necessarily mean previously "authorized thereto" by some general law or by the provisions of the charter. We think that, taking the section (207) in its entirety, and remembering that the act to be performed was but ministerial, and that the charter nowhere authorizes any officer to sign contracts for the city, and does authorize the council to designate the mayor or some other person, it would be an unwarranted construction to adopt appellant's meaning of the section. If by the charter the mayor was authorized to sign contracts, there might be force in the argument that "some other person authorized thereto" should also be some person having similar or previous authority. But this some other person may be some other person than an officer of the city, in which case it would be unreasonable to hold that the council should first pass an ordinance conferring the authority, and thereafter make the order directing him to sign. The natural and obvious construction, it seems to us, is that the order directing the clerk to sign for the city carries with it his authority.

The views herein expressed render it unnecessary to notice respondents' point as to the insufficiency of the complaint to entitle plaintiff to injunctive relief.

It is advised that the judgment be affirmed.

I concur: GRAY, C.

I concur in the conclusion: COOPER, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

146 Cal. 745

SACRAMENTO BANK v. MONTGOMERY et al. (S. F. 3,239.)

(Supreme Court of California. May 17, 1905.)

1. Trusts — Perpetuities — Conveyance to After-Born Children.

A conveyance in trust to lease the premises, and to pay the net rentals to the grantor's son during his life, and upon his death to convey the property to any child or children afterwards born to the son, or to the issue of a deceased child of the son, or, in the event of the son's dying without issue, to the child or children, or issue of a deceased child, of the grantor's daughter, is void in so far as it purports to create a trust for the conveyance of the property upon the death of the son.

2. Same—Trusts for Support.

But the trust to lease the property and pay the net rentals to the son is valid, under Civ. Code, § 857, subds. 2, 3, authorizing the creation of trusts to lease real property, and apply the rents and profits to the use of any person.

3. Same—Trusts Invalid in Part—Sustention of Valid Portion.

The valid portion of the trust being separable from the invalid, the former will be sustained, although the latter will fall.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 72.]

4. Same — Invalid Trusts — Estate of Author.

Under Civ. Code, §§ 864–866, providing that every estate not embraced in a trust or otherwise disposed of is left in the author of the trust or his successors, and may be transferred or devised subject to the trust, so as to vest in the grantee or devisee a legal estate in the property as against all persons except the trustee, a conveyance of property in trust to apply the net rents to the support of the author's son, and convey the premises to the son's children at the son's death, which is void as to the conveyance to the children, leaves in the author of the trust a legal estate in the property which is subject to sale on execution against him.

5. Judgments — Collateral Attack — Recitals as to Validity—Conclusiveness.

A judgment reciting that defendant's default was "regularly entered according to law" is good against collateral attack, although the only affidavit showing publication of summons contained in the judgment roll was filed after the expiration of the three years from the commencement of the action allowed by Code Civ. Proc. § 581, subd. 7, for the service and return of summons.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Sacramento Bank against Charles Montgomery and others. From a judgment for defendants, plaintiff appeals. Reversed.

Freeman & Bates, for appellant. Seth Mann (Goodfellow & Eells, of counsel), for respondents.

ANGELLOTTI, J. This is an action to quiet title to certain real property in the city and county of San Francisco, in the possession of defendants. The court found that plaintiff is not, and never has been, the owner of said lot, or of any interest or estate therein, and gave judgment for defendants. Plaintiff has appealed from the judgment.

Both parties claim under R. H. McDonald, who was the owner of the property on the 1st day of September, 1891. The plaintiff claims under an attachment, judgment, and execution sale of the property in a proceeding against said R. H. McDonald; and the defendants by virtue of a conveyance made by said McDonald, which conveyance antedates plaintiff's attachment and judgment. Plaintiff claims that said conveyance was void because it attempted to create a trust forbidden by the laws of the state. Defendants, while contending for the validity of the conveyance, further contend that the judgment under which plaintiff claims was void, and that plaintiff derived no title by the execution sale, even if the conveyance by McDonald was void.

The conveyance under which defendants claim purported to grant, bargain, sell, and convey the property in question to one Orin F. Miner and his successors in trust "to have and to hold said premises for the following uses and purposes and none other, viz.: In trust to lease said premises not exceeding a term of five years, to collect the rents thereof and to pay out of the same all taxes, assessments and charges and retain a reasonable sum for the care and business thereof, and to pay to my son Richard H. McDonald the net rentals so long as he shall live and upon his death to convey to any child or children hereafter born to him or the issue of a child not living so born to him said property; but in the event he shall not have such child or children then my trustee shall convey said property to the child or children or the issue of any child not living of my daughter Mrs. Mattie Spencer share and share alike." Defendant Montgomery is the duly and regularly appointed trustee in place and stead of said Miner, also a defendant; the only other defendant being Richard H. McDonald, Jr., the son of the grantor, and a beneficiary under the deed.

So far as this deed purports to create a trust for the conveyance of the property upon the death of the son, it must be held to be void, under the decisions of this court. Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; Estate of Sanford, 136 Cal. 97, 68 Pac. 494; Estate of Pichoir, 139 Cal. 682, 73 Pac. 606; Hofsas v. Cummings, 141 Cal. 525, 75 Pac. 110; McCurdy v. Otto, 140 Cal. 48, 73 Pac. 748.

The trust to lease the property, collect the rents and to pay the net rentals to the son so long as he shall live, is, however, one authorized by the law of this state. Subdivisions 2, 3, § 857, Civ. Code. The question then arises as to whether this valid provision is so interwoven with the invalid one that the invalid provision cannot be eliminated without interfering with and changing the main scheme of the grantor. If not, it will stand (Estate of Pichoir, 139 Cal. 682, 73 Pac. 606; Nellis v. Rickard, 133 Cal. 617, 66 Pac. 32, 85 Am. St. Rep. 227, and cases there cited), and the estate of the trustee will be upheld to the extent necessary to enable him to execute the valid trust, and will be void only as to the invalid trust.

We think there can be no doubt that the two attempted trusts are severable. It is impossible to distinguish this deed of trust, so far as this question is concerned, from the deed made by the same grantor, considered in Nellis v. Rickard, supra, under which there was a valid trust for the benefit of Mrs. Spencer for her life, and an attempted trust for the benefit of her children after her death, which latter trust was void because of suspension of alienation beyond the legal period. This court said in that case: "Looking at the deed before us, what seems to us to be intended as the primary trust is the trust for the benefit of Mrs. Spencer, and the ulterior contingent limitation is easily separable from the primary trust, and is but incidental; its purpose being to provide for a contingency which may never arise, since Mrs. Spencer may outlive all her children, and the failure of the provision as to them would not affect the trust as to her." The same, in effect, may be said with equal force of the deed here involved. The case is clearly distinguished from Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, and 136 Cal. 79, 68 Pac. 306, where it was held that the asserted estate of the trustees for life in the realty, and the trust as to personal property, fell with the trust to convey, because they could not be separated therefrom without destroying the whole scheme of the testator. In Estate of Pichoir, supra, this court, in holding that a trust as to personalty was not so inseparably blended with an invalid trust as to realty as to make it necessary to hold that the trust as to the personalty was also void, fully discussed the Fair Case, and the considerations compelling the decisions therein. 139 Cal. 686, 688, 73 Pac. 606. What was said by the court in that case and in the opinions in the Fair Case shows that the court considered that the several trusts in the Fair will were all parts of an exceedingly complicated scheme, so inseparably blended that the settled purpose of the testator would be entirely frustrated, were a portion only of the scheme adhered to. All must stand or fall together. In the Fair Case reported in 136 Cal. 79, 68 Pac. 306, it was said that to hold "that the testator, if he had known that his attempted disposition of the realty was invalid, and that upon his death his vast amount of real property, worth many millions of dollars, would go immediately in fee simple to his children, would have given to them also the income of the personal property, would be to indulge in a most impossible supposition, and to violate the settled law on the subject." No such conditions exist here. As in the case of Nellis v. Rickard, supra, the trust for the benefit of the son during his life was a separate independent scheme, apparently the primary trust, and the invalid trust but incidental. It was plainly the intention of the grantor that, whatever might ultimately become of the property, his son should have the net income thereof so long as he lived, and we see no good reason why effect cannot be given to such intention. In Estate of Sanford, 136 Cal. 97, 100, 68 Pac. 494, the trust for the benefit of the children of the nephew of the decedent, until one of said children should attain the age of 25 years, was held invalid, not because it was inseparably blended with the trust to convey, but because it was merely discretionary. The ruling in Hofsas v. Cummings, 141 Cal. 525, 528, 75 Pac. 110, was as to a trust over, which was absolutely dependent upon a void trust.

Our conclusion on this branch of the case is that the deed of trust was valid to the extent of the life estate thereby created, and that the estate of the trustee must be upheld to that extent.

The defendants cannot, however, uphold their claim to any greater extent than this. The attempted trust to convey being void, no other estate in the property than that necessary to enable the trustee to execute the valid trust was effectually conveyed by the deed. See Estate of Pichoir, 139 Cal. 688, 73 Pac. 606. Every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors, and could be transferred or devised by him subject to the execution of the trust, and any grantee or devisee would acquire a legal estate in the property as against all persons except the trustees and those lawfully claiming under them. Civ. Code, §§ 864–866. The author of the trust here, R. H. McDonald, having a legal estate in this property after the execution of the trust deed, the same must have passed to plaintiff under the execution sale of his interest therein, unless such sale was for some reason invalid.

It is claimed that the sale was void for the reason that the judgment against McDonald upon which the execution was issued was void upon its face; the contention as to the invalidity of the judgment being based upon the further contention that it appears upon the face of the record that return upon the summons was not made within three years after the commencement of the action, and that the court was therefore without jurisdiction to render the judgment. Code Civ. Proc. § 581, subd. 7. This is the only point made against the validity of the sale under execution. The property in question having been attached in the action in which the judgment was given—that of Sacramento Bank against J. M. Burnett, R. H. McDonald et al., an action to recover money—the summons was served upon McDonald by publication. Assuming for the purposes of this decision that, under subdivision 7 of section 581 of the Code of Civil Procedure, where service is had by publication an affidavit showing publication must be filed within three years after the commencement of the action, or the court loses jurisdiction to proceed further in the case, we cannot say that the failure to file such an affidavit is shown by the record of the action in question. Admittedly, the judgment in question cannot be held void upon this collateral attack unless it is void upon its face; i. e., unless its invalidity is apparent upon an inspection of the judgment roll. From this it appears that the action was commenced on September 1, 1894, and that summons was issued on the same day. The record affirmatively shows that the summons was regularly served by publication within three years. There is contained in the record an affidavit showing the mailing of a copy of the summons and complaint within the three years, which was filed within that time, viz., on December 1, 1896. The only affidavit showing publication of summons contained in the judgment roll is one filed after the expiration of three years, viz., on April 1, 1898. This affidavit was subscribed and sworn to on February 17, 1897, and showed proper publication within the three years. The record does not contain the original summons. The indorsement of the clerk upon the complaint shows that the default of McDonald for not answering was entered April 1, 1898. Judgment was given April 2, 1898, and it was recited therein as follows, viz: "In this cause the defendant R. H. McDonald having been regularly served with process, and having failed to appear and answer the plaintiff's complaint as amended, the time allowed by law for answering having expired, and the default of said defendant R. H. McDonald having been regularly entered according to law, and the court having ordered judgment entered in favor of plaintiff and against the defendant R. H. McDonald," etc. The affidavit of publication of summons, filed after the expiration of three years, constitutes a part of the record; and, if this were the only evidence as to the time of the filing of any such affidavit, defendants' contention that it is apparent from an inspection of the record that no affidavit was filed within three years of the commencement of the action would be well made. But such affidavit is not the only evidence upon this subject. The jurisdictional recitals in the judgment also constitute a part of the record, and it is there solemnly declared that the default of the defendant R. H. McDonald has been regularly entered according to law. Assuming here the soundness of defendants' argument to the effect that the court lost all jurisdiction of the case if an affidavit of publication was not filed within the three years, this recital could not be true if no affidavit had been filed prior to the one contained in the record. The whole record must be construed together, and the jurisdictional recitals in the judgment must be taken on collateral attack as true, unless the record affirmatively shows that the facts upon which they are based are insufficient to sustain them. The remainder of the record here does not show this. It does not appear that the recital that default was regularly entered according to law was at all based upon the affidavit contained in the record. For aught that appears, it may have been made to appear to the court in that action that another affidavit showing due publication was filed within the proper time, and the recital may have been based upon that fact. Such affidavit may have been lost or omitted from the record. Such a condition of affairs is entirely consistent with the whole record before us, and, in support of the judgment, must be assumed to have existed. To hold otherwise would be to make the record, in part, speak falsely.

Defendants say that while, where the record is silent as to what was done, it will be presumed in favor of the judgment that what ought to have been done was not only done, but rightly done, yet, when the record shows what was done, it will not be presumed that something different was done. This statement is undoubtedly true, and is supported by a wealth of authority. But it has no application where the record does not purport to show all that was done, and the judgment states that all that was necessary to be done was done. This matter was very clearly discussed by this court in Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742, and, so far as the particular question here involved is concerned, the views there announced have never been departed from. It was said therein (page 407, 34 Cal. [94 Am. Dec. 742]): "To avoid any misapprehension, we deem it proper to add that so far we have assumed, for the purposes of the argument, that the record, aside from that portion of it which is denominated the 'proof of service,' is silent upon the question of service. But it may happen that other portions of the record may also speak upon that question. If so, what they say is not to be disregarded. On the contrary, in determining the question whether a want of jurisdiction is apparent upon the face of the record, we must look to the whole of it, and report the responses of all its parts. To illustrate: Suppose that portion of the judgment roll denominated the 'affidavit or proof of service' shows that personal service was made upon the son of defendant, and the remainder of the roll says nothing about service; we then have a want of jurisdiction appearing upon the face of the record. But suppose the judgment states that the defendant appeared, or that personal service was made upon him, or something else that is equivalent, as it frequently does; the opposite result follows, for the record cannot lie, and it appears that the father as well as the son had been served, which may well have been the case. The record in such a case does not blow hot and cold, as might be supposed. On the contrary, both acts may have been done. On presentation of the return of service upon the son, the court may have declared it no service, and service upon the father may have been subsequently made, and the wrong return may have found its way into the judgment roll. To hold thus would be consistent with the record, while to hold otherwise would be to contradict the judgment. So, in the case of a service by publication, if the affidavit of the printer states that the summons was published one month, and yet the court, in its judgment, states that it was published three, or that service has been had upon the defendant, it will be presumed that other proof than that contained in the judgment roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it. Thus limited or understood, the point made by counsel for appellant is doubtless well made." See, also, Quivey v. Porter, 37 Cal. 458; Vassault v. Austin, 36 Cal. 691, 695; Reily v. Lancaster, 39 Cal. 354, 355; People v. Harrison, 84 Cal. 607, 609, 24 Pac. 311; Whitney v. Daggett, 108 Cal. 232, 41 Pac. 471.

In Belcher v. Chambers, 53 Cal. 635, the judgment considered was a personal judgment against a nonresident, without personal service of process, and without attachment proceedings against property of the judgment debtor situated in this state. The court there simply held that, upon a question which might be re-examined by the Supreme Court of the United States on writ of error, it would follow the rule of law laid down by that tribunal, and did not purport to overrule Hahn v. Kelly, supra, as to any matters not so reviewable by the court. See In re Newman, 75 Cal. 213, 220, 16 Pac. 887, 7 Am. St. Rep. 146. Latta v. Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30, relied upon by defendants, involved the question as to the validity of a deficiency judgment on foreclosure proceedings, wherein the judgment roll showed affirmatively only service of summons by publication in a case where, to authorize personal judgment for any deficiency, personal service was essential. The judgment of foreclosure contained recitals that the defendants had been duly and regularly summoned, and that their defaults had been duly and regularly entered. Service by publication was all that was essential to the jurisdiction of the court to adjudge a foreclosure of the lien, and it was held that the recital in the judgment applied as well to service by publication as to personal service, and the recital must be presumed to refer to such service as the record affirmatively disclosed. So construed, the whole record was consistent, and sufficient to support a judgment, viz., the judgment of foreclosure, but not sufficient to authorize the clerk to enter a deficiency judgment. As applied to this case, the utmost that can be claimed is that under it the recitals as to service here applied as well to service by publication as to personal service, and will therefore be presumed to refer to such service as the record affirmatively shows, not being inconsistent therewith. But the recital here as to the default of McDonald having been duly entered is not consistent with the fact that an affidavit of publication of summons was not filed until after the expiration of the three years, and cannot, therefore, be held applicable to the showing made by the affidavit contained in the record. The case of Latta v. Tutton is not in point here.

We are of the opinion that the judgment in question is not void upon its face, and that the execution sale thereunder conveyed to plaintiff such interest as the judgment debtor then had in the property in question, viz., such estate therein as was not conveyed by the trust deed.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

We concur: SHAW, J.; VAN DYKE, J.

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In re COLLINS. (Cr. 1,199.)

(Supreme Court of California. May 24, 1905.)

1. Attorneys—Disbarment — Verification of Accusation.

Under Code Civ. Proc. § 291, relating to proceedings for disbarment, and providing that the accusation must be verified by some person, it is not necessary that an accusation presented by a committee of a bar association be verified by a member of the committee.

2. Same.

Where the accusation does not purport to be made on information or belief, a verification stating positively that the charges are true and in the exact language of the statute is sufficient.

3. Same—Knowledge of Affiant—Evidence.

The sufficiency of the verification must be determined by an inspection of it, and the evidence of affiant cannot be taken for the purpose of showing that he had no personal knowledge as to the charges.

4. Same—Causes for Disbarment.

Under Code Civ. Proc. § 287, enumerating the causes for which an attorney may be disbarred, an attorney cannot be disbarred for any cause not enumerated.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 50.]

5. Same—Accusation—Sufficiency — Duty to Client.

In proceedings for the disbarment of an attorney, the accusation alleged that respondent was attorney for an administrator, and that while so acting he became substituted as attorney for one suing the estate on a rejected claim, and that after the revocation of the administrator's letters the respondent applied in behalf of his client for the appointment of another administrator, who did not appear in the action, and suffered judgment to go against him by default. It was not alleged that any defense existed to the claim against the estate, and there was no allegation as to why it was the duty of respondent to appear for the administrator. *Held* not to show misconduct which was ground for disbarment.

6. Same—False Charges Against Judge.

Where, pending the signature of findings in a cause, the attorney for the defeated party maliciously procured the publication of false charges against the judge for the purpose of improperly influencing or unjustly discrediting the action of the judge in the case, such conduct was cause for disbarment, in view of Code Civ. Proc. § 282, requiring attorneys to make oath to maintain the respect due to courts of justice and to judicial officers, and to employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth.

In Bank. Proceeding for the disbarment of George D. Collins, an attorney at law. On demurrer to the accusation. Demurrer overruled in part and sustained in part.

LORIGAN, J. This is a proceeding wherein George D. Collins, an attorney of this bar, is accused of such unprofessional conduct as, it is claimed, warrants his disbarment. The accusation is made and presented against him by a committee of the Bar Association of San Francisco, and is verified by the oath of Joseph S. Tobin (not a member of the committee), who deposes "that he has read the foregoing petition, and that the charges therein contained are true." The respondent moves to quash the accusation, and also objects by demurrer to the legal sufficiency of each of the several counts it contains.

As to the motion to quash: It is insisted that this should be granted because the purported verification made by Joseph S. Tobin is not made by one of the persons who makes the accusation, and is not made by one having personal knowledge of the matters set forth therein, and on the further ground that the accusation is not verified as prescribed by law. Section 291, Code Civ. Proc., which directly applies to proceedings of the character here involved, prescribes that the accusation must "be verified by some person to the effect that the charges therein contained are true." The section does not require that the accusation shall be made by any particular person, but only by "some person"; and when such an accusation is preferred by a quasi public body, such as a bar association, or by some other public officer whose duty it is to proceed in such matters in the public interest, it is not contemplated or necessary that the verification should be made by a member of the committee acting for such association, or by such public officer. It is sufficient if the accusation so presented be verified by some person who swears to the truth of the charges set forth in it. Such person is to be deemed the accuser, although the charges are presented and the prosecution conducted on behalf of the bar association or of the public. Nor is there any force in the claim that the verification to the charges is not made by one having personal knowledge of the facts, or that the accusation is not verified as prescribed by law. The charges in the accusation here do not purport to be made on information or belief. They state directly and positively that certain acts of an alleged unprofessional character were done by respondent. The oath of Tobin is positive and unqualified that these charges so made are true, and this is all that the statute requires. The cases of In re Hotchkiss, 58 Cal. 40, and In re Hudson, 102 Cal. 467, 36 Pac. 812, cited by respondent, are not in point. In both these cases the accusation and verification were expressly stated to be made on information and belief. Upon the point that the verification is not made as prescribed by law, it is only necessary to say that it is made in the exact language of the statute. In proceedings of this character the statute (section 291, Code Civ. Proc.) prescribes the form of oath to be taken, and the verification in question is in the literal language of the legislative requirement. This disposes of the motion to quash, which we conclude has no merit, and is denied.

In this connection, however, it is proper to dispose of another point made by respondent at the time of the argument on the motion to quash. Prior to that time respondent had attempted to take the deposition of J. S. Tobin, for the purpose of showing on the hearing of the motion to quash that his verification to the accusation was in fact made upon information, and not upon personal knowledge of the matters specified in the charges. Under advice of the representatives of the bar association preferring the charges, and upon the ground that the verification could not be so attacked, when Tobin appeared before the notary and was sworn he refused to answer any questions on that subject. Respondent, upon the argument, insisted that he had a right to take such deposition for the purpose of making such showing under his motion to quash, and asked for an order of this court directing the witness to answer the questions. We were not then disposed to concede any such right as respondent claimed, and do not now consider that he was either entitled to the order or to make the showing. Whether an oath to an accusation is or is not sufficient is to be determined from an inspection of the verification alone. The verification can neither be supported nor attacked by evidence taken in some ancillary proceeding, and inaugurated avowedly for that purpose. Its validity or invalidity must be determined upon the face of the verification itself.

Upon the demurrer: The accusation consists of three counts, which, for the purposes of this demurrer, may be referred to in a general way, and relate, the first to a transaction of a private nature, and the others to legal proceedings, in all of which the Hibernia Savings & Loan Society of San Francisco was concerned, and in the course of which it is charged either directly or inferentially that the misconduct of the respondent arose.

As to the first count: It is charged therein: That the respondent in May, 1901, for the purpose of securing the payment to himself of $1,255.61 then on deposit in said Hibernia Savings & Loan Society to the credit of one Agnes M. Newman, produced to said J. S. Tobin, the agent and counsel of said banking society, a passbook issued by it to said Agnes M. Newman, together with an assignment purporting to have been made by her of the same and of said deposit in favor of respondent, and stated to said Tobin that said Agnes M. Newman had died in said month of May; that at the time of her death she was his wife; that she had assigned and transferred said passbook and deposit to respondent some time previous to her death; that three of his children had likewise in said month of May died; and that the amount on deposit represented by said passbook was community property of himself and his said wife. That upon the assurance of said Tobin that, if he made an affidavit embodying these statements, the said deposit would be paid to him, said respondent, to procure the "immediate and unhesitating" payment of the same, made an affidavit before a notary public of the truth of the facts above recited, except that no mention was made therein of said children or their death. This affidavit was delivered by respondent to said Tobin, and the money was, at his direction, forthwith paid respondent by the bank. It is charged that this affidavit, in as far as it is stated therein that Agnes Newman was the wife of respondent, and that the deposit standing in her name and subsequently paid to him was community property, was false, as it is likewise charged that his oral statement relative to the death of his children was false. And in this connection it is also alleged that many years previous to May, 1901, respondent had married a sister of said Agnes Newman, who is still living and undivorced from him.

These constitute the salient facts as set forth in the first count, and it is insisted by respondent that they are insufficient to constitute cause for either his disbarment or suspension. In this regard it is contended generally that the matters stated do not, under any view of the law, constitute a cause for his disbarment or suspension from practice. And it is specially alleged that the matters charged do not bring him within any of the provisions of section 287 of the Code of Civil Procedure, which particularly enumerates the causes for which an attorney may be disbarred, and still further that none of the matters pleaded in said count have relation to any act done or committed by respondent in the practice of the law, or in relation to anything pertaining to or affecting his professional conduct as an attorney.

Addressing our attention to the points specially made, it is quite clear that the facts recited do not bring respondent within any of the terms of said section 287. A simple reading of the section in the light of the facts charged makes this obvious. It is equally clear that the acts complained of were not done by the respondent in his professional capacity, or in connection with any matters in which his duties as an attorney were involved. His representations, conceding them to have been falsely made (as the demurrer does), were representations made in his private capacity, and in a purely personal negotiation with the representative of the bank. These points—that the matters charged are not within the express terms of any of the provisions of the section, and that the acts complained of were not done in his professional capacity—are conceded by the relator, but it is contended that the provisions of the section are not conclusive upon the power of the court to strike the name of an attorney from the rolls. It is insisted that the power is inherent in the court itself to discipline its officers for causes that are not specified in the statute; that the statute is not to be construed as restrictive of he general powers of the court in this respect; and that the conduct of the respondent, as charged in the first count, shows him to be so wanting in moral integrity that this inherent power of the court should be invoked to remove him, notwithstanding the restrictive terms of the statute. We are not inclined to indorse the contention of relator in this respect. Whatever the rule may be, in the absence of statutory regulations, as to the power of courts to deprive attorneys of their license for causes which, in the judgment of the court, may warrant that action, we are satisfied that, when the Legislature has specified the acts for which an attorney may be disbarred or suspended, the court is not authorized to act for other causes, or warranted in invoking an asserted implied power to amove for causes not specified in the statute; that the Legislature has the power to regulate the causes for which a disbarment or suspension of an attorney may be had; and that the courts are bound by this regulation and the limitation it imposes. As was said in Ex parte Yale, 24 Cal. 243, upon this subject: "The manner, terms, and conditions of their admission to practice and of their continuance in practice, as well as their powers, duties, and privileges, are proper subjects of legislative control, to the same extent and subject to the same limitations as in the case of any other profession or business that is regulated by statute." In the plenitude of its power, as announced in that case, the Legislature of the state has plainly defined the causes for which an attorney may be deprived of his right to practice. This it had the right to do, and its specification of such causes is, in our judgment, conclusive on this court. And to the extent that an attorney may be disbarred for causes which affect his moral integrity in dealings with others of a purely personal character, and transacted in his private capacity, the statute has provided that it shall be done by court only when he has been convicted of a felony or of a misdemeanor involving moral turpitude. Subdivision 1, § 287, Code Civ. Proc. In all other cases the statute provides for disbarment only when the act or conduct complained of has relation to the violation of the oath taken by him as an attorney, or the violation of some duty or responsibility incumbent or imposed upon him in his official capacity as such attorney. Subdivisions 2-4, § 287, Code Civ. Proc. As it is conceded by relator, and is apparent upon the face of the accusation, that the facts stated in the first count do not bring respondent within any of the terms of the section cited, the demurrer to the first count for that reason must be sustained.

As to the second count of the accusation: It is there charged that in 1892 one Walter T. Robinson was administrator of the estate of Caroline A. Robinson, deceased, then being administered in the superior court of the city and county of San Francisco, and that on April 17, 1898, respondent became, by substitution, attorney for said administrator; that prior to the substitution of respondent as attorney for said administrator an action had been commenced by C. H. Robinson, one of the heirs at law of said Caroline A. Robinson, against her estate, to recover $1,500 upon a claim presented against the same and rejected by said administrator; that, while attorney for said administrator, respondent became substituted as attorney for said C. H. Robinson in his action against said estate on the rejected claim, and, appearing in the said action, had a demurrer, which had been interposed by the former attorney for said administrator, submitted to the court, and it was overruled; that thereafter the letters of administration of said W. T. Robinson were revoked, and in October, 1901, on application of respondent made in behalf of his client, C. H. Robinson, one Purrington was appointed and qualified as administrator of said estate; that thereafter respondent filed an amended and supplemental complaint in said action of C. H. Robinson against said estate, bringing in Purrington, the administrator thereof, as party defendant, and causing service thereof to be made upon him as such administrator; that no appearance in said action was made by Purrington, and respondent in due course had his default entered, took judgment, and subsequently filed an application on behalf of said Purrington, as administrator, for an order of sale of the property of said estate to pay said claim. It is further set forth that the Hibernia Savings & Loan Society prior to April 13, 1896, presented to the administrator of said estate a claim based upon a note and mortgage executed by said Caroline A. Robinson and her husband, Thomas B. Robinson, which claim was allowed and filed; that on said last date all the heirs at law of said Caroline A. Robinson, except said C. H. Robinson, conveyed their interest in the estate to their father, said Thomas B. Robinson, who, in conjunction with said C. H. Robinson, and by way of renewal of the existing mortgage lien, executed and delivered to said estate a mortgage on all of said property, the said C. H. Robinson, however, not joining in the note; that Thomas B. Robinson subsequently died, and, the interest on the note and mortgage becoming delinquent, the said bank foreclosed the mortgage, bid in the property at the sale, and thereafter obtained a commissioner's deed therefor. Upon these facts it is charged that the respondent was guilty of unprofessional conduct in representing conflicting interests in the suit of C. H. Robinson against the Robinson estate, and his conduct in relation thereto, and particularly "in failing to advise said Purrington, as administrator, of his duty as trustee to protect said estate against said claim of C. H. Robinson." We do not think that the facts stated in this count are sufficient to sustain the charge made. While they may show that the respondent did not act with scrupulous regard to adverse criticism of his conduct, or with that sense of propriety which should restrain an attorney from even an appearance of occupying conflicting relations in a legal proceeding, yet the mere fact that he apparently occupied that position does not necessarily imply that in doing so he has been guilty of such unprofessional conduct as warrants disbarment. In order to entail that consequence, it should appear that there were antagonistic interests in fact which he assumed to represent upon both sides, and this should appear by appropriate allegations in the accusation. And it should further appear therefrom that in assuming this relation to both sides of a controversy he was acting from a corrupt motive or with evil intent, and that by reason of such conduct some injury or wrong was sustained by parties interested directly or indirectly in the litigation. An attorney might appear upon the record as representing all of the parties in a suit with their consent, and no exception could be taken to it as against the attorney. And it does not appear from the facts stated that this was not the situation here. This court has said, speaking with reference to a proceeding for disbarment: "This accusation is in the nature of a criminal charge, and all intendments are in favor of the accused. The accusation is not sufficient if, all its statements being true, the accused could be innocent. * * * A construction favorable to innocence must be given to this, if possible. * * * It is true, no such facts are stated in the accusation, but the question on demurrer is, does the accusation negative the possibility of innocence?" Matter of Haymond, 121 Cal. 388, 53 Pac. 899.

Now, examining the allegations in the light of this rule: It is not contended that respondent actually appeared of record for the administrator in the suit of C. H. Robinson against the estate of Caroline A. Robinson, deceased. The point made is that, while he represented the administrator of the estate for general purposes, it was his duty to represent him specially of record in controverting this claim, and not to become the attorney for the claimant without relinquishing his employment as attorney for the administrator; and, as mainly insisted, it was his duty to advise the administrator to protect the estate against such claim. But this duty could only arise if there was any protection which could be afforded against it, and upon this point the count in question is entirely silent. It is not stated why it was the duty of respondent to advise the administrator to that end, nor is there any averment of facts which would even apparently render that advice or the administrator's resistance to the claim necessary. It is nowhere averred that the claim made against the estate was unjust or invalid, or that there was any defense to it, either on the merits or otherwise, or any possible manner by which the estate could be protected against its enforcement. Neither does it appear that, in obtaining a judgment upon it, any benefit accrued to the claimant but what he was justly entitled to, or that any advantage was secured thereby to the injury of any person interested in the estate of the decedent. For aught that appears in the record, the claim was just; no question about its validity could be raised; and hence no necessity or propriety in entailing expense upon the estate in contesting it. And as we have suggested, neither does it appear but that all matters with reference to the conduct of respondent in this litigation were with the consent of all persons interested in the estate—a consent which they were empowered to give, and which would justify the conduct of respondent. The only creditor of the estate was the Hibernia Savings & Loan Society, and it is not asserted even that this action of respondent relative to the matter was without its consent or acquiescence. As to the allegations with reference to the bank's claim against the estate, and its own conduct relative to the renewal of the note and mortgage and the foreclosure, these allegations are quite general, and there is an entire absence of specific dates to show when anything was done by the bank relative to these matters, or particular allegations as to how or in what manner it was affected by the conduct of respondent and the administrator by the suit in question or at all. It may be that the rights of the bank were prejudiced in some manner thereby, but there is nothing of that kind directly averred; nor, if it were permissible, is there such a statement of facts as would warrant a clear inference that it was. Nor is it claimed in the brief of relators that the bank suffered any injury. As there is nothing in the accusation to negative these matters, it must be assumed, within the rule laid down in the Matter of Haymond, supra, as a conclusion in favor of innocence, that the claim was meritorious, and that no defense to it existed; that the conduct of respondent in the matter of this litigation has worked no injury upon any one interested in said estate; that what he did was in good faith, without improper or corrupt motive, and with the consent of all persons interested in the estate.

As to the third count: It is there alleged that in an action on trial in the superior court of the city and county of San Francisco—the Hibernia Savings & Loan Society against Charles H. Robinson—in which respondent represented the defendant, the trial judge, about Saturday, March 26, 1904, announced his decision adverse to Robinson, and reflecting to some extent upon respondent himself; that before findings in the case were signed by said judge, and on Sunday, March 27, 1904, respondent sent for the reporters of the San Francisco Chronicle and San Francisco Examiner to meet him at his office that day, which they did; that he thereupon stated to said reporters that he was about to make charges against the judge who tried said cause "which would make a story for the papers," and thereupon stated said charges to said reporters, which were next day, and before the signing and filing of said findings, published in each of said papers; that the charges so made were of alleged flagrant violations of the duty of such judge with reference to the substance of the proposed findings in the case and their preparation, and concerning which he stated he had some heated discussion with the judge, together with other charges against said judge, which he stated he proposed making to the Governor of the state in order that a special session of the Legislature might be called to consider impeachment proceedings against him. The statements so made by respondent to said reporters, which were published next day, charged said judge with malfeasance in office in many particulars and with incompetency. Said charges so made and given to said reporters on March 27th for publication were on the next day transmitted by mail to the Governor of the state of California. It is charged by the relators that said respondent invited and procured the publication of such charges publicly attacking said judge before the signing and filing of said findings for the purpose of coercing said judge into modifying them in favor of his client, Robinson, or, in the event of not modifying them, for the purpose of discrediting them when they should be signed and filed, and that all said charges were false, and in making and publishing them said respondent acted in bad faith and maliciously, and in violation of his duty as an attorney. We are satisfied that the demurrer to this count should be overruled. The essence of the offense charged against respondent in this branch of the accusation is that he directly procured and instigated a widespread publication in the newspapers mentioned of charges which were false and malicious, and reflecting on the integrity and official conduct of the judge before whom the case in which he was interested was pending, and that this was done by him with a view of improperly influencing or unjustly discrediting the action of said judge in that particular case. No legal exception can be taken to this as a sufficient charge of official misconduct on the part of respondent. None should have known better than he his duty and obligation as an attorney, and that under his oath of office he was bound "to maintain the respect due to the courts of justice and judicial officers," and "to employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth." Section 282, Code Civ. Proc. And it requires no argument or citation of authorities to the proposition that a false and malicious publication of the character charged, instigated and procured under the circumstances averred, and with the intent and motive attributed to him, constitutes gross misconduct on the part of respondent as an attorney. Respondent dwells very largely in his brief on his legal right to prefer charges with the governor of misdemeanor in office and incompetency on the part of the judge, with a view of instigating impeachment proceedings, on the assumption that the gravamen of the accusation against him arises from his having done so in this particular case. There is no warrant for this assumption. The right of respondent to prefer charges with the Governor in good faith against any judge is not questioned. Nor does the conduct of respondent here involved have primary reference to those transmitted charges, although his good faith in so preferring them is questioned. The alleged official misconduct of respondent—and there is no room for a misconception of the charge—consists of having disseminated through certain public journals false and malicious charges affecting the integrity of the judge in his official capacity, with intent to influence his action or discredit his proceedings in a matter then pending before him, and in which respondent was interested. This is charged as something aside from and independent of, the transmission of formal charges against the judge to the Governor, and is alleged to have been done before they were transmitted. Preferring charges against a judicial officer in good faith and through the proper channel is a matter of legal right. Publishing false charges to influence or affect judicial action in a pending cause is misconduct on the part of an attorney doing so. This latter is what the respondent is charged with having done, and is a very different matter from preferring charges against a judge in a legal manner, and through the recognized channel, as a basis for action by the proper public officer or duly constituted tribunal.

The demurrer is overruled as to the third and sustained as to the first and second counts, with leave to relators to amend within 20 days, should they so elect. Should they not elect to amend, then, upon notice to respondent to that effect, he shall have 15 days after such notice within which to answer the accusation.

We concur: HENSHAW, J.; McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.

BEATTY, C. J. I concur in the order of the court, and generally in the opinion. Respecting the second count of the accusation, I do not think the attorney of an administrator can with any propriety accept a retainer to prosecute a claim which the administrator has rejected. But in this case it appears that Collins did not enter any default against the administrator whose attorney he was when first employed as attorney for C. H. Robinson, and so, though chargeable with an impropriety, it resulted in no wrong.

When the first administrator was removed, the situation was simply this: Collins was attorney for a party desirous of litigating a rejected claim against the estate of a decedent, and the administration was vacant. In such a situation I suppose there is no doubt that an attorney may, for the purpose of enabling his client to prosecute the action, apply in his behalf for the appointment of an administrator, and, the administrator being appointed, he may act as his attorney generally in all matters in which his client's interest coincides with that of other creditors, and of the heirs or devisees; that is to say, he may represent the administrator in any proceeding for the discovery or collection of assets, or in the resistance of unjust or illegal demands. But with respect to his client's demand, I conceive that his duty is very clearly indicated by the provisions of section 1510, Code Civ. Proc., relating to an analogous case. It might not be necessary to serve the summons on the probate judge, but the matter should be called to his attention, so that, in the exercise of his discretion, he might appoint an attorney to defend the action. It would not be the duty of the attorney to advise the administrator to resist the claim, but it would be his duty to refer him to the judge for instruction as to the proper course to be pursued, and pending action by the judge no default should be taken or judgment entered.

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147 Cal. 21

GLIDE v. SUPERIOR COURT OF COUNTY OF YOLO et al. (S. F. 4,173, 4,174.)*

(Supreme Court of California. May 26, 1905.)

1. EQUITY—INJUNCTION—RECLAMATION DISTRICTS — AUTHORITY OF BOARD OF SUPERVISORS.

Civ. Code, § 3423, declares that an injunction cannot be granted to prevent a legislative act by a municipal corporation, and Pol. Code, tit. 8, c. 2, prescribing the manner of proceeding and obtaining title to swamp land, gives the determination of all questions of fact relative to the organization and division of reclamation districts to the board of supervisors of the county. *Held*, that a court of equity has no jurisdiction to restrain a board of supervisors from acting on an application for the formation of a reclamation district, on the ground that the lands had been in fact reclaimed.

2. PROHIBITION — JURISDICTION — PROHIBITING UNAUTHORIZED INJUNCTION.

Inasmuch as Civ. Code, § 3423, prohibits an injunction to prevent a legislative act by a municipal corporation, prohibition lies to prevent a court of equity from restraining a board of supervisors from performing a legislative duty.

In Bank. Application by J. H. Glide for prohibition restraining the superior court of Yolo county and Francis Dwyer from proceeding in the trial of an action brought by Dwyer against the petitioner, Glide, and the board of supervisors of the county. Writ granted.

A. L. Shinn, for petitioner. Devlin & Devlin, for respondents.

HENSHAW, J. This is an original application to prohibit the superior court of the county of Yolo and Francis Dwyer from proceeding further in the trial of a certain action brought by said Dwyer against petitioner, Glide, and the board of supervisors of the county of Yolo.

In April, 1903, the petitioner, Glide, presented to the board of supervisors of the county of Yolo a petition in due form for the formation of a reclamation district out of a tract of land belonging entirely to him, and situated within the limits of reclamation district No. 307. The board made its order, fixing the time and place for the hearing of the petition, and the petition and order were duly published for the period prescribed by law before the time fixed for the hearing. At the hearing Francis Dwyer appeared, and asked for a postponement, which request was granted, and the hearing was regularly continued until May 8, 1903. Before the matter came up again for hearing, Francis Dwyer, as plaintiff, commenced an action in the superior court of the county of Yolo to restrain the board of supervisors from acting on the application of the petitioner, and procured a temporary injunction. The superior court of the county of Yolo set the case of Dwyer v. Snider et al. for trial upon the 25th day of November, 1904, at which time the board of supervisors and this petitioner objected to the introduction of any evidence to the effect that the lands in reclamation district No. 307 were reclaimed, on the ground that the court had no jurisdiction to hear or determine that question, because jurisdiction so to hear and determine was exclusively vested in the board of supervisors. The court overruled the objection, holding that it had jurisdiction to hear and determine the matter, and that it had power to enjoin the supervisors in the event that it should be of opinion that the lands were in fact reclaimed, and it announced that it would proceed with the trial of the action under this expressed view of the law and of its powers. The defendant, Glide, then made application to this court to prohibit the superior court of Yolo county from proceeding further with the trial.

Against this petition respondents urge that if, in any conceivable case, the superior court would be justified in enjoining the action of the board of supervisors, this application must be denied. Such, however, is not the law. Courts of equity do interfere, and are justified in their interference, in cases where municipal corporations or inferior boards or tribunals are acting, or proposing to act, in excess of their jurisdiction, and without authority. But, upon the other hand, such courts will not attempt to restrain the political or legislative or governmental acts of such corporations or boards when acting within the legitimate scope of their powers. It is therefore no answer to petitioner's application to say that because, in some instances, courts of equity enjoin the proceedings of an inferior tribunal, that in no instance, therefore, will a higher court stay the hand of a court of equity which is undertaking so to do. Says High (Injunctions, § 1309): "In applications for relief by injunction against the acts of public officers, the determining point is ordinarily whether they are acting within the scope of their authority; and, while equity will not interfere while such officers are acting within the authority conferred upon them by law, to determine whether their action is good or bad, yet, if they assume powers over property which do not belong to them, and infringe upon or violate the rights of citizens under pretense of such assumed authority, equity has jurisdiction to interfere for the protection of the citizens. * * * It is important to observe that courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting inferior quasi judicial tribunals, such as boards of supervisors, commissioners of highways, and the like, on matters properly pertaining to their jurisdiction; nor will they review and correct errors in the proceedings of such officers, the proper remedy, if any, being at law by writ of certiorari." Id. § 1311. "Delicate and interesting questions have frequently arisen touching the extent to which the judiciary may interfere with the executive department of the government, either state or national, and the jurisdiction of equity to enjoin the acts of officers whose duties partake of an executive or quasi executive character. The true test in all such cases is as to the nature of the specific act in question, rather than as to the general functions and duties of the officers. If the act which is sought to enjoin is executive instead of ministerial in its character, or if it involves the exercise of judgment and discretion upon the part of the officer, as distinguished from a merely ministerial duty, its performance will not be prevented by injunction." Id. § 1326. In Alpers v. San Francisco (C. C.) 32 Fed. 503, Mr. Justice Field, discussing the same matter, says: "The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. Municipal corporations are the instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power upon the subjects submitted to their jurisdiction they are as much beyond judicial interference as the Legislature of the state. The courts cannot in the one case forbid the passage of a law, nor in the other the passage of a resolution, order, or ordinance. If by either body, the Legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative act threatened may be in disregard to constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary." Alpers v. San Francisco was reviewed and affirmed by the Supreme Court of the United States in the recent case of McChord v. Louisville, 183 U. S. 495, 22 Sup. Ct. 165, 46 L. Ed. 289. In consonance with these utterances are the decisions of our own state in Fall v. County of Sutter, 21 Cal. 237; McBride v. Newlin, 129 Cal. 36, 61 Pac. 577; Barto v. Supervisors, 135 Cal. 494, 67 Pac. 758. Finally, it may be added that this principle of which exposition has thus been made is crystallized in the language of section 3423 of the Civil Code, which declares that an injunction cannot be granted "(7) to prevent a legislative act by a municipal corporation."

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*Rehearing denied June 23, 1905.

It becomes necessary, therefore, to consider whether or not jurisdiction is vested in the board of supervisors to determine whether or not the lands in the district are unreclaimed, and whether or not the lands sought to be set apart are subject of independent reclamation. The provisions of title 8, c. 2, of the Political Code, answer these questions absolutely in favor of the jurisdiction of the board of supervisors. In that title is prescribed the manner of proceeding to obtain title to swamp lands, the organization, the division of swamp land reclamation districts, and all other matters affecting their affairs; and by the provisions of that title the determination of all questions of fact relative to the organization and division of these reclamation districts is confided to the board of supervisors. Section 3446 et seq. set forth the plan for the formation of such districts. Section 3481 provides that, in case the owners of lands within the limits of a reclamation district desire to have the same set off, they must, "in addition to the petition required by section 3446, show to the board that the said body of lands is capable of independent reclamation." And that the setting off or formation of a reclamation district is a legislative act, and is referable solely to the legislative department of the government, has been frequently decided. Williams v. Supervisors, 65 Cal. 160, 3 Pac. 667; Bixler v. Supervisors, 59 Cal. 698; People v. District No. 108, 53 Cal. 346; Reclamation Dist. v. Gray, 95 Cal. 601, 30 Pac. 779; Reclamation Dist. v. Silver, 98 Cal. 53, 32 Pac. 866; People v. Levee Dist., 131 Cal. 30, 63 Pac. 676. When a petition is filed by the board of supervisors as provided by section 3481, and the notice given as prescribed by section 3447, the board of supervisors acquires jurisdiction to act upon the petition. It appears, therefore, that jurisdiction over this matter, political and legislative in its nature, has been vested in the board of supervisors. Being so vested, the courts are powerless to interfere or restrain the exercise of this political legislative power. Says Judge Cooley (Const. Limitations [3d Ed.] page 168): "The moment a court ventures to substitute its own judgment for that of the Legislature in any case where the Constitution has vested the Legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference. The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but the courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them." See, also, County of San Mateo v. Coburn, 130 Cal. 631, 63 Pac. 78, 621; Wulzen v. Supervisors, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17; County of Siskiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468; Farmers' Bank v. Board, etc., 97 Cal. 318, 32 Pac. 312.

We have said that no doubt can be entertained but that the jurisdiction over these matters is primarily vested with the board of supervisors, and that so long as the board is, as here, acting within the scope of its jurisdiction, judicial interference with its proceedings is improper, and cannot be tolerated. In confirmation of the views here expressed reference may be made to the case of Rice v. Snider et al. (No. 13,681, Circuit Court of the United States for the Ninth Judicial Circuit) 134 Fed. 953, where this precise question in this identical case was presented to Circuit Judge Hunt in an effort to invoke the aid of the federal courts to restrain the supervisors of Yolo county in this very proceeding. Judge Hunt, in refusing the petition for an injunction, after setting forth the principle that courts will not interfere by injunction with legislative action of a municipal corporation, unless the proposed legislation is beyond the scope of the corporate power, and its passage would, under the circumstances, work an irreparable injury, declared that under the law it was the duty "of the board of supervisors alone to ascertain the fact whether the land is or is not reclaimed, and thereafter to exercise a judgment and discretion as may be proper and expedient. To hold that the lands are reclaimed would be to pass upon the disputed facts of the case. It would not be proper at this time. It would, in effect, be to control the action of the board of supervisors by injunction. But, as said, the ascertainment of the fact rests with the board alone, and does not affect their jurisdiction." It appears, therefore, from the undisputed facts in this case, that the superior court of Yolo has taken unto itself the determination of a question of fact, jurisdiction to determine which question of fact is in the first instance exclusively vested by law with the board of supervisors of Yolo county. Further, it appears that the superior court of Yolo county, as it shall determine the fact to be, will proceed to enjoin the board of supervisors in the performance of a legislative duty, the execution of which is made their sole province under the law. That the trial court is acting mistakenly in this particular does not admit of question.

The only question left in the case is whether or not the remedy by prohibition from this court is open to petitioner herein. We think it is. The writ will lie in cases where there is an attempt on the part of a court to assume jurisdiction to determine a matter whose determination belongs exclusively to another jurisdiction, or where there is no warrant in law for the court's assumption of jurisdiction. Under such a state of facts, and wherever it appears that an appeal does not afford an adequate and speedy remedy, the writ will issue. It was so ordered in Siebe v. Sup. Court, 114 Cal. 551, 46 Pac. 456. There the superior court erroneously sought to try a proceeding without authority of law, in entertaining an accusation in writing against the petitioner for willfully undervaluing certain property. The accusation was brought under section 772 of the Penal

Code. The defendant to the accusation appeared and objected to the jurisdiction of the court, as was done in the present case, and moved the dismissal for lack of jurisdiction. His objection being overruled, and his motion denied, the trial might have proceeded, and he could have obtained relief upon appeal; but he made application for prohibition to this court, and prohibition was granted, this court holding that, if the petitioner's motives were criminal, he was not properly charged, and, if the act was done in the ordinary course of official duty, without improper motive, it was one for which he was not amenable to the penal laws of the state. In Hopkins v. The Superior Court, 136 Cal. 552, 69 Pac. 299, the court imposed as a condition on the right of plaintiff to dismiss the payment of defendant's costs. Here, of course, an appeal after trial would have cured the error of which plaintiff complained, but upon application to this court for prohibition it was held that the right of dismissal could not be thus qualified, and the trial court was prohibited from proceeding with the case, this court saying: "The plaintiff, under the circumstances, has no other plain, speedy, or adequate remedy than the one she here seeks. She would otherwise be obliged, submitting to the order, to undergo a trial of the action, which within her rights she has caused to be dismissed." In Carter v. The Superior Court, 138 Cal. 150, 70 Pac. 1067, there was an attempt by the superior court to determine an election contest between rival candidates for the office of city treasurer of Santa Rosa. Notwithstanding the fact that an appeal was open to the injured party after trial, this court prohibited the superior court from proceeding with the trial of the contest upon the ground that the jurisdiction of the common council of Santa Rosa was exclusive, and that it was the proper tribunal to determine the matter. In Hayne v. Justices' Court, 82 Cal. 284, 23 Pac. 125, 16 Am. St. Rep. 114, it was held that, where a court proceeds to trial against an express prohibition of a statute, its assumption of authority will be corrected by prohibition. So here it appears that the superior court is undertaking to enjoin the action of the board of supervisors in the performance of a duty, exclusive jurisdiction over which is vested in it by law, and this in direct opposition to the rule laid down in section 3423 of the Civil Code that an injunction cannot be granted to prevent a legislative act by a municipal corporation. It follows, therefore, from what has been said, that an appeal, following the delay, trouble, and expense of the trial of a question of fact over which the superior court has no jurisdiction, would, under the adjudicated cases, be no adequate relief to the petitioner herein, and that he is therefore entitled to the relief prayed for.

Let the writ of prohibition issue accordingly.

We concur: LORIGAN, J.; McFARLAND, J.; VAN DYKE, J.

SHAW, J. I concur in the opinion of Mr. Justice HENSHAW, except the part thereof referring with approval to the decisions upon the question whether or not prohibition is the proper remedy. The question whether or not the remedy by appeal is adequate is, even in cases where jurisdiction is plainly lacking, a matter resting in the sound discretion of this court, upon the particular circumstances of each case. Upon such a question precedents are of little value, and I am not prepared to approve all the decisions cited upon that point. The lack of jurisdiction in the injunction suit is properly put upon the ground that the superior court should not, in advance of legislative action, attempt to restrain or control the subordinate legislative body, where it is proceeding according to the forms and in the mode prescribed by law. I think it is proper to say further that this decision should not be understood as going to the extent of holding that, if private property rights are affected or destroyed by the formation of the new district out of a part of the old one, the preliminary decision of the board, in the proceeding to form the new district, that the land embraced therein had not been reclaimed, will be conclusive under all circumstances, or that such decision is not subject to review in an attack upon the proceedings in a proper case and upon proper grounds.

I concur: ANGELLOTTI, J.

BEATTY, C. J. I concur in the view of Justice SHAW regarding the effect of a finding by the board of supervisors in the proceeding instituted by Glide that his lands have not been reclaimed. It does not necessarily follow from anything here decided that such a finding would be deemed conclusive for all purposes between him and other landowners in the district, and there is, perhaps, no danger that the opinion of the court will be so construed. I think, however, it should be made very plain that we decide nothing more than this: that the superior court has no power to enjoin the board from acting upon the petition. When swamp lands within an established reclamation district have not been reclaimed, the board, upon a proper petition, supported by proofs satisfactory to them, is empowered to set off such lands in a separate district; and necessarily, when a proper petition is filed, they must decide preliminarily whether the case is one in which they are authorized to act. But the effect of a finding in favor of their jurisdiction upon the vested rights of others remains an open question. When the lands of a district are fully reclaimed, the board has no power to exempt a portion of them from their share of the current expenses of the system by taking them out of the district, and a finding contrary to the fact that they have not been reclaimed is not necessarily conclusive, and certainly could not be deemed conclusive if its effect was to impair vested rights. The reason why the law limits the power of the board to unreclaimed lands is sufficiently obvious. By completing the reclamation of the lands within a regularly organized district according to the plan of reclamation, each landowner acquires, under existing laws, valuable rights as against the others; and among the rest the right to demand from each a ratable contribution to operating expenses (i. e., the expense of pumping seepage and surface waters, if that is a part of the plan, and keeping the levees in repair). Can a board of supervisors destroy this right by deciding that lands are unreclaimed, when in fact they are fully reclaimed? I think the answer to this question is furnished by such cases as Spring Valley W. Co. v. San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116. Vested rights of property and contract rights are placed by the Constitution under the protection of the courts, where alone the questions of law and fact upon which they depend can be finally decided.

I concur in the judgment.

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146 Cal. 621

WELSH v. CROSS. (S. F. 3,323.)

(Supreme Court of California, May 2, 1905. On Rehearing June 2, 1905.)

1. EXECUTION SALES—REDEMPTION—EXISTING JUDGMENTS—AMENDMENT TO STATUTE—CONSTRUCTION.

Under Code Civ. Proc. § 702, prior to the amendment of Feb. 26, 1897 (St. 1897, p. 41, c. 44), a judgment debtor was allowed six months after sale in which to redeem real estate from a sale thereof under execution. *Held*, that the amendment, which extends the time of redemption to 12 months, does not apply to judgments existing at the time of its passage.

On Rehearing.

2. SAME — CONSTITUTIONAL LAW — VESTED RIGHTS.

A law extending the time of redemption from execution sale is unconstitutional as to liens accruing before its enactment because it impairs the security in which the creditor has a vested right.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 203.]

3. SAME.

A law reducing the interest rate on a redemption of land from execution sale is not unconstitutional because it does not impair the security of the creditor or affect injuriously the interest of the debtor.

Commissioners' Decision. Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John O. Welsh against R. H. Cross to redeem from a sale of lands on execution. Judgment for defendant, and plaintiff appeals. Affirmed.

Franklin P. Bull and William H. Schooler (L. A. Wittenmeyer, of counsel), for appellant. Roger Johnson, for respondent.

COOPER, C. A demurrer was sustained to the complaint, and judgment entered for defendant, from which the plaintiff has appealed. A judgment was recovered in June, 1896, against plaintiff, upon his promissory note made in 1892, and on the judgment a writ of execution was issued and levied upon the lands described in the complaint, which were regularly sold thereunder in October, 1900. At the time the promissory note was executed, and at the time the judgment was rendered, the judgment debtor was allowed, under section 702, Code Civ. Proc., six months after sale in which to redeem real estate from a sale thereof under execution. In February, 1897, after the entry of judgment, but before the levy of sale, the section of the Code was amended so as to allow the judgment debtor 12 months in which to redeem. In October, 1900, the defendant became the purchaser of the property at the sheriff's sale under a writ of execution issued upon the judgment, and after the expiration of six months the sheriff executed a deed to him. After the execution of the deed, and before the expiration of the year, plaintiff offered to redeem by paying the amount of the purchase price and interest thereon as fixed by the statute, and now seeks by this action to be allowed to redeem by paying the amount of the judgment and interest according to the statute of February, 1897. The question for determination is, whether the judgment debtor's right to redeem is governed by the law in effect when the contract was made and the judgment obtained, or by the law now in force. Does the statute, as amended in February 26, 1897 (St. 1897, p. 41, c. 44), apply to contracts made, upon which judgments had been obtained, at the time it was so amended? If it does, then plaintiff had the right to redeem; but if it does not, then the judgment of the court below is correct.

It is provided in section 10, art. 1, of the Constitution of the United States, that no state shall pass any law "impairing the obligation of contracts," and in section 16, art. 1, of the Constitution of the state of California, that the Legislature shall pass no "law impairing the obligation of contracts." The language of the two Constitutions is not ambiguous nor doubtful. Any law which impairs the obligation of a contract is prohibited. The restriction is not aimed solely at laws which expressly destroy or annul contracts, or in a certain degree impair their obligation, but it applies to all laws which in any substantial degree impair the obligation of contracts. The question as to whether or not a law impairs the obligation of a contract is not always of easy solution. The provision of the Constitutions quoted, in its varied applications, has been the subject of more learning and discussion in the courts of the states and of the United States than perhaps any other constitutional provision. It is settled that all the laws of a state existing at the time a contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are as obligatory upon all courts which assume to give a remedy on such çontracts as if they were referred to or incorporated in the terms of the contract. Von Hoffman v. City of Quincy, 4 Wall. 550, 18 L. Ed. 803; Brine v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858. The remedy, where it affects substantial rights, is included in the terms "obligation of a contract," and the remedy cannot be altered so as to materially impair such obligation. Green v. Biddle, 8 Wheat. 75, 5 L. Ed. 547; Edwards v. Kearzey, 96 U. S. 600, 24 L. Ed. 793. In the latter case it is said: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law ceases to be, and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest."

When the judgment was obtained against plaintiff it became a lien upon all his real estate, and the law of the land gave his creditor the right to have execution issue thereon, and, under said execution, to levy upon and sell any real estate of the plaintiff, the title at such sale to become absolute unless redemption be made within six months. The law as afterwards amended, if applicable to judgments obtained before its passage, would take away this right, deprive the creditor of the right to sell a title which would become absolute at the end of six months, and vest in the plaintiff an equitable estate for another six months. The right to sell property so as to convey an absolute title and the immediate right of possession is more valuable than the right to sell it on condition that the title shall vest at some future time. It is evident that, the longer the time for redemption before the purchaser can acquire a title, the less valuable the property would be to the purchaser. If 10 years were given in which to redeem, there would, we apprehend, be few purchasers; and, if 100 years were given, the right to sell land would be a right without value, and of no assistance to the creditor. If the Legislature can extend the right to redeem from execution sales, after the judgment has been obtained, for a period of six months, it could extend it for twelve months, or for many years. The difference would only be one of degree. In one case the obligation of the contract would be impaired in a less degree than in the other. But the Constitution says it shall not be impaired at all. We think the safer rule is to hold that the amendment is not applicable to an execution sale made upon a judgment rendered before its passage, instead of trying to distinguish the case by discussing the degree in which the contract was impaired. If the Legislature desires to change the period of redemption from execution sales from time to time, it is better policy to hold that such change shall not be retroactive, but shall only be applicable to judgments rendered after such amendment. The law as read into the contract at the time it is made should govern in its enforcement. The question in various aspects has been before the Supreme Court of the United States several times.

In Green v. Biddle, 8 Wheat. 1, 5 L. Ed. 547, where the Constitution of Kentucky provided that all private rights and interests to certain lands should remain secure and valid under existing laws, it was held that a law passed by the Legislature of Kentucky relieving the occupant of lands from damages for its wrongful detention, and requiring the owner to pay the occupant for his improvements, was unconstitutional. It was there said: "If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure, according to the nature and extent of such restrictions." In McCracken v. Hayward, 43 U. S. 608, 11 L. Ed. 397, after the plaintiff had recovered a judgment, the Legislature of the state of Illinois passed an act providing that a sale of property should not be made under execution unless it should bring two-thirds of its value as appraised by certain householders. The act was held to impair the obligation of the contract. In that opinion it is said: "The obligation of a contract consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made. These are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate according to their settled legal meaning. Where it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies there in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other. Hence any law which in its operation amounts to a denial or obstruction of the rights accruing by contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. * * * The right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant and as much a part of the contract as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. * * * Any subsequent law which denies, obstructs, or impairs this right by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement or any other mode of valuation than a public sale, affects the obligation of the contract as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. * * * No agreement or contract can create more binding obligations than those fastened by the law, which the law creates and attaches to contracts. The express power which a mortgagor confers on the mortgagee to sell as his agent is not more potent than that which the law delegates to the marshal to sell and convey the property levied on under an execution."

The law as stated in the above case is decisive of this. The amendment diminished the right of the creditor; it created a greater estate in the debtor. Its object was to give the debtor greater rights than he had before, and he cannot be given rights that he did not have when the judgment was obtained, without such rights being taken from the creditor.

In Planters' Bank v. Sharp, 47 U. S. 301, 12 L. Ed. 447, the court held that an act of the Legislature of the state of Mississippi prohibiting any bank from transferring, by indorsement or otherwise, any note, bill receivable, or other evidences of debt, impaired the obligation of contracts as to the notes and bills receivable held by the bank at the date of the passage of the act. The court said: "What law existed on this point when the note was actually transferred is not the inquiry, but what existed when it was made and its obligations as to a contract were fixed."

In Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793, on error from the Supreme Court of North Carolina, it appeared that when the debts or obligations were contracted the exemption laws of the state allowed as exempt such property as freeholders appointed for the purpose might deem necessary for the comfort and support of the debtor's family, not to exceed $50 in value, and 50 acres of land not to exceed $500 in value. The Constitution of 1868 provided for exempting $500 worth of personal property and a homestead not to exceed $1,000 in value. It was held that the Constitution could not impair the obligation of a contract which existed at the time of its adoption. In that case there was no judgment at the time of the adoption of the Constitution, but the contracts existed. The rule is thus stated in the opinion: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void."

In Seibert v. U. S., 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161, the relator had obtained an ordinary money judgment against the county at a time when a state law gave him the right to have a tax levied to enforce it. Before he could collect it the law was repealed. The United States Circuit Court granted him a mandamus to compel the levy, and the Supreme Court affirmed the judgment, holding that the right to have the tax levied was a vested right that could not be taken away by repeal.

In the late case of Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93, the principle is fully discussed, and it is held that a statute which authorized the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. The court, after citing many cases, said: "It seems impossible to resist the conclusion that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract." This is quoted by Freeman in his work on Executions (3d Ed., vol. 3, § 315), and the author says: "It is true that the decisions of the national courts have been only in cases involving the application of the law to debts secured by mortgage. We do not, however, understand that the fact that the debt was secured gives it any additional obligation or inviolability. It merely selects specific property out of which payment might be coerced, notwithstanding any subsequent transfers or incumbrances by the mortgagor. Where the debt is unsecured, the creditor still has the right to sell under execution any property of the debtor subject to sale, and a statute creating or extending the right to redeem operates to impair the obligation of the contract to the same extent as if the debt were secured by specific property." This court has followed the case of Barnitz v. Beverly, supra, in the late cases of Savings Bank of San Diego v. Barrett, 126 Cal. 417, 58 Pac. 914, Haynes v. Tredway, 133 Cal. 400, 65 Pac. 892, and Malone v. Roy, 134 Cal. 344, 66 Pac. 313.

In the above case of Haynes v. Tredway the subject is fully discussed, and the court said: "In another form it may be said that the agreement of the mortgagor was that the purchaser at the sale should have title to the property, subject to a right of possession thereafter in the mortgagor for six months. That was the contract in this case, and the necessary result of giving the amended statute effect here is to give the mortgagor the right to the possession of the property for twelve months after the sale. It is thus patent upon its face that a statute extending the right of possession in the mortgagor for a period of twelve months is a substantial impairment of the obligation of a contract limiting the right of possession to six months."

Upon what principle could it be said that where the parties create a specific lien upon real estate an extension of the period of redemption impairs the obligation of the contract, but that where they create a general lien upon such real estate it does not impair the obligation of the contract? If a debtor is the owner of a single lot or tract of land, the lien of the creditor by judgment thereon is in most cases as valuable to him as if he had a lien thereon by mortgage. And the later decisions of this court are in accord with its earlier ones. In the case of Thorne v. Hays, 4 Cal. 127, the opinion states that the case had attracted more attention and deeper interest than any that had ever come before the court. Four counsel on each side were heard in argument, and it was held in an able opinion that a law as to redemption did not apply to judgments existing at the date the law was passed. The court said: "By the change of the law the right of absolute sale is taken away, and a provision substituted which not only hinders and delays him in recovering his money, but renders him insecure in the hope of it, and might in many instances totally destroy his rights by nullifying them. It is said that a substantial remedy is left, but if the Legislature can delay payment by limitation or exemption laws for six months, they could do it for six years. Hence the cautious apprehensions of the sages of the law who tell us that such a construction would be pregnant with mischief and liable to abuse. The highest authorities among American jurists and the most learned expounders of the federal Constitution concur in the rule that the suspension by statute of remedies, or any part thereof, existing when the contract was made, is more or less impairing the obligation of the contract. It is said that the authorities only apply to those cases where the remedy is denied. Such is not the language of the Constitution—it says 'impaired.'" The case was followed in Seale v. Mitchell and Wardell, 5 Cal. 402. These two early cases were apparently departed from in Toulumne Redm. Co. v. Sedgwick, 15 Cal. 517, and Moore v. Martin, 38 Cal. 428.

Without discussing the two latter cases, it is sufficient to say that we think the three cases cited, following Barnitz v. Beverly, are in accord with the earlier cases, and practically overrule the cases cited from 15 and 38 Cal. The rule, which we have attempted to show is the correct one, was applied to an act as to redemption of real estate from execution sales, and held not to affect contracts made before its passage. Collins v. Collins, 79 Ky. 88. For a further discussion of the subject in accordance with what has been said, see Swinburne v. Mills, 17 Wash. 611; Scobey v. Gibson, 17 Ind. 572, 79 Am. Dec. 490; Blair v. Williams, 4 Litt. 35; State v. Sears, 29 Or. 580, 43 Pac. 482, 46 Pac. 785, 54 Am. St. Rep. 808.

The latter decision was rendered by the Supreme Court of Oregon, on rehearing, after the decision in Barnitz v. Beverly. It is reported in 54 Am. St. Rep. 808, and in a note to the case, referring to Barnitz v. Beverly, it is said: "The decisions in the state courts respecting the constitutionality of statutes purporting to give to debtors a time within which to redeem from execution or foreclosure sales, where no previous right of redemption existed, or, in the case of the previous existence of the right, extending the time within which it might be exercised, were very evenly divided. Thus the constitutionality of such statutes was affirmed in Moore v. Martin, 38 Cal. 428, Beverly v. Barnitz, 55 Kan. 466, 42 Pac. 725, 31 L. R. A. 74, 49 Am. St. Rep. 257, and State v. Gilliam (Mont.) 44 Pac. 394, 45 Pac. 661, 33 L. R. A. 556, and denied in Thorne v. Hays, 4 Cal. 154, Watkins v. Glenn, 55 Kan. 417, 40 Pac. 316, and Wilder v. Campbell (Idaho Sup. Ct.; Jan. 1896) 43 Pac. 677; but the decisions in denial made in California and Kansas were overruled by subsequent decisions made in the same states. It now appears, however, that the earlier decisions in both states were correct." After the decision in Barnitz v. Beverly a rehearing was granted by the Supreme Court of Montana, and a judgment rendered in accordance therewith. 18 Mont. 109, 44 Pac. 394, 45 Pac. 661, 33 L. R. A. 556.

We therefore conclude that the statute extending the time for redemption does not apply to judgments existing at the time of its passage, and that the judgment should be affirmed.

I concur: GRAY, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: SHAW, J.; VAN DYKE, J.; ANGELLOTTI, J.

On Rehearing.

SHAW, J. In a petition for rehearing, the appellant cites the recent decision of the Supreme Court of the United States in Hooker v. Burr, 194 U. S. 415, 24 Sup. Ct. 706, 48 L. Ed. 1046, and insists that it is contrary to the views stated in the opinion of Commissioner COOPER herein. The case was not cited in the briefs of counsel upon which the case was submitted, nor referred to in the opinion. Upon an examination of the opinion in that case, I am satisfied that it is not decisive of the case at bar.

It involved the validity, as against a purchaser at a foreclosure sale, of a law enacted after the execution of the mortgage and before the decree of foreclosure, reducing the rate of interest on the purchase money to be paid by a redemptioner from 2 per cent. a month, as previously allowed, to 1 per cent. a month. Cal. St. 1895, p. 225, c. 184. The opinion also refers to another law of this state (St. 1897, p. 41, c. 44), increasing the time allowed for redemption from 6 to 12 months, which is the law here in question; but, as the redemption there involved was in fact made within the 6 months, the validity of this law was not in issue. The suit was by the purchaser to compel the sheriff to execute to him a deed pursuant to the sale, notwithstanding the payment of redemption money with interest at 1 per cent. a month. The decision is to the effect that the law was valid against such purchaser. The ground of the decision is that the purchaser is not a party to the contract of mortgage, and cannot invoke the constitutional protection afforded to it, but that his contract regarding the right to redeem was a contract made under the law in force at the time of the sale. The court says: "Upon principle, we cannot see how an independent purchaser, having no connection with the mortgage, excepting as he became such purchaser at the foreclosure sale, can raise the question in his own behalf in relation to the validity of legislation as to redemption and rate of interest which existed at the time he made his purchase. * * * In our view, the independent purchaser must, under the facts herein, abide by the law as it stood at the time of his purchase."

If this proposition is to be taken as broadly as the language would warrant, it would, of course, apply to all sheriffs' sales, and to all laws affecting them, so far as the rights of purchasers thereunder are concerned, and, as the relation of the defendant herein to the case is that of a purchaser only, it might be said that his rights depend on and are measured by the law in force when he purchased. The language of the decision must, of course, be interpreted with reference to the particular law there considered. So understood, I do not think it can be applied to the law here in question. It must be conceded, in view of the fact that it has been so decided by the United States Supreme Court, which is the paramount authority on such questions, that the law which prescribes the amount of interest on the purchase money which must be paid to redeem land from a foreclosure or execution sale is the only law on which the purchaser can rely, and is the measure of his rights in that particular. It does not follow that the same is true of the law which fixes the period allowed after the sale within which the debtor may redeem and during which he may remain in possession of the land. The rights of the parties in regard to the land reach farther back, and must depend on the rights of the creditor. The purchaser must necessarily obtain all the estate of the debtor in the land which the creditor was empowered to sell. A power to subject property to sale which does not include the power to transfer to the purchaser all the estate sold is no power at all with respect to the estate not subject to such transfer. By the law which became part of his contract the creditor in this case was entitled, for the payment of his debt, to subject to sale the entire estate of the debtor in the land, save and except the right of possession for six months. This right necessarily included the right to transfer all of this estate to the purchaser at the sale. The subsequent law, purporting to carve out of this estate, and reserve to the debtor, an additional term of six months, which is an estate for years, would clearly violate the obligation of the original contract. The purchaser obtains all the right of the creditor with respect to the property subject to sale. The case cannot be distinguished in principle from Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143, Howard v. Bugbee, 24 How. 461, 16 L. Ed. 753, and Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1043, 41 L. Ed. 93, which declare laws allowing or increasing the period of redemption invalid as to pre-existing mortgages; nor from McCracken v. Hayward, 2 How. 608, 11 L. Ed. 397, and Gantly v. Ewing, 3 How. 707, 11 L. Ed. 794, holding laws requiring the appraisement of property, and prohibiting the sale thereof for less than a certain proportion of the appraised value, invalid against previous contracts; and Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793, and Gunn v. Barry, 15 Wall. 610, 21 L. Ed. 212, establishing the same rule concerning laws providing a homestead or additional exemptions. In all such cases the creditor would obtain no benefit whatever from the constitutional provision in his favor, if he could not by means of his legal process transfer to the purchaser the property, or estate therein, attempted to be withheld by the subsequent law.

BEATTY, C. J. The case of Hooker v. Burr, 194 U. S. 415, 24 Sup. Ct. 706, 48 L. Ed. 1046, upon which petitioner so confidently relies, is not authority in this case, because of the broad and vital distinction between a law extending the time of redemption from execution sale and a law reducing the rate of interest to be paid by a redemptioner. The former diminishes the estate which can be sold, and necessarily impairs the security. If an independent purchaser cannot hold the entire estate subject to the mortgage or judgment lien, the lienholder cannot sell the whole estate. No man will purchase and pay for what he cannot hold, and what no one will purchase has no salable value. The only possible method of securing the full rights of the lienholder is to uphold the title of his vendee to all that he is empowered by his contract or by the law to sell. But a law which merely reduces the rate of interest to be paid by a redemptioner, so far from impairing the security of a mortgagee or judgment creditor, has the opposite effect. There are two classes of bidders at execution sales: One man desires to keep the property for use or as an investment for idle funds, and, it may be assumed, will offer its fair value if compelled to do so by the competition of other bidders. Another man has no desire to keep the property; his only object in bidding at the sale is to profit by the interest to be paid on a redemption. The competition of these two classes of bidders is, of course, advantageous alike to the execution creditor and to his debtor, and a law which induces either class to bid more nearly the fair value of the property than he otherwise would, so far from impairing the security, actually enhances it. I think it is demonstrable—assuming, as the fact is, that the current rate of interest on secured loans is less than 12 per cent.—that a law which reduces the redemption rate from 24 to 12 per cent. has a necessary tendency to induce those who are bidding with a view to redemption to bid higher than otherwise they would. For he cannot afford in any case to pay a sum which will make a redemption unprofitable to the execution debtor or a junior lien holder, and a simple illustration will show that he can afford to bid more nearly the fair value of the property when the redemption rate is 12 per cent. than when it is 24 per cent. Suppose the property offered for sale to be fairly worth $1,250, the man who is bidding solely with a view to a redemption cannot, if the rate is 24 per cent., afford to pay more than $1,000, for at the end of a year the cost of redemption ($1,240) would be practically equal to the value of the property. Whereas, if the rate was 12 per cent., he could better afford to pay $1,100, for at the end of the year the cost of redemption would be only $1,232, leaving eighteen instead of ten dollars as the profit on redemption. Of course, it is not likely that so nice a calculation would or could often be made, but the illustration shows what the real tendency of a law reducing the redemption rate is. It redounds to the advantage of the parties to the contract, and hurts no one but the speculative bidder, who is not in a position to complain.

This view reconciles the two lines of decisions in this court and in the Supreme Court of the United States. A law extending the time of redemption is unconstitutional as to liens accruing before its enactment, because it impairs the security in which the creditor has a vested right. A law reducing the interest rate upon a redemption is not unconstitutional, because it does not impair the security of the creditor or affect injuriously the interest of the debtor.

Rehearing denied.

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JAMES v. E. G. LYONS CO. (S. F. 3,236.)

(Supreme Court of California. May 31, 1905.)

1. Drafts — Contract of Acceptance—Letters—Evidence.

Where an alleged contract by defendant to accept a draft was based on a letter written by defendant to the drawers, requesting them to send acceptances for certain invoices, and stating that defendant was at all times willing to assist the drawers in meeting such paper as per their understanding, namely, "should you find yourself short at maturity to draw back on us for part of them," subsequent letters and telegrams shown to plaintiff's assignors before they purchased the draft, requesting the drawers to pay certain acceptances, and "draw back on us for what you require and send short paper," and "pay our draft and draw back on us for amount need," and "should you, however, at any time find yourself short, honor your paper and draw on us for amount you may require," were admissible as tending to show that defendant's agreement to pay the drawers' back drafts was not limited to the acceptances for invoices mentioned in the first letter, and as throwing light on the general course of dealing between defendant and the drawers.

2. Same — Former Appeal — Law of the Case.

A decision on a former appeal that uncontradicted evidence was sufficient to justify a judgment for plaintiff precluded a review on a subsequent appeal from a judgment for plaintiff of an objection that the same evidence was insufficient to support such judgment.

3. Same—Instructions.

Where, in an action on a contract to accept a draft, it was determined on a former appeal that a letter written by defendant to the drawers contained an unconditional promise on defendant's part to pay the draft, if the purchase of the draft by plaintiff's assignor was made on the faith of the letter, an instruction on retrial of the case on the same evidence, merely submitting for the jury's determination whether the draft was purchased by plaintiff's assignor on the faith of the letter, was proper.

4. Same—Inconsistent Instructions—Prejudice.

Where, in an action on a contract to accept a draft, plaintiff was entitled to recover in case his assignor purchased the draft on the faith of defendant's letter, and the court so charged, a further instruction that if the jury found that the letter containing defendant's promise was intended to include the draft in question, and that plaintiff's assignor purchased the same on the faith of such letter, they should find for plaintiff, though erroneous and inconsistent with the former, was not prejudicial to defendant.

Department 2. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Action by C. H. James against the E. G. Lyons Company. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Reinstein & Eisner and M. S. Eisner, for appellant. Vogelsang & Brown, for respondent.

LORIGAN, J. C. H. James, the plaintiff, brought this action as assignee of D. Sullivan & Co., a banking association of San Antonio, Tex., to recover from the E. G. Lyons Company of San Francisco the amount of $325 alleged to be due on a sight draft drawn at San Antonio, March 5, 1897, by the firm of Mayer & Adler of that city, upon the defendant, and in favor of the assignors of plaintiff. The plaintiff alleged that during the month of February, 1897, the defendant in writing made an unconditional promise to accept and pay said draft, and thereby accepted the same, and that on the faith of such promise the assignors of plaintiff purchased it from Mayer & Adler for value; that said draft was duly presented to defendant and dishonored. The trial was had before a jury, a verdict rendered for plaintiff in the amount sued for, and from the judgment and an order denying its motion for a new trial defendant appeals.

As grounds for a reversal it is insisted that the evidence is insufficient to justify the verdict; that the court erred in its rulings as to the admission of evidence, and misdirected the jury in its instructions.

This is the second time this case has been here. The first trial was had before the court below without a jury, and the plaintiff suffered a nonsuit. Upon appeal the judgment of nonsuit was reversed. James v. The E. G. Lyons Company, 134 Cal. 189, 66 Pac. 210. The last trial, from which this appeal proceeds, was had before a jury, and an examination of the record on both appeals shows that in each trial in the lower court the evidence presented was substantially, and it may be said essentially, the same. On both trials the only evidence offered was on the part of plaintiff, and consisted of the deposition of one Herman Brendel, cashier of the said bank of D. Sullivan & Co.

While the first point urged on this appeal is that the evidence is insufficient to warrant the verdict, we deem it proper to dispose of one of the other points before discussing that one.

1. It is insisted that the court erred in permitting certain evidence to go before the jury. The evidence in this case, aside from

what is claimed to have been improperly admitted, shows that in 1896 and the early part of 1897 the defendant corporation was selling and shipping goods to the firm of Mayer & Adler at San Antonio, who were its customers. The goods were purchased on credit, and drafts for the invoices were accepted by Mayer & Adler, the acceptances becoming due at the expiration of the terms of credit upon which the goods were sold. These acceptances were forwarded by defendant for collection when due, and the collections were made through the bank of D. Sullivan & Co., who were the bankers of Mayer & Adler. The bank, in the course of business, purchased from Mayer & Adler their drafts whenever written authority to draw on responsible persons was produced to it. On February 17, 1897, Mayer & Adler delivered to the said bank a letter dated February 9, 1897, written by the defendant corporation from San Francisco to said Mayer & Adler at San Antonio, the contents of which were as follows: "We must request of you again to send us your acceptances to cover invoices November 20th, $109.38; November 27th, $200; December 18th, $195.50, at four months. We find our selves obliged at times to use these papers, and the unnecessary delay in forwarding the same inconveniences us. We do not want to be kickers, as you seem to think we are, but you should give our letters a little more attention. We are at all times willing to assist you in meeting these papers as per our understanding, viz.: Should you find yourself short at their maturity to draw back on us for part of them. Hoping that you will comply with our request without further delay, we remain," etc.

On March 5, 1897, said bank purchased from Mayer & Adler the draft on the defendant in question, and it is claimed by the plaintiff that said bank purchased it upon the faith of said letter, and upon the unconditional promise to pay it which, it is insisted, is contained therein. This draft was forwarded in due course to defendant through another bank for payment, and payment refused. Before presentation the firm of Mayer & Adler had failed in business.

The evidence, which it is claimed the court should not have admitted, consisted of two telegrams adn a letter from the defendant to Mayer & Adler, sent at different dates in 1896, concerning drafts drawn by it on said firm in the course of their business dealings. On May 12th it telegraphed: "Pay acceptance fourteenth. Draw back on us for what you require and send short paper." On May 13, 1896, it again telegraphed: "Pay our draft and draw back on us for amount need." On November 11, 1896, it wrote: "We have had occasion to discount your acceptances, amongst others, with our bank, and hope you will be in a position to meet them promptly. Should you, however, at any time find yourselves short, honor your paper and draw on us for the amount you may require." Supplementing these offers, and under objection, evidence was admitted to show that the banking firm of D. Sullivan & Co. were shown these telegrams and the letter about the times they were received by Mayer & Adler, and on the faith of them, and at about their respective dates, the said bank bought drafts from said Mayer & Adler drawn by that firm on defendant, as authorized therein. These drafts were all met promptly on presentation to the defendant at San Francisco. There were also admitted, over the same objection, two other letters. One was a letter sent by Mayer & Adler to defendant on the day (March 5, 1897) the draft in question was drawn by them and purchased by the bank, informing the defendant of their inability to meet an acceptance due that day in favor of defendant for $341, and stating that they were compelled "to value back" on defendant for the amount in order to protect the same; that they would draw on defendant for $325, and requested defendant to protect the draft. Also a letter of defendant, dated March 10, 1897, received by Mayer & Adler prior to the presentation of the draft in question, in response to their letter of March 5th, in which the following language is used: "We are in receipt of your letter of the 5th. Your draft on us for $325 will be protected on presentation," etc.

We think all this evidence was properly admitted. Its object was to remove any doubt as to the exact meaning of the language used in the letter of February 9th. That letter is not as explicit as it might have been as to the extent of the obligation which the defendant intended to assume with reference to the acceptance of drafts drawn on it by Mayer & Adler. In fact, commercial correspondence is rarely as clear and satisfactory as it should be. It is not usually phrased with that particularity as to detail, or with that exactness of expression, which renders the meaning of the writer clear and unambiguous. Frequently mention is made in a general way of prior correspondence, or negotiations or understandings between the parties on the particular subject written about, which are intended to be considered as part of the immediate letter, or are often referred to as embracing some of the terms of a contract which the parties are negotiating, or as defining the extent of an obligation which is assumed. When a writing contains such a reference to prior correspondence or negotiations or understandings evidence of these matters is admissible in an action involving the writing, for the purpose of fully showing the terms of the contract or the extent of the obligation.

The letter of February 9th expresses a willingness on the part of the defendant to assist Mayer & Adler at all times "as per our understanding" relative to acceptances in favor of defendant which the former could not meet when due, by authorizing said firm to draw back on it for part of them.

The contention of counsel for appellant, and the construction he claims for the letter, is that defendant only obligated itself therein to accept the drafts of Mayer & Adler to meet their acceptances for the three specially designated invoices mentioned in the letter, if they should find themselves short at their maturity; that it was not an engagement which authorized Mayer & Adler to draw against the previous acceptance for $341 due to defendant on March 5, 1897, the day the draft in dispute was purchased from the bank for the purpose of meeting that acceptance. It was therefore on this point proper to show what the understanding mentioned in the letter of February 9th was; whether it contemplated only particular drafts, as claimed by counsel for defendant, or whether it contemplated any draft accepted by Mayer & Adler in favor of defendant, and their acceptance of which they were unable to meet at maturity. As throwing light upon that subject the past general course of business between defendant and Mayer & Adler was proper to be shown, if it had any tendency to prove an understanding relative to the acceptance of drafts by the former when drawn upon it by the latter, and the terms of that understanding. This the evidence in that regard certainly tends to do, and its pertinency and force, as disclosing what the understanding referred to was, is apparent from the language used by the defendant in the letter of November 11, 1896, where, in writing about the acceptances of Mayer & Adler generally, it is said: "Should you, however, at any time, find yourself short, honor your paper and draw on us for amount you may require."

The letter of February 9th, read in connection with the letter of November 11th, leaves no room for any question as to what the understanding referred to in the former was, or the extent of the obligation assumed, and makes it quite plain that it was intended to be and was an unconditional promise upon the part of the defendant to accept any draft drawn by Mayer & Adler against it, when such draft was drawn to meet acceptances in favor of defendant, which Mayer & Adler were unable to pay at maturity. So we also think that the letter of March 10, 1897, written by defendant to Mayer & Adler relative to the draft in question, was properly admitted in evidence for similar reasons. It was evidence to be taken into consideration with the other evidence just discussed, as tending to show the construction placed by the defendant upon the letter of February 9th, and its understanding of the extent of the obligation it assumed therein.

2. Having disposed of the objections to the admissibility of the evidence, we may now consider the point that the evidence itself is insufficient to support the verdict. As we have said above, this case has been tried twice, and the evidence upon both trials is the same. On the previous appeal from the judgment of nonsuit the sufficiency of the evidence was the only point involved. It was there decided that the evidence, being without conflict, sufficiently made out a case which would have supported a judgment for plaintiff, and the determination of the lower court to the contrary was set aside. On the present appeal we are asked to again review the same unconflicting evidence under the same objection. This we may not do. The decision on the former appeal upon that point is conclusive upon us. It is the law of the case.

3. Upon the instructions. In the first instruction the jury were told to find for the plaintiff if they believed that the assignors of plaintiff, D. Sullivan & Co., purchased the draft on the faith of the letter of February 9, 1897. Under this instruction the only matter submitted to the jury for determination was whether or not the draft in question was purchased by Sullivan & Co. on the faith of that letter; the court, in effect, instructing them that as a matter of law the letter contained an unconditional promise on defendant's part to pay said draft, if the purchase was made on the faith of it. We are satisfied that the instruction was correct, and that, under the previous decision in this case, the court properly limited the consideration of the jury to the question of the purchase of the draft. On the former appeal in this action, and, as we have said before, upon an examination of the same unconflicting evidence as was presented on this last trial, this court said: "We think that the letter of February 9, 1897, read and interpreted in the light of what had preceded it as well as what followed it, contained an unconditional promise in writing to accept the instrument upon which the suit is based. * * * The evidence without conflict shows that the draft in suit was within the limits as to amount and purpose contemplated in the promise of defendant, and that such promise was an unconditional promise, within the meaning of said section 3197 of the Civil Code." James v. The E. G. Lyons Co., supra, pages 192, 196 of 134 Cal., pages 211, 212 of 66 Pac.

It will be thus seen that that decision laid down, as a matter of law, the proposition that, under the undisputed evidence in the case as there presented, the letter of February 9th contained an unconditional promise to pay the draft in question, if it was purchased on the faith of it. That decision on a question of law arising between the parties to the action on a given state of facts became the law of the case, and controlled the lower court upon a subsequent trial of the cause, provided the same state of facts was again presented as was before this court when the decision on the former appeal was made. And as there is no question but that exactly the same state of facts was before the lower court upon this second trial as was reviewed on the previous appeal, and upon which the court reached the conclusion of law above declared, it was not only proper, but it was the duty of the lower court, in harmony with the law so laid down in that previous decision, to instruct the jury specifically, or in effect, that as a matter of law such letter constituted an unconditional promise to pay the draft in question, provided the jury found that such draft was purchased by plaintiff's assignor on the faith of the promise contained therein, and limiting the consideration of the jury solely to the question of such purchase. The instruction to the jury was formulated upon this basis, and was correct.

It is further insisted, however, that this first instruction is inconsistent with a third instruction given, in which the court did submit for the consideration of the jury whether or not the language of the promise in the letter of February 9th included or excluded the draft in question, and in which the jury were further instructed that if they did find that the letter was intended to include said draft, and that D. Sullivan & Co. purchased the same on the faith of said letter, they should return a verdict for plaintiff.

It is insisted that these instructions were inconsistent, and that the giving of them was prejudicial to appellant. They were no doubt inconsistent, but we cannot discover how they were prejudicial to appellant. They do not lay down two different propositions of law so repugnant to each other that in the determination of a material fact in issue the jury might be misled thereby, because, as we have seen, it was not a material issue, or any issue at all, for consideration by the jury as to whether the letter of February 9th contained an unconditional promise or not. It was the settled law in the case that it did. The only material point for their determination, and the one to which the court should have alone instructed them, was whether or not the assignor of plaintiff purchased the draft in question on the faith of it, and, as they so found, returned a verdict.

Neither are the instructions contradictory to the extent that it was impossible for the jury, in considering their verdict, to know which instruction they should be guided by; neither is it impossible to determine after the verdict that they were not influenced by the erroneous instruction in returning it. The verdict is in perfect consonance with a consideration by the jury of either instruction. If they followed the first instruction, their verdict shows they found that the draft was purchased on the faith of the letter referred to. If they were guided by the third instruction, it is equally clear that they must have found that the language of the letter of February 9th included the draft in question in addition to finding that it was purchased on the faith of it.

Neither was the appellant prejudiced by the giving of these instructions. The first one correctly stated the law, and, of course, it cannot complain of that. The second one was erroneous, but the error was in favor of appellant, and it cannot complain of that which was to its advantage. Had the verdict been against the respondent he undoubtedly would have ground for complaint as to the inconsistency of these instructions, but the appellant is in no position to do so.

There is nothing further in this case which requires consideration. The order appealed from and the judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

7 Cal. Unrep. 211

In re ANTOLDI'S ESTATE. (S. F. 4,206.)*

(Supreme Court of California. May 31, 1905.)

1. APPEAL—FINDING OF FACT—CONCLUSIVENESS.

A finding of fact which is not attacked on the ground of insufficiency of evidence to sustain it is conclusive.

2. SAME—PARTIES AGGRIEVED—STATUTE.

Will contestants who are not heirs at law of a testator, nor related to him, are not parties aggrieved by the denial of their motion for a new trial, within Code Civ. Proc. § 938, providing that parties aggrieved may appeal.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 823.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of S. Antoldi, deceased. From an order denying a motion for a new trial in a contest of the will of deceased, Carolina Antoldi Casagrande and other contestants appeal. Dismissed.

A. D. Splivalo, R. W. Hent, and J. A. Spinetti, for appellants. G. W. McEnerney, for respondent.

PER CURIAM. This is an appeal from an order denying a motion of contestants for a new trial in a contest of the will of deceased. The present matter before the court is a motion of respondents to dismiss the appeal of contestants upon the ground that neither said Carolina A. Casagrande nor either of the other contestants is a party interested in said estate, or aggrieved by the order appealed from. The motion must be granted on the grounds urged.

It affirmatively appears from the record that in the petition for the revocation of the will of deceased it was alleged by the contestants that they were the only blood relations and heirs at law of the testator. This was denied in the answer of the proponents of the will, and the court found directly in their favor—that contestants were not either heirs at law of the testator, or related to him. Contestants gave notice of intention to move for a new trial, specifying as one of the grounds thereof the insufficiency of the evidence to sustain the findings. Subsequently they prepared and had settled a statement on motion for a new trial, and thereafter moved for a new trial which was denied. In the specification of errors contained in the said statement there is no specification at all of any insufficiency of the evidence to justify the finding that contestants were not heirs at law or related to the testator. This finding, not being attacked, must stand as conclusively true, with the obvious legal result that, as the contestants are not any of them heirs at law of the testator, they are not parties interested in the estate, nor are they parties aggrieved, under section 938 of the Code of Civil Procedure, who alone are entitled to appeal.

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*Rehearing denied June 30, 1905.

The appeal for this reason is dismissed.

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147 Cal. 77

DE GALINDO v. DE GALINDO et al.

(S. F. 3,251.)*

(Supreme Court of California. May 31, 1905.)

1. CONSTRUCTIVE TRUSTS — FRAUD—FINDINGS —EVIDENCE.

Where complainant conveyed certain property which she had acquired from the estate of her deceased husband to her daughter-in-law, and permitted her and her husband to live on the land and use it as their own for nearly nine years, and until after the death of the grantee's husband, a finding in favor of defendants in an action to establish a trust in the land in favor of complainant, founded on alleged misrepresentations of the grantee's husband with reference to other claims concerning it, was not error, though complainant's evidence with reference to such trust and misrepresentations was uncontradicted.

2. SAME—HARMLESS ERROR.

Where, in an action to establish a trust in certain land, based on alleged false representations made by complainant's son in his lifetime, who was the husband of the grantee of the land, the evidence was insufficient to establish such misrepresentations, or to entitle complainant to recover, the erroneous admission of declarations made by the grantee's husband to her as to his dissatisfaction with his father's will, not in the presence of the grantor, for the purpose of showing that such dissatisfaction was the inducement for the deed, was not prejudicial to complainant.

Department 2. Appeal from Superior Court, Contra Costa County; A. J. Buckles, Judge.

Suit by Ynez Peralta De Galindo against Marina Amador De Galindo and others. From a judgment in favor of defendants, and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

John R. Glascock, for appellant. W. S. Tinning and R. H. Latimer, for respondents.

McFARLAND, J. This is an action to establish an alleged trust in certain described land, to compel the defendant Marina to convey said land to the plaintiff, and to quiet title thereto as against all the defendants. The defendants other than Marina are made parties upon averment that they claim some interest in the property. The court made findings and rendered judgment in favor of defendants, and from the judgment, and an order denying her motion for a new trial, plaintiff appeals.

The plaintiff is the surviving wife of Francisco Galindo, deceased, who died testate on January 10, 1890; and she was the owner, as successor of said Francisco, of certain land, including that described in the complaint. Francisco left surviving him a son named John, by a former wife, and the defendant Marina is the surviving wife of said John, now deceased. John was nominated in the will of Francisco as executor, and qualified and acted as such. On January 29, 1891, the plaintiff executed a deed to said Marina, which on its face absolutely and unconditionally conveys the land described in the complaint in fee to said Marina. At the time of the execution of this deed Marina and her husband, John, were living on said land, and had been living there since before the death of said Francisco; and they continued to live there, using the land as their own, until the death of John, which occurred on December 4, 1898, and the defendant Marina continued to so live there after the death of John. It does not appear that after her deed plaintiff asserted any interest in said land until after John's death. Several months thereafter, and between eight and nine years after the said deed to Marina, plaintiff commenced this action.

Plaintiff seeks to maintain the action upon averments which may be briefly stated as follows: She avers that she had confidence in said John, and was herself ignorant of business; that, pending the administration of the estate of Francisco, and while said John was acting as executor, he represented to her that the heirs of one Salvio Pacheco were claiming that a large part of the property of Francisco, including the land here involved, was held in trust by him for them; that said heirs were threatening to and about to commence legal proceedings to enforce said trust; that said proceedings would cause plaintiff great trouble and annoyance if she retained the title to said land in her own name; that he was familiar with business and legal proceedings, and that, if she would convey the land to him, he could manage the legal proceedings to better advantage and with less trouble to her than if she retained the title; and that, if she would make the transfer to him, he would hold and protect the property for her, save her all trouble in defending against the legal proceedings, and "would reconvey the property to her whenever she might demand the same." She further avers that these representations were false and fraudulent, and that he never intended to reconvey the property to her, but that, relying on these representations as true, and solely by reason thereof, she agreed to convey said property to him; that he had a deed prepared, in which defendant Marina was named as grantee, instead of said John; that she at first declined to make a deed to Marina, but it was represented by John that it would be safer and better to make the conveyance to his wife than to him, and that she would take the deed upon the same trusts and conditions as theretofore agreed upon between him and plaintiff; and that upon these promises she agreed to, and did, execute the deed to Marina, who, she avers, took with knowledge of the said conditions and trusts. The complaint is quite full of details, but the foregoing condensed statement of its contents is sufficient for a full consideration of the case. Its averments as to the false representations about the claims and threats of the Pacheco heirs, and considerations which induced plaintiff to execute the deed, are all denied in the answer.

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*Rehearing denied June 30, 1905.

The court found that the said John Galindo did not make any of the representations averred in the complaint. The findings on this subject are as follows: "(2) That John C. Galindo did not, pending the administration of the estate of Francisco Galindo, deceased, or while he was the qualified or acting executor of said will, in the month of January, 1891, or at any other time, or at all, state or represent to the plaintiff that certain parties claiming to be the heirs of one Salvio Pacheco, deceased, or any other person or persons, were claiming that a large portion or any portion of the property of said Francisco Galindo, or the property in said complaint described, was held by said Francisco Galindo in trust for them, or that neither said Francisco Galindo in his lifetime, nor any of his successors in interest, ever had any beneficial interest in or to the property in said complaint described, or in or to any part thereof, or that the said heirs of said Salvio Pacheco were threatening to or were about to commence legal proceedings to enforce such trust. That the said John C. Galindo did not on or about the date last aforesaid, or at any other time, further or at all state or represent to plaintiff that such legal proceedings would cause her great or any trouble or annoyance if she retained the title to said property in her own name, or that he was familiar with the facts concerning said property and the title thereto, and the claims of said heirs of said Salvio Pacheco thereto, or that he resided in said county of Contra Costa, where such legal proceedings would probably be commenced, and was familiar with business affairs and legal proceedings, or that if she would transfer said property to him he could and would attend to such legal proceedings as might be commenced to better advantage and with less trouble and annoyance to her than if she retained such property in her own name, or that if she would make such transfer to him he could or would hold or protect the same for her, or save her all the trouble and annoyance of defending against such legal proceedings, or that he would reconvey said property to her whenever she might demand the same, or that he would reconvey said property to her at any time or at all. That said John C. Galindo, did not then or at all state or represent to the plaintiff any of the matters or statements alleged in said complaint to have been made to her by him." Appellant contends that this finding is against the evidence; but the contention is not maintainable. It is true that the plaintiff testified generally that John did make the alleged misrepresentations, and that no witness positively contradicted her; but, as John was dead, it could hardly have been expected that there would be any other witness who could possibly testify that John did not make the alleged representations. The testimony of plaintiff in chief was considerably weakened by her cross-examination. Moreover, the court had the right to consider her conduct as to the land in question from the date of her deed to the death of John; her acquiescence during that long time in the possession and use of the land by Marina and her husband; her laches in asserting any interest in the land and in not bringing suit until after the death of John, who was the only person likely to know about his alleged false representations, and what the court might have considered as inherent improbabilities in her testimony, and in her claim that she made the deed for the reason assigned by her. Considering all the features of the case, we would not be warranted in holding that the trial court should have found the other way. And this is particularly so in view of the principle that a court should not hold a conveyance absolute on its face to be a mortgage or trust, or anything other than what it purports to be, except upon clear and convincing evidence. Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797; Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

Defendants, in addition to denying the false representations averred in the complaint as plaintiff's cause of action, also averred that John C. Galindo was dissatisfied with the will of his father, Francisco, because there had not been devised to him the land here in contest, upon which John and his wife had been living for several years before his father's death, and which he claimed his father had given him before his death; that he threatened plaintiff with a contest of said will; and that, as a compromise, the plaintiff executed the said deed to Marina; and the court so found. Appellant contends that this finding was not supported by any competent evidence, and particularly that the court erred in allowing Marina, over plaintiff's objection, to testify to declarations made by John as to his dissatisfaction with the will to her, and not in the presence of plaintiff. It may be conceded that the court erred in admitting this testimony, and that it was material to the issue of John's dissatisfaction with the will, and his threats to contest it; but the finding of the court, as above set forth, against the averments in the complaint as to the false representations touching the Pacheco heirs, upon which alone the cause of action rests, is determinative of the case against appellant, and it is of no consequence what errors the court may have committed as to other matters. Plaintiff, in order to overcome her absolute deed of conveyance, was bound to show that it was procured by the false and fraudulent representations alleged in her complaint; and, not having done so, she cannot recover. This view applies to all other exceptions taken to rulings as to the admissibility of evidence bearing on the subject of John's dissatisfaction with and threats about the will, or on any other subject, other than the false representations alleged in the complaint. And the findings as to other subjects are immaterial. And as to the alleged newly discovered evidence set up as a ground for a new trial, it is sufficient to say that it is not applicable to the averments in the complaint of false representations.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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147 Cal. 82

BLYTHE CO. v. BANKERS' INV. CO. et al. (S. F. 3,811.)

(Supreme Court of California. May 31, 1905.)

1. Decree of Federal Court—Conclusiveness in State Court.

The action of a federal court in vacating and setting aside a decree rendered therein is not open for review in a state court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1367.]

2. Same—Setting Aside Decree Pro Confesso on Cross-Bill—Jurisdiction—Equity Rules.

A decree rendered on a cross-bill is interlocutory, merely; and a decree pro confesso on a cross-bill is not within rule 19 of the rules of practice in equity in the federal courts, providing that when the bill is taken pro confesso the court may proceed to a decree at any time after the expiration of 30 days from and after the entry of the order to take the bill pro confesso, and that such decree shall be deemed absolute unless the court shall at the same term set aside the same, etc.; but such decree is within rule 1, providing that the circuit courts, as courts of equity, shall be deemed always open for the purpose of filing pleadings, and making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to hearing all causes on their merits, and hence the decree may be vacated on motion after the adjournment of the term.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 981.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Blythe Company against the Bankers' Investment Company and others. From a judgment in favor of defendants, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

George W. Towle, Jr. (Richard P. Henshall, of counsel), for appellant. Heller & Powers and A. A. Moore (John Garber, E. H. Rixford, and J. L. Robison, of counsel), for respondents.

VAN DYKE, J. This is an appeal by the plaintiff from the judgment in favor of the defendants, and from an order denying the motion for a new trial. The defendants in the action, other than Florence Blythe Moore and her husband, have acquired interests in the property in question from said Florence. The case is notable for the many shapes and forms it has assumed in the process of litigation during the last 15 or 20 years in the various courts, state and federal, and is remarkable for its vitality and endurance to survive after repeated defeats.

Thomas H. Blythe died intestate in the city and county of San Francisco, in this state, in April, 1883. While his estate was in probate, and prior to 1887, proceedings were instituted and prosecuted by the respondent Florence B. Moore, then Florence Blythe, by her guardian (she being then a minor), under the provisions of section 1664 of the Code of Civil Procedure, to establish heirship and her right to the estate of Thomas H. Blythe, deceased. Numerous defendants appeared in that proceeding, claiming to be kin or heirs of said deceased, Thomas H. Blythe. Among these it is only necessary to mention John W. Blythe, Henry T. Blythe, and Boswell M. Blythe, represented by the Messrs. Holliday. Another set of claimants were designated as the "Williams claimants," and another as the "Jones claimants"; the plaintiff and appellant in the present action, a California corporation, having succeeded, as alleged, to the interest of the Jones claimants. The superior court of the city and county of San Francisco in that case rendered judgment declaring Florence Blythe to be the sole heir of Thomas H. Blythe, deceased. From this judgment the Williams heirs appealed, and not only were the appellants represented on that appeal, but also several other interested parties defendant in the court below, including the Blythe Company. But this court, in bank, after full, and, it may be said, exhaustive consideration of the case, affirmed the judgment. Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40. Subsequently the Blythe Company (plaintiff and appellant in the present case) also took an appeal from the order denying its motion for a new trial in said proceeding to establish heirship. The various parties who appeared in the former appeal also took part as against the respondent Florence Blythe on that appeal from the order denying the Blythe Company's motion for a new trial. And again, after a full consideration of the case by this court in bank, the judgment of the court below refusing a new trial to the Blythe Company was affirmed. Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522. Subsequently the Blythe claimants, represented by the Messrs. Holliday, took an appeal from the order of the superior court of the city and county of San Francisco refusing to dismiss the said proceeding to determine heirship, already referred to. This appeal was heard by this court in bank November, 1895, and the order appealed from affirmed. In re Blythe's Estate, 110 Cal. 226, 42 Pac. 641. Subsequent to the judgment in favor of Florence Blythe in the proceeding to establish heirship, the superior court, sitting as a court of probate, distributed the estate of Thomas H. Blythe to her (then Florence Blythe Hinckley). And from this decree of distribution two several appeals were taken by different groups of claimants, and in each the judgment and decree of distribution appealed from were in November, 1895, affirmed. In re Blythe's Estate, 110 Cal. 229, 231, 42 Pac. 642, 643. The Blythe Company, the appellant here, also appealed from said decree of distribution, and this court in May, 1896, again affirmed the said decree, and indorsed the regularity and finality of the proceeding. In re Blythe's Estate, 112 Cal. 689, 45 Pac. 6. The same ruling was subsequently made on the appeal by the Holliday Blythes, January, 1897. In re Blythe's Estate, 115 Cal. 553, 47 Pac. 1097.

In the meantime, at the November term of the United States Circuit Court for the Northern District of California, the claimants John W. Blythe and Henry T. Blythe, represented by Messrs. Holliday, as plaintiffs, filed a complaint to quiet title as against Florence Blythe Hinckley, Frederick W. Hinckley, her husband, and the Blythe Company, a corporation (plaintiff and appellant in the present action). It is alleged in their complaint so filed in said court that said John W. Blythe was a resident and citizen of the state of Kentucky, and the said Henry T. Blythe was a resident and citizen of the state of Arkansas, and defendant Blythe Company was a corporation organized and existing under the laws of the state of California, having its office and principal place of business at the city and county of San Francisco, and that each of the defendants is a citizen of the state of California, and a resident within the said Northern District of the state of California. The defendants in said action, the Blythe Company and Florence Blythe Hinckley, appeared in said action and answered to said complaint. Thereafter several amendments were made on the part of the plaintiffs to their complaint, and the defendant therein, the Blythe Company, also filed a cross-complaint. It is not necessary to notice the various amendments which were made to the several pleadings in the case, or the orders and stipulations of the parties therein, but only such as relate to the matter constituting the basis of this action on the part of the Blythe Company. It appears on April 6, 1897, the solicitor of the Blythe Company entered in the rulebook in the United States Circuit Court a rule taking the cross-bill pro confesso as to Florence Blythe Hinckley for not appearing to said cross-bill, and also took a similar rule as against the plaintiffs in said action, John W. and Henry T. Blythe. But thereafter, on May 10, 1897, the solicitor for the Blythe Company amended his cross-bill, and obtained an order that it should stand as so amended. On June 1, 1897, the complainants John W. and Henry T. Blythe again amended their supplemental bill by striking out the name of Boswell M. Blythe. No new rule taking the cross-bill as amended pro confesso was entered, but on July 1, 1897, the solicitor of the Blythe Company filed his affidavit showing that the subpœna issued on the cross-bill was served on Florence Blythe Hinckley on the 1st of March, 1897, and no appearance had been entered by her. A similar statement was made in reference to the failure of plaintiffs in said action, John W. and Henry T. Blythe, to appear or answer. Thereupon an order was entered by the court that the cross-bill of the Blythe Company be taken pro confesso, and that a judgment and decree of the court be entered accordingly. On July 3, 1897, a decree in conformity with this order was entered in favor of the Blythe Company, and the court soon after, and on the same day, adjourned for the term. It is this decree so taken pro confesso that constitutes the basis of the present action on the part of the plaintiff and appellant herein, the Blythe Company, But on July 7, 1897, four days after the taking of such decree by the solicitor of the Blythe Company, Florence Blythe Hinckley filed a petition to have said judgment of July 3d set aside and vacated on the ground that she had never been served with any process or received a copy of any process issued upon said cross-bill; that she had never seen or received said cross-bill or a copy thereof, and no cross-bill or any copy thereof, or any process or any copy of any process, had ever been delivered to her, or left at her dwelling house or usual place of abode, with any adult person who was ever a member or resident of her family. The petition was supported by the petitioner's affidavit, together with the affidavit of her attorneys and counsel to the effect that prior to July 6, 1897, they had no knowledge that a subpœna or any other process had ever been issued upon the cross-bill filed by the Blythe Company; that they had no knowledge or information that a default had been entered against Florence Blythe Hinckley, or that an order had been made that the cross-bill should be taken pro confesso. The complainants also appeared and moved to set aside the decree on various grounds. The hearing on their application was continued by the said court until the first day of the next ensuing term, which was July 12, 1897, when the same was further continued to a subsequent day in the term, and at the hearing all the parties plaintiff and defendants therein—the Blythe Company as well as Florence Blythe Hinckley—took part. The matter of the application to set aside said decree pro confesso was fully argued and considered by the court, and in Judge Morrow's opinion he reviews the various matters, and granted the petition and motion and set aside the so-called decree taken pro confesso. Blythe v. Hinckley, 84 Fed. 228, 234. Among the grounds on which the opinion of the learned judge of the United States Circuit Court seems to have been based are the following: That a decree entered pursuant to an order pro confesso on a cross-bill is not final, but interlocutory, where it leaves undetermined, as between the parties to the original and supplemental bills, the question of the legal ownership of property in dispute, and that no complete and final decree upon the whole case can be entered pursuant to an order pro confesso upon the cross-bill where there is pending and undetermined a motion to dismiss the original bill for want of jurisdiction, as was the case here, and, further, that a decree entered pursuant to an order pro confesso on a cross-bill will be set aside where it appears that there were serious irregularities in the service of the subpœna on the cross-bill, and that such bill was amended between the date of the order pro confesso and the date of the decree by withdrawing certain allegations and striking out the name of another defendant, as was the case here. The solicitor of the Blythe Company appealed from said judgment and decree of the Circuit Court setting aside said decree pro confesso to the United States Supreme Court, and on January 9, 1899, upon motion of the respondents therein, said court dismissed said appeal. Blythe Co. v. Blythe, 172 U. S. 644, 19 Sup. Ct. 873, 43 L. Ed. 1183.

Before the entry of the order and decree pro confesso on the cross-bill of the Blythe Company, referred to, the defendant Florence Blythe Hinckley entered a motion in the United States Circuit Court to dismiss said suit, which motion was pending at the time of the taking of the said order and decree pro confesso on the part of the counsel for the Blythe Company. Subsequent to the order made in the Circuit Court granting the petition of said Florence Blythe Hinckley to set aside said order and decree pro confesso, the said motion to dismiss the cause came on to be heard, and, after a full hearing of all the parties interested in said cause, the order was granted, and the bill of complaint dismissed. 84 Fed. 246, 256. In the opinion of the court reviewing the case on that motion it is said: "But there is still another reason why this action cannot be maintained. It appears from the bill of complaint that when the original bill was filed, on December 3, 1895, neither party was in possession of the land in controversy, but that it was in the hands of the public administrator of the city and county of San Francisco." Then, after citing the provisions of the Political Code and certain cases from the United States Reports, the court says: "In the present case not only did the land have an occupant when the original bill was filed, but it was in the possession of the public administrator under the authority and jurisdiction of the superior court of the state. 'An administrator appointed by a state court is an officer of that court. His possession of the decedent's property is a possession taken in obedience to the orders of that court. It is the possession of the court, and it is a possession which cannot be disturbed by any court. Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867.' It follows that, while the possession of the administrator continued, no decree for the possession of the real property in his custody could have been entered in favor of the complainants. But it appears that on the next day after the filing of the original bill the defendant Florence secured possession of the property, and she has ever since continued in possession of the same. She was therefore in possession when the second amended and supplemental bill was filed, and against her, at that time, so far as appears from the bill of complaint, a suit in ejectment by the complainants' claiming to be the heirs of Thomas H. Blythe, would have afforded a plain, adequate, and complete remedy. * * * As the view here taken of this feature of the case disposes of the motion to dismiss the bill, it will not be necessary to consider the question of parties and diverse citizenship. The bill of complaint will be dismissed." An appeal was taken from this judgment and decree of the Circuit Court dismissing the suit in question to the Supreme Court of the United States, where it was heard at the January term of 1899, and decided April 13, 1899. Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783. In the opinion in that case it was said: "The superior court of San Francisco was a court of general jurisdiction, and authorized to take original jurisdiction of all matters of probate, and the bill averred that Thomas H. Blythe died a resident of the city and county of San Francisco, and left an estate therein; and that court repeatedly decreed that Florence was the heir of Thomas H. Blythe, and its decrees were repeatedly affirmed by the Supreme Court of the state. So far as the construction of the state statute and the state Constitution in this behalf by the state was concerned, it was not the province of the circuit court to re-examine their conclusions. As to the question of the capacity of an alien to inherit, that was necessarily involved in the determination by the decrees that Florence did inherit and that judgment covered the various objections in respect of section

1978 of the Revised Statutes [U. S. Comp. St. 1901, p. 1262], and the tenth section of article 1 of the Constitution of the United States, and any treaty relating to the subject."

The case again came before the United States Supreme Court on a writ of error to the supreme court of this state, to review the judgment of this court affirming the judgment of the superior court in favor of Florence and against the Blythe claimant, decided February 25, 1901. 21 Sup. Ct. 390, 45 L. Ed. 557. In the statement of the case it is said: "The case involved a large amount of real property belonging in his lifetime to one Thomas H. Blythe, who was a naturalized citizen of the United States, and died intestate on the 4th day of April, 1883, a resident of the city and county of San Francisco. Questions relating to the title of this property have been in litigation for over fifteen years, and various suits have been instituted in the state and federal courts in California during that time, all of which have resulted favorably to the interests of the defendant in error herein, who claims to be the owner of the property. Three suits have been before this court upon a writ of error or by appeals brought by some of the parties interested, and have been dismissed for want of jurisdiction. Blythe v. Hinckley, 167 U. S. 746, 17 Sup. Ct. 991, 42 L. Ed. 1210; Blythe Co. v. Blythe, 172 U. S. 644, 19 Sup. Ct. 873, 43 L. Ed. 1183; Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783. Continuing, that court said: "The original judgment in the superior court of California, which was affirmed by the Supreme Court of that state, determined the rights of the defendant in error, and conclusively adjudged her to be the owner of the property in question, unless the judgment was reversed upon appeal. The state courts had jurisdiction over the whole question, including the defense founded upon the federal Constitution; and if that objection had been properly raised, and appeared in the record, an appeal to this court from the Supreme Court of California could have been taken if the defense had been overruled. The allegation of the plaintiff in error that the state courts had no jurisdiction to determine the question, because of the facts set forth by him in the complaint herein, is not, therefore, well founded, and, being a mere conclusion of law, is not admitted by the demurrer." Further: "Litigation in regard to the merits of the claim of the defendant in error to this property has been continued by her opponents since the judgment of the state courts, just as if the whole merits of the case had not been decided by the state courts in her favor several times. This court has been asked to review a judgment dismissing the complaint filed in a separate action brought in the federal Circuit Court to set aside the state judgments, and this we refused to do on the grounds stated in the report. * * * The claim which the plaintiff in error founds upon the section of the federal Constitution is too plainly without foundation to require further argument. The right of the defendant in error to this property has been in litigation for more than fifteen years, and many years after courts of competent jurisdiction have decided all the questions in her favor; and we think this writ of error, judging by the character of the question sought to be raised under it, has been taken for delay only. The judgment must be affirmed." Blythe v. Hinckley, 180 U. S. 333, 342, 21 Sup. Ct. 390, 45 L. Ed. 557.

After these many adverse decisions encountered by the Blythe Company in the federal courts, the matter, it seems, was allowed to slumber until nearly the expiration of the five-years limitation of the right to bring an action based upon the so-called judgment or decree pro confesso, when it was switched back into the state courts, where the contest has been renewed; and this action, so commenced, is founded upon the said judgment or decree pro confesso entered in the circuit court July 3, 1897. The trial in the court below resulted in a judgment in favor of the defendants, and the motion of the plaintiff for a new trial was denied; and, as already stated, the present appeal is from the said judgment and order denying the motion for new trial.

The record in the case brought to this court contains three volumes of printed matter, amounting to over 1,600 pages in all, and nearly 5,000 folios. It consists mostly of records and documents introduced at the trial in the court below, from the federal court; and many of these records and documents are repeated several times, with full captions of court and cause and certificates, and indorsements of filing and authentication. The appeal could just as well have been presented to this court by the parties to this action on a record of less than one-fourth in size and volume. We cannot, of course, ascertain from the record who is responsible for the unnecessary portions thereof. We have repeatedly called attention to this abuse in the matter of uselessly incumbering records on appeal, without any apparent reform in the practice.

The contention of the Blythe Company in the court below, as well as here on appeal, is that the decree of July 3, 1897, was and is a final decree of the Circuit Court; that it was rendered in due course on the cross-bill of complaint as amended, and in full compliance with the equity rules; and that the Circuit Court had no power to reverse or vacate a final pro confesso decree on motion therefor made after the adjournment of the term, and hence the action of the United States Circuit Court in setting aside the said decree pro confesso was without jurisdiction and void. The equity rule relied upon is No. 19 of rules of practice in equity in the federal courts, and reads as follows: "(19) When the bill is taken pro confesso the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill pro confesso, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant, and no such motion shall be granted unless upon the payment of the cost of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause." But rule 1 of said equity practice provides: "1. The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits." If the contention upon the part of the Blythe Company be correct—that the so-called decree pro confesso, of July 3, 1897, was a final decree in the matter, and unaffected by any proceeding in the Circuit Court thereafter had with reference to the case—there is no reason shown, nor does any appear, why it could not have been enforced in that court, instead of renewing the controversy again in the state court by bringing this action. The Blythe Company, through its counsel, in effect, asks this court to review and annul the proceedings of the federal court vacating and setting aside the so-called decree pro confesso, and to reinstate it as a valid and subsisting final judgment and decree in favor of the said company in reference to the matter in controversy. This we decline to do, but, if it were an open question with us, we should arrive at the same conclusion as did the federal court—that said decree is not final, but merely interlocutory, and falls within rule 1, instead of rule 19, of the equity practice. In dismissing the appeal from the Circuit Court of the United States in Blythe Company v. Blythe, already referred to, the Supreme Court of the United States cites in support of its judgment so dismissing said appeal, among other cases, Cross v. De Valle, 1 Wall. 1, 17 L. Ed. 515, and Ex parte Railroad, 95 U. S. 221, 24 L. Ed. 355. In the former case it is held that the "cross-bill, being an auxiliary bill simply, must be a bill touching matters in question in the original bill. If its purpose be different from that of the original bill it is not a cross-bill, even though the matters presented in it have a connection with the same general subject. As an original bill it would not attach to the controversy unless it be filed under such circumstances of citizenship, etc., as give jurisdiction to original bills. 'A cross-bill is a mere auxiliary suit, and a dependency of the original.' " The suit in the federal court was brought by John W. and Henry T. Blythe against the Blythe Company and Florence Blythe, and the only thing that conferred jurisdiction on the United States Circuit Court in that case was the fact of the diverse citizenship of the parties; it being alleged in the bill of complaint that John W. and Henry T. Blythe were citizens of other states—the former a resident and citizen of the state of Kentucky, and the latter a resident and citizen of the state of Arkansas, and the Blythe Company, a California corporation, and Florence Blythe, residents of California. The matter in controversy involved no federal question. The cross-bill of the Blythe Company, as well as the so-called decree pro confesso, must necessarily attach themselves to the original suit brought by John W. and Henry T. Blythe, in order to be within the jurisdiction of the federal court, and it follows, therefore, that the said decree pro confesso was merely interlocutory, and not final.

In Ex parte Railroad—one of the cases cited by the Supreme Court of the United States in dismissing the appeal from the Circuit Court—it is said: "Among the pleadings in the Strand suit thus brought into the consolidated suit was the cross-bill of this company, praying affirmative relief in the final determination of the cause. It matters not that at a former day in the term a special decree had been rendered upon the subject-matter of the cross-bill, and that an appeal from that decree had been taken, for 'a cross-bill is a mere auxiliary suit and a dependency of the original.' Cross v. De Valle, 1 Wall. 5, 17 L. Ed. 515. As we have said in Ayres et al. v. Carver et al., 17 How. 591, 15 L. Ed. 179: 'Both the original and cross bill constitute one suit,' and ought to be heard at the same time. Consequently 'any decision or decree in the proceedings upon the cross-bill is not a final decree in the suit, and * * * not the subject of an appeal to this court. * * * The decree, whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case. That appeal brings up all the proceedings for re-examination, when the party aggrieved by any determination in respect to the cross-bill has the opportunity to review it, as in the case of any other interlocutory proceeding in the case.' A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action." In Ayres v. Carver, 17 How. 591, 15 L. Ed. 179, referred to in the opinion just quoted, it is said: "A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it. It is said by Lord Hardwicke that both the original and cross bill constitute but one plea, so intimately are they connected together. Field v. Schieffelin, 7 J. Ch. R. 252. The office of a cross-bill has been very fully discussed at this term by Mr. Justice Curtis, in the case of Victoire Shields et al. v. Barrow; and I need not, therefore, pursue it, but refer only to that opinion for the true doctrine on the subject. It is manifest, from this brief reference to the doctrine, that any decision or decree in the proceedings upon the cross-bill is not a final decree in the suit, and therefore not the subject of an appeal to this court, under the twenty-second section of the judiciary act. (Act Sept. 24, 1789, c. 20, 1 Stat. 84). The decree, whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case. That appeal brings up all the proceedings for re-examination, when the party aggrieved by any determination in respect to the cross-bill has the opportunity to review it, as in the case of any other interlocutory proceeding in the cause."

The claim of the Blythe Company never came to a trial or hearing upon the merits, and the judgment or decree sought to be sustained is based upon a mere technicality. As the law respects form less than substance, courts should not lend support to such a case, unless compelled to do so by some unyielding rule of law, which is not the case here. The decree on the Blythe Company's cross-bill was interlocutory and not final, and dependent entirely upon the original proceeding in that case in order to give the federal court jurisdiction in the premises; and the United States Circuit Court therefore retained jurisdiction, notwithstanding the adjournment of the term, to vacate and set aside said interlocutory order and decree, and, under the circumstances appearing in this case, such action was entirely justified on the part of said court, and the subsequent dismissal of the original action by said court necessarily carried with it the whole fabric of the cross-action of the Blythe Company.

From the foregoing it becomes entirely unnecessary to consider the list of cases cited by appellant's counsel, as they refer to cases where the decree pro confesso was a final decree, and not merely interlocutory, as here.

The judgment and order are affirmed.

We concur: HENSHAW, J.; SHAW, J.; LORIGAN, J.; McFARLAND, J.; ANGELLOTTI, J.

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LAMB v. HALL. (S. F. 3,927.)

(Supreme Court of California. May 27, 1905.)

1. BANKRUPTCY—FRAUDULENT CONVEYANCES—VALIDITY—NEW TRIAL.

Where a bankrupt, while insolvent, and after having used certain of defendant's money for purposes other than that for which the money was intrusted to him, on the eve of bankruptcy conveyed his remaining interest in a buffet connected with a hotel, of which he was lessee, to defendant, who knew that the bankrupt was insolvent, it was not error to grant a new trial, and set aside a finding that such transfer was bona fide, and not an attempt to prefer defendant as a creditor, based solely on the testimony of defendant and the bankrupt that the sale was but the consummation of a former arrangement by which defendant had agreed to buy such interest at a specified price.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 879, 898, 899, 904.]

2. SAME—PARTNERS—ASSIGNMENT OF INTEREST—ACTIONS—PARTIES.

Where a suit was brought by a bankrupt's trustee to set aside a transfer of the bankrupt's interest in a partnership to a third person, the bankrupt's partner was not a necessary party on the ground that he not being insolvent, and, the partnership business not being adjudged bankrupt, the partner was entitled to retain possession of the property pending settlement of the partnership business, as authorized by Bankr. Act July 1, 1898, c. 541, § 5, par. "h," 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424].

3. SAME—NEW TRIAL—APPEAL.

The question of proper parties is not involved in an appeal from an order granting a new trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3476, 3477.]

In Bank. Appeal from Superior Court, Mariposa County. J. J. Trabucco, Judge.

Action by J. T. Lamb, as trustee in bankruptcy of J. H. Corcoran, against Frank E. Hall. From an order granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

Congdon & Congdon, J. A. Adair, F. D. Nicoll, and Newman Jones, for appellant. John A. Wall, for respondent.

BEATTY, C. J. This is an appeal by the defendant from an order of the superior court granting the plaintiff's motion for a new trial in an action to set aside an alleged fraudulent transfer of property by an insolvent debtor in anticipation of bankruptcy, and for the purpose of giving the defendant an undue preference over other creditors. The grounds of the motion were insufficiency of the evidence to support the findings and that the decision was against law. It was made upon a statement of the case setting forth the evidence adduced at the trial.

The second ground of the motion seems to have no support, and is not discussed in the briefs. The only question to be considered is whether there was evidence which would have supported findings for the plaintiff on the material issues made by the pleadings; for if so the discretion of the superior court was not abused in granting a new trial, and its order must be affirmed.

It is alleged in the complaint that for some time prior to the 24th day of December, 1902, one J. H. Corcoran was engaged in the hotel and saloon business at the town of Mt. Bullion, in Mariposa county; that on said date and on his own petition he was duly adjudged a bankrupt; that plaintiff was subsequently appointed and qualified as trustee in that proceeding; that as such trustee he took possession of the hotel portion of the Corcoran House, but was excluded by the defendant from the possession of one-half of the saloon property in said hotel, consisting of the stock, fixtures, business, and so forth; that the refusal of the defendant to yield possession of said interest in the saloon was based upon a pretended bill of sale of the same made, executed, and delivered to the defendant by said Corcoran on the 12th day of December, 1902; and, finally, "that said attempted transfer was an attempted fraudulent preference against the other creditors of the said J. H. Corcoran, a bankrupt." This rather meager statement of the sole ground upon which the validity of the transfer is assailed is all that the complaint contains in relation to that point. It seems to have been treated at the trial as equivalent to an allegation that defendant was at the date of the bill of sale one of the creditors of Corcoran, and that what purported on its face to be a sale of Corcoran's half interest in the bar fixtures, etc., for a consideration of $1,000 then paid, was in fact an attempted transfer of the property in satisfaction of a pre-existing debt in prejudice of the rights of other creditors, and in anticipation of the voluntary petition in bankruptcy filed by the vendor only 12 days thereafter. The denial of this allegation in the answer of the defendant raised the only material issue in the case, and to that issue all the evidence taken at the trial was directed. No issue was made or tendered as to the value of the property or the adequacy of the consideration, if it was a sale, and if, as suggested in the argument of counsel for appellant, the order granting a new trial was based upon the sole ground that $1,000 was not an adequate price for the property attempted to be transferred, neither the pleadings nor the evidence would justify it. The order, however, is general in terms, and we must presume that it was made because in the opinion of the judge of the superior court the transaction was not a sale, but an attempted transfer of the property in satisfaction of a debt due the defendant.

The only direct evidence upon this point was that of the defendant and of Corcoran, which was to this effect: Corcoran boarded in his hotel a number of employés of a mining company, and after each pay day was in the habit of cashing the checks received by them for their wages out of funds furnished by the defendant. The consideration to defendant for supplying these funds is not stated, and we are left to infer either that the checks were cashed at a discount for him or that Corcoran paid him some percentage for supplying the means of collecting his bills from the men by cashing their checks and retaining in each case the amount due from the payee. In November, 1902, Corcoran's debts to various parties amounted to about $18,000, and all his property was incumbered except his homestead and his half interest in the Corcoran Hotel bar, the property in controversy. Among his pressing obligations was a note for $1,666, secured by mortgage, and falling due December 1st. To meet this obligation he applied to defendant for a loan of $1,600, stating that the only security he had to offer was his half interest in the saloon. Defendant declined to make the loan upon the ground, among others, that the proposed security was not worth more than $1,000. He advised Corcoran to try to obtain an extension of time on his note, and offered, in case he failed to do so, to buy his interest in the saloon for $1,000. Corcoran failed to obtain the extension and returned home. About the 9th of December defendant placed in Corcoran's hands $3,000 to be used in cashing checks on the approaching pay day, and this money was in Corcoran's safe on December 10th when he was threatened with an attachment suit for $208. To prevent this attachment and to satisfy some other claims he was authorized by defendant to use a portion of the $3,000. Defendant says that in giving him this authority he expressly stated that whatever amount he so used should be deemed a payment on account of the purchase of the saloon interest at the agreed price of $1,000. Corcoran does not testify to any such express agreement, but says that having occasion to pay several demands, and deeming defendant's offer to purchase still open, he appropriated $1,000 out of the $3,000 on the 11th, and the next morning at 4 o'clock, just before leaving home, made out a bill of sale, statement of checks cashed, etc., and left them and the remaining cash with his bookkeeper for delivery to defendant. The bill of sale, statement, and possession of the saloon were delivered to and accepted by the defendant at 6 o'clock the same morning, and he thereafter remained in possession of the saloon by his employés in conjunction with Corcoran's former partner—the owner of the other half interest. This evidence, if true, shows a perfectly legitimate transaction in no wise opposed to the letter or spirit of the bankruptcy laws, if the price paid for the property transferred was a fair one, and there is neither allegation nor proof that it was inadequate. A creditor of an insolvent debtor gains no advantage over other creditors by buying his property at a fair price paid in cash. And there is no fraud in such a transaction unless its purpose is to enable the insolvent to conceal, misappropriate, or abscond with the proceeds.

The whole question in this case is therefore reduced to this: Was there anything in the testimony of the other witnesses or in the documentary evidence adduced at the trial which would have warranted the court and jury in discrediting the testimony of defendant and Corcoran, and in finding that there was no sale of the property in controversy, but merely a transfer in satisfaction of a debt? Counsel for respondent contends that it is clear from Corcoran's own testimony that what happened was simply an embezzlement by Corcoran of $1,000 of defendant's money on December 11th, and then, when he owed defendant over $1,700, a pretended sale of the property on the 12th—an afterthought on his part to screen him from the consequences of his misappropriation of money intrusted to him for a particular purpose, acquiesced in by defendant merely because he could do no better than to put that face upon it. We find nothing in the testimony of Corcoran or the defendant to justify this construction. But considering the unusual circumstances of the transaction, we think the burden of proof rested upon the defendant to establish its bona fides. The sale—if a sale—was not in the ordinary course of business. Corcoran was undoubtedly insolvent, and there is abundant evidence that defendant knew the state of his affairs. The court was not bound to accept their evidence upon a matter in which they were so deeply interested, and, although we cannot see in the record before us any cogent reason for rejecting their evidence, the judge who heard them testify may have been entirely justified in doing so, and, as his order granting a new trial implies that he did not accept their statements, it cannot be disturbed.

Counsel for appellant makes the point that the order granting a new trial should be reversed, and the superior court directed to dismiss the action, because it is essentially an action to recover the property or its value, and that no such action can in any event be sustained, because it appears from the record that Corcoran and C. F. Adair owned the saloon and conducted the business as partners; that Adair is not insolvent or adjudged bankrupt; that under paragraph "h" of section 5 of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]) he is entitled to retain possession of the property pending settlement of the partnership business, subject only to the duty of accounting for the interest of Corcoran when the business is closed. The fact of Adair's interest is found by the court, though not alleged in the pleadings, and the law appears to secure him in the right of possession as contended. But this is not an action to recover possession of the property. Its object is merely to determine the title to the half interest which Corcoran attempted to transfer to defendant. The prayer of the complaint is that said transfer may be adjudged invalid, for an accounting of the proceeds received by defendant since he took possession, and for general relief. A judgment for plaintiff would not disturb the possession of Adair, or affect his right to conduct the business to a settlement. Nor is Adair a necessary party to the action in any view. With respect to the rival claims of plaintiff and defendant to Corcoran's half interest he occupies the position of a sort of stakeholder, and in supposable circumstances might have required them to interplead as to their conflicting claims upon him for an accounting of the Corcoran interest in the partnership. But whether he should be a party to the controversy or not was a question for him to decide. At all events the defendant could not be prejudiced by his absence. And, moreover, the question of proper parties is not involved in an appeal from an order granting a new trial.

Order affirmed.

We concur: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

147 Cal. 44

LAMB v. HALL et al. (two cases). (S. F. 3,963, 3,967.)

(Supreme Court of California. May 27, 1905.)

1. BANKRUPTCY — RIGHTS OF TRUSTEE — ASSIGNMENTS.

Where a lessee of a hotel assigned a one-half interest in the buffet attached thereto in good faith, his trustee in bankruptcy was bound by such assignment, which was valid as against such lessee.

2. SAME—OCCUPANCY — PARTNERSHIP ASSETS.

Where a lessee of a hotel assigned a one-half interest in the buffet connected therewith to another, to continue for the balance of the lease of the hotel, the right to occupy the premises for the purpose of the business during the remainder of the lessee's term was a partnership asset, and hence the lessee could not have recovered possession of the buffet from his partner during the continuance of the lease.

3. SAME — DISSOLUTION OF PARTNERSHIP — OCCUPANCY OF PREMISES.

Where a lessee of a hotel transferred a half interest in the buffet to a third person, with the right to occupy the premises for the balance of the term of the lease, and thereafter the lessee assigned his remaining interest in the buffet, and thereby dissolved the partnership, the right to occupy the premises for the remainder of the lease of the hotel thereby vested exclusively in the continuing partner for the purpose of closing up the partnership business, and either paying over the lessee's share of the surplus to his assignee, or accepting such assignee as a partner in place of the lessee, and retaining the right to occupy the premises as an asset of the new firm.

4. SAME—ASSIGNMENT — SUBLEASE—STATUTE OF FRAUDS.

A written contract, reciting that a lessee of certain hotel premises, in consideration of $1,000, paid by A., granted, sold, and conveyed unto him, his executors and assigns, an undivided one-sixth interest in a saloon business conducted in the hotel described, together with an undivided half interest in the fixtures, furniture, etc., to continue for the balance of the period now covered by the lease of the grantor to the hotel, etc., was sufficient to satisfy the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 189.]

5. SAME—TRUSTEE IN BANKRUPTCY—ACQUISITION OF LEASE—EFFECT.

Where a lessee of certain hotel property assigned the right to occupy that portion of the hotel used as a buffet to others during the continuance of the lease, the fact that the lease was listed and passed as a part of the lessee's assets to his trustee in bankruptcy did not affect the rights of the assignees of the buffet.

6. SAME — APPEAL — PARTIES—CODEFENDANTS —NOTICE.

Where the change in the findings and modifications of the judgment sought by defendant H., and from a denial of which he appealed, could be granted without any adverse effect on his codefendants, and the reversal of the judgment would not prevent their recovery of costs, and an award of a new trial of the issues found adversely to H. would leave the findings in favor of the codefendants in full force, as well as that portion of the judgment based thereon, such codefendants were not necessary parties to H.'s appeal, on whom notice should have been served.

7. SAME—RECOVERY OF POSSESSION.

Where plaintiff, the trustee in bankruptcy of a lessee of a hotel, was not entitled to recover possession of a portion of the hotel used as a buffet, as against a prior assignee of a one-half interest in the buffet by the bankrupt for the term of the lease, plaintiff was not entitled to recover possession as against a subsequent transferee of the bankrupt's remaining interest in the buffet, though such latter transfer did not give the transferee a right of possession of the realty.

In Bank. Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by J. T. Lamb, as trustee in bankruptcy of J. H. Corcoran, against F. E. Hall and others. A judgment was rendered in favor of plaintiff against defendant Hall for possession of the premises in question, and in favor of defendants Adair for costs; whereupon plaintiff and Hall moved for new trials of the issues found against them, and, both motions being denied, plaintiff appeals from the judgment in favor of defendants Adair and from the order denying his motion for a new trial, and defendant Hall appeals from the judgment against him and from the order denying his motion for a new trial. Affirmed on plaintiff's appeal, and reversed on defendant's appeal.

John A. Wall, for appellant. Congdon & Congdon and J. A. Adair, for respondent.

BEATTY, C. J. These are two appeals in the same action upon separate, and in some particulars different, records, but they have been argued, and may be conveniently considered, together. The litigation arises out of the same transactions partially detailed in the opinion just filed in the case of Lamb, Trustee, etc., v. Hall (S. F. 3,927) 81 Pac. 286. That was an action to set aside a bill of sale of certain personal property described as "the Corcoran House Bar, liquors and fixtures," on the ground that it was a fraudulent attempt on the part of an insolvent debtor to give an undue preference to one of his creditors. This is an action against the occupants of the premises where the saloon business is conducted to recover possession of property described in the complaint as "the saloon premises (including the cardrooms and storerooms) known as the Corcoran House Bar or saloon," etc. The defendant Hall resists the claim of the plaintiff to the right of possession upon the ground that it was lawfully transferred to him by the bill of sale of December 12, 1902, and the defendants Adair claim a transfer of the right of possession to them by other instruments in writing evidencing a sale of a half interest in the saloon business and an agreement of partnership for a definite term. In the action against Hall for an accounting of the personal property described in the bill of sale (S. F. 3,927; 81 Pac. 286), the question whether that instrument would, if bona fide, have transferred any right of possession in the saloon premises did not arise, the case turning not upon its construction, but upon its validity for any purpose. In this case the bona fides of that transaction is not questioned, but the theory of the complaint as against all the defendants is that the various bill of sale and agreements upon which their respective claims to the possession of the premises are founded could have no effect, conceding their perfect validity, except to transfer the personal property in the bar, that the defendants were mere tenants at will of the saloon premises, and that the plaintiff by giving them a proper notice to quit after his appointment as trustee in the matter of Corcoran's bankruptcy became entitled to the possession before the commencement of the action.

The cause was tried in the superior court without a jury, and upon very full findings of fact a judgment was rendered in favor of the plaintiff against the defendant Hall for possession of the premises, and in favor of the defendants Adair for their costs of suit. The plaintiff moved for a new trial of the issues found against him, and Hall moved for a new trial of the issues as to which of the findings were adverse to him. Both motions were denied, and plaintiff appeals from the judgment against him and the order denying his motion for a new trial (No. 3,967), while defendant Hall appeals from the judgment against him and from the order denying his motion for a new trial (No. 3,963).

All questions of any real importance involved in both appeals may be disposed of in considering plaintiff's appeal from the order denying his motion for a new trial of the issues found in favor of the Adairs. Upon these issues there was a general finding to the effect that they, as sublessees of Corcoran or as assignees of his term, were lawfully in possession of a portion of the premises for the full period of the original demise to him. This general finding was based upon more specific findings to which it refers, and is rather a conclusion of law than a finding of fact. As such it might, perhaps, be more properly reviewable on the appeal from the judgment than on the appeal from the order; but it has been treated in the argument as a matter pertaining to the appeal from the order, and as the question is of no practical consequence in this case we proceed on that assumption.

There is no conflict in the evidence as to the probative facts specially found, and all that are material may be stated as follows: In September, 1901, the Mariposa Commercial & Mining Company leased to J. H. Corcoran for a term of ten years a certain lot in the town of Princeton (P. O. name Mt. Bullion), Mariposa county, with covenants on the part of Corcoran to pay a rent of $60 per annum, to erect prior to April, 1902, a hotel with at least 40 rooms, and to conduct and maintain it as a decent and orderly hotel; he to have privilege of purchase during the term or of removing his improvements at the end thereof. In pursuance of this lease Corcoran took possession of the premises, and erected, and in January, 1902, opened, the hotel. What is known as the saloon premises consisted of a barroom, cardrooms, and storeroom on the first floor of the hotel, all of which were used in the conduct of the bar or saloon business. April 6, 1902, he executed in writing an agreement, reciting that it had been entered into January 8, 1902, as follows: "That the said party of the first part for and in consideration of the sum of fifteen hundred dollars lawful money of the United States to him paid, does hereby sell to the aforesaid J. A. Adair an undivided one-third interest in and to the saloon business to be henceforth conducted and carried on in the town of Mt. Bullion at the hotel there erected and conducted by the party of the first part hereto for the period of ten years from the first day of January, 1902. The said party of the second part to share one-third of the profits, if any there be, from said business, and to bear one-third of the expense of conducting said saloon business, also to be responsible for one-third of the liquors and cigars to be purchased for said business during the existence of this contract. It is also understood and agreed to by the parties to these presents that if the party of the first part sells or disposes of his interest in and to the hotel known as the Corcoran House, in the town of Mt. Bullion, county of Mariposa, state of California, in which said saloon business is to be conducted that the party of the second part is to receive for his interest such proportion of the purchase price that is received for said property as may be agreed on by the parties hereto, or if not agreed upon to be settled by three disinterested parties, one to be selected by each of the parties hereto, these two to select a third party, their decision to be binding upon both parties."

In October, 1902, J. A. Adair assigned to his brother, C. F. Adair, all his interest under this agreement. A few days previous to this assignment Corcoran had made and delivered to C. F. Adair the following agreement: "Know all men by these presents: That J. H. Corcoran of Mariposa county, state of California, the party of the first part, for and in consideration of the sum of one thousand dollars, gold coin of the United States of America to him in hand paid by C. F. Adair of Mariposa county, state of California, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell and convey, unto the said party of the second part, his executors, administrators and assigns, one undivided one-sixth interest in and to the saloon business now being conducted in the Corcoran House in the town of Mt. Bullion, county of Mariposa, state of California, together with a one undivided one-half interest in and to the saloon fixtures and furniture including chairs, mirror, cash register, clock, bar, back bar, glasses, bottles, and all and everything used in connection with the saloon, also a one-half interest in and to the two slot machines, together with the use of the barroom, cardroom and storerooms now in use in connection with said saloon, said interest in said business to continue for the balance of the period now covered by the lease to the party of the first part from the Mariposa C. & M. Co. To have and to hold the same to the said party of the second part, his executors, administrators and assigns forever. And I do, for my heirs, executors, administrators covenant and agree with the said party of the second part, executors administrators and assigns to warrant and defend the sale of the said property, goods, chattels hereby made unto the said party of the second part, his executors, administrators, and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same."

Subsequently C. F. Adair assigned all his interest to J. A. Adair. It is not found when the Adairs went into possession under these agreements, but it appears from the uncontradicted testimony of J. A. Adair that he had been in possession ever since February 11, 1903, the date of his brother's reassignment to him. Meantime, on December 12, 1902, Corcoran had executed and delivered to defendant Hall the following bill of sale: "Mt. Bullion, Dec. 12, 1902. This is to certify that I have this day sold and transferred to F. E. Hall all my right, title and interest in and to the Corcoran House, bar, liquors and fixtures for and in consideration of $1,000. J. H. Corcoran. Witness. Geo. Schlusen"—And Hall had gone into possession of the premises a day or two later. April 6, 1903, while Hall and C. F. Adair were jointly in possession of the premises, plaintiff served them with notice to quit and deliver possession to him at the end of 30 days, and upon their refusal commenced this action. The question upon plaintiff's appeal is whether upon these facts the defendants Adair were rightfully in possession of the demanded premises when the action was commenced.

There is no question in this case as to the regularity and good faith of the various dealings between Corcoran and the defendants, and so far as the Adairs are concerned there has never been any suggestion of fraud or unfairness on their part in any of the proceedings above detailed. The plaintiff, therefore, as representative of Corcoran's creditors, has no right, as against the defendants or either of them, except such as Corcoran might have transferred to him by a voluntary assignment. He stands in Corcoran's shoes, and can recover only what Corcoran himself could have justly claimed to recover from the defendants if he had never become bankrupt or insolvent, and we think that upon a bare statement of the case it is too plain for argument that, after his agreement with the Adairs, Corcoran could not have turned C. F. Adair out of possession of the saloon premises at any time prior to December 12, 1902, when he transferred his remaining interest in the saloon to Hall, because up to that time C. F. Adair was by virtue of their agreement his equal partner in the business, and the right to occupy the premises for the purposes of the business during the remainder of his term was, by virtue of the same agreement, a partnership asset. After his bill of sale to Hall, and the consequent dissolution of the partnership, he had no longer even a joint right of occupancy of the premises. That right vested exclusively in C. F. Adair for the purpose of closing the partnership business and paying over his share of the surplus to Hall, or he could, as he did, accept Hall as a partner in place of Corcoran, retaining the use of the saloon as an asset of the new firm.

It is not necessary to determine the true construction and effect of the original agreement of April, 1902, between Corcoran and J. A. Adair. It was assigned the following October to C. F. Adair, and coupled with his separate agreement with Corcoran, entered into about the same time, constituted him an equal partner of Corcoran in the saloon business for the full term of his lease, and transferred to the firm and its successors the right to the exclusive use of the bar, cardrooms, and storerooms for and during the same term. The contention of the appellant that the agreement of October, 1902, between Corcoran and C. F. Adair is invalid as a sublease or assignment because of failure to comply with the statute of frauds cannot be sustained. The writing contains everything essential to a transfer of the saloon premises to the partnership for the remainder of Corcoran's term, at least as between Corcoran and his assigns and the partnership and its successors.

The fact that the lease from the Mining Company to Corcoran was listed as, and in fact was, an asset which passed to his trustee in bankruptcy does not affect this conclusion. His lease of the lot and hotel was a valuable asset, qualified though it was by the right which he had sold to others for a valuable consideration to occupy a portion of the premises during his entire term for the purpose of conducting the saloon business.

The plaintiff seems to rely, as an argument against the finding in favor of the Adairs, upon the fact that he, as Corcoran's assignee, is compelled to pay the annual rent reserved to the lessor of the hotel premises, while they have the use of the bar rent free. There is nothing incongruous in this. They paid in the beginning a lump sum for the use of the bar during Corcoran's term, and it became his duty to perform all the covenants of his lease necessary for their protection in the enjoyment of the right which he had transferred to them for an adequate consideration.

There is no error in the judgment in favor of the Adairs, and none in the order denying plaintiff's motion for a new trial.

What has been said in regard to the plaintiff's appeal leaves but little to be added in disposing of the appeal of the defendant Hall. It is necessary in the first place, however, to consider briefly the motion of plaintiff to dismiss Hall's appeal on the ground that neither his notice of motion for new trial or of appeal was served on the Adairs or either of them. Such service was not necessary. The change in the findings and the modifications of the judgment which Hall sought by his motion and asks on this appeal can be granted without any adverse effect upon the Adairs. The reversal of the judgment will not prevent their recovery of costs, and the award of a new trial of the issues found adversely to Hall will leave the findings in favor of the Adairs in full force as well as that portion of the judgment which is based upon them.

Coming to the merits of the appeal, we think the court erred in denying a new trial. The finding or conclusion that the plaintiff had the right of possession as against Hall seems to have been based solely upon the view that the bill of sale of December 12, 1902, from Corcoran to Hall, transferred no right of possession of the realty. This may be so, but it is not conclusive of the right to the possession. In this action the plaintiff cannot recover on the weakness of the defendant's title; he must show a right in himself. The right of possession of the demanded premises was in the firm or partnership of Corcoran and C. F. Adair, and when Corcoran sold his interest in the partnership assets he ceased to be a member of the firm, and if no right of possession passed to Hall it vested exclusively in Adair, who, as the evidence clearly shows, had accepted Hall as a partner before the notice to quit was served. The new firm succeeded to all the rights of the former partnership, and as a member of the firm Hall's possession was lawful.

The portion of the judgment and the order from which plaintiff has appealed are affirmed. The portion of the judgment and the order from which defendant Hall has appealed are reversed, and the cause remanded.

We concur: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

(147 Cal. 62)

SAMPSON et al. v. HUGHES et al. (S. F. 3,241.)*

(Supreme Court of California. May 29, 1905.)

1. SETTING OUT FIRE—NEGLIGENCE—STATUTORY PROVISIONS — ACTIONS—PLEADING—PROOF—JUDGMENT.

Under Pol. Code, § 3344, providing that a person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured, where a complaint alleges that defendants negligently set fire to woods on their land, and also that they negligently permitted the fire to extend onto plaintiffs' land, proof of either allegation will support a judgment.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fires, § 5; vol. 37, Cent. Dig. Negligence, § 28.]

2. SAME.

Where the conditions as to combustible materials on the land and the season of the year are such that setting out fire would be intrinsically dangerous, setting out fire would be negligence, and, if the proximate cause of damage, would render the party setting it out liable.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fires, § 5; vol. 37, Cent. Dig. Negligence, § 28.]

3. SAME—INSTRUCTIONS—ERROR.

An instruction that, if defendants used ordinary care to prevent the fire from extending to plaintiffs' land, defendants were not liable, was erroneous, as entirely ignoring the averment that defendants negligently set out the fire.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fires, § 5; vol. 37, Cent. Dig. Negligence, § 28.]

4. SAME.

Instructions that defendants were not bound to prove that they did not set out the fire complained of, nor to prove who, if any one, set it out, but that plaintiffs were bound to prove by a preponderance of evidence that defendants set it out, were erroneous, as conveying the impression that plaintiffs could not recover unless they proved that defendants set out the fire, and set it out negligently.

5. SAME—WITNESSES — CONCLUSIONS—QUESTIONS FOR JURY.

It was error to overrule plaintiffs' objection to the question asked one of defendants as to whether or not on a certain date, or at any time thereafter, he willfully, negligently, or carelessly failed to watch and look after the fire complained of; the question being for the jury to determine.

6. SAME—EVIDENCE—ADMISSIBILITY.

It was error to permit a witness to testify that he had no desire to allow fire to extend from his land to that of plaintiffs.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 440.]

7. DISCREDITING WITNESS.

One of defendant's witnesses having testified that, on the day the fire was alleged to have been set, he and his brother set fire to a rat's nest on defendants' land, and the fire escaped their control, and that, to avoid being seen, they returned home by a certain route, it was error to exclude evidence offered by plaintiffs that the route was so covered with brush and débris as to be impassable.

8. APPEAL—REVERSIBLE ERROR.

Where a witness has stated in detail facts on which he rests his conclusion, a case will not always be reversed because of permitting him to state such conclusion.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2292.]

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by D. W. Sampson and another against William Hughes and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Geo. C. Ross, for appellants. Edw. F. Fitzpatrick, for respondents.

McFARLAND, J. This action was brought under section 3344 of the Political Code, which is as follows: "Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured." At the time mentioned in the complaint, plaintiffs were the owners of a certain tract of timber land, upon which they had a shingle mill and considerable personal property, and defendants were the owners of another tract of timber land, adjoining that of plaintiffs. It is averred in the complaint that on or about September 12, 1900, defendants negligently, etc., kindled and set out fire in the woods on their said land, and that said fire was permitted by defendants to continuously remain and burn on the said land until the 21st day of said September, on which last-named day the defendants negligently omitted to watch and guard the fire so as to prevent it from spreading across their land to the lands of plaintiffs, and negligently suffered it to extend onto plaintiffs' land, and that it did so extend, and burned up and destroyed a large amount of plaintiffs' property on their land, to their great damage, etc. These averments were denied in the answer, and upon the trial the jury returned a verdict for defendants, and judgment for them was entered accordingly. From this judgment, and from an order denying their motion for a new trial, plaintiffs appeal.

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*Rehearing denied June 28, 1905.

Appellants rely for reversal on certain alleged errors committed in rulings upon the admissibility of evidence, and in giving and refusing instructions to the jury. The rulings as to the admissibility of evidence are perhaps not very important, and some of them will be noticed hereafter. The controlling questions in the case arise out of rulings as to instructions.

Whether or not there was any material and prejudicial error committed in the matter of giving and refusing instructions depends on the question whether plaintiffs, in order to recover, were bound to prove both of these facts, to wit, that defendants negligently set fire to the woods, and also that they negligently allowed the fire to escape and spread onto plaintiffs' land, or whether it was sufficient for them to prove one of those facts. Appellants contend that the instructions as to this question were contradictory and confusing; that those given at the request of appellants are correct, and those given at the request of respondents are erroneous; and that therefore the judgment and order must be reversed. We see no sufficient answer to this contention. Respondents argue that a judgment will not be reversed for contradictory instructions where those favorable to the appellant, and given at his request, are erroneous—citing Dennison v. Chapman, 105 Cal. 447, 39 Pac. 61, and other cases; but, admitting such to be the rule, it does not apply here, where correct instructions given at appellants' request were contradicted by erroneous instructions given at the request of respondents. The court, at plaintiffs' request, gave these two instructions (the italics are ours):

"(1) The plaintiffs in this case may prove negligence on the part of the defendants both in setting out fire and in suffering it to escape, or they may prove negligence in either. In other words, plaintiffs may prove negligence in the act of setting out fire, or negligence in omitting to properly control a fire burning on their premises so that it escaped therefrom; and therefore the court instructs you that if the plaintiffs have proved that the defendants have *either* negligently set out fire in their own woods, *or* negligently suffered *any fire burning on their lands* to extend beyond their own lands, and the plaintiffs thereby suffered damage, then the defendants are liable for such damages, and plaintiffs will be entitled to a verdict in their favor for such damage as you may find plaintiffs have suffered, if any.

"(2) The court instructs you that if you believe from the evidence in this case that the plaintiffs suffered injury by any negligent act of the defendants in setting out fire, or by any negligent omission of the defendants in suffering any fire burning on their land to extend beyond their land, then the plaintiffs are entitled to a verdict for damages for the injury so suffered."

These instructions are, in our opinion, correct. Respondents contend that because it is averred in the complaint that the respondents negligently set fire to the woods, and also that they negligently permitted the fire to extend onto appellants' land, therefore appellants were bound to prove both those allegations. We do not think that this contention is maintainable. Perhaps the pleading would have been in better form if setting out fire had been averred in one count, and negligently allowing fire to spread in another count; but both facts are averred, and proof of either would support a judgment. If, for instance, appellants could have proved that respondents negligently allowed the fire to spread from their land to the land of appellants, by which appellants were damaged, they would have been entitled to judgment without also proving the other averment—that respondents started the fire—for the proof of this last-named averment would then have been unnecessary. Where a complaint contains averments of facts sufficient to constitute a cause of action, plaintiff is entitled to judgment upon proof of such facts, although he may have averred other facts which he has not proved. And if the damage was caused by a fire which respondents negligently set out, appellants were entitled to recover, whether or not respondents afterwards used care in trying to stop its spread, but failed to prevent the mischief.

But the court afterwards gave instructions which are inconsistent with and contradictory of the said instructions numbered 1 and 2 given at appellants' request, and which are to the point that appellants, in order to recover, must prove that respondents negligently set out the fire, and also negligently failed to watch and guard it. Instructions numbered 4, 6, and 7, given at the respondents' request, are to that effect. For instance, said instruction numbered 7 is as follows: "I instruct you that, as a matter of law, the mere proof of the setting out of the fire complained of, by the defendants, or by either of them, in their own woods (if you should find that said defendants, or either of them, did in fact set out a fire therein), coupled with the further proof that said fire so set out (if you should find that the fire complained of was set out by the defendants, or by either of them, in their own woods), did in fact spread to the lands of plaintiffs, to plaintiffs' damage, as complained of, would not justify you, under the law, in rendering a verdict in favor of the plaintiffs in any amount; but, before you can find a verdict in favor of the plaintiffs in any amount, you must also find that the setting out of such fire was negligent, and, further, that the spreading of said fire to the lands of plaintiffs was by reason of the negligence of the defendants, or of either of them, in failing to use ordinary care and prudence in watching, guarding, and attending to said fire in order to prevent it from spreading to the lands of plaintiffs." And the other two instructions are substantially to the same effect as number 7. This instruction means that no carelessness of respondents in setting out fire on their land would make them liable, although the fire thus carelessly set spread to appellants' land and did damage there, if, after such fire had been by them carelessly started, they had used due care, and made all reasonable, though unavailing, efforts to prevent the fire from spreading onto plaintiffs' land. But this is not the law. The conditions as to combustible materials on the land, the season of the year, dryness, the topography of the country, prevailing winds, etc., may be such that setting out fire on the land would be intrinsically dangerous, and would naturally result in a combustion that would reach adjoining lands. Under such circumstances, setting out fire would be a highly negligent act; and, if it became the approximate cause of damages to adjoining land, the party setting out the fire would be liable for the damage, no matter how strenuously he afterwards endeavored to prevent its spread. By instruction No. 8 given at respondents' request, the jury are charged that if respondents used ordinary care and skill to prevent the fire from extending to defendants' land, but in spite of such care it did spread to such land, and did the alleged damage, respondents are not liable. This instruction is erroneous, because it entirely ignores the averment that respondents negligently set out the fire. Moreover, there are other instructions, given at respondents' request, which must have left the impression on the jury that appellants could not recover unless they had proved that respondents had set out the fire, and set it out negligently. For instance, the first part of instruction No. 11 is as follows: "I further charge you that the defendants are not bound to prove to you that they did not set out the fire complained of, nor are they bound to prove who, if anybody, did set out said fire, but the plaintiffs are bound to prove to you by a preponderance of evidence that the defendants themselves, or one of them, did in fact set out the fire complained of"—and the first part of instruction No. 12 is to the same effect; and although the latter half of each of said instructions may, perhaps, when closely scrutinized, somewhat modify the first part, still the jury would naturally take the first part of said instruction as stating the law. For these reasons, the judgment must be reversed. There are no other rulings as to instructions which call for special notice. Upon another trial, instructions Nos. 1 and 2 asked by appellant should be given, and there should be no other instructions inconsistent with or contradictory of said instructions Nos. 1 and 2. Appellants are entitled to recover if they show by a preponderance of evidence either that the damage was caused by a fire which respondents negligently set out on their own land, or that it was caused by a fire burning on their land, no matter how it originated, which respondents negligently permitted to extend onto the land of appellants.

The rulings as to admissibility of evidence are not very important, and we are not prepared to say that they would warrant a reversal, even if erroneous. We think, however, that error was committed in at least three of said rulings. It was error to overrule an objection of appellants to the following question asked by respondents of the defendant Hughes when on the witness stand: "Did you on or about the 12th day of September last, or at any time subsequent thereto during that month, willfully, negligently, or carelessly, or willfully or negligently or carelessly, fail and omit to watch, guard, attend, and look after the fire which has been described here?" It was asking the witness to decide the very issue which it was the province of the jury to determine. Where a witness has stated in detail facts upon which he rests his conclusion, a case will not always be reversed because he has been allowed to state such conclusion, for his opinion usually has little weight with the jury; but, under the law of evidence, such a question is erroneous, and should not be permitted. It was also erroneous to allow said Hughes to testify that he did not have any wish or desire to allow fire to extend from his land to that of appellants. It was also error to refuse to allow appellants to prove certain facts relating to the testimony of respondents' witness Charles Wyman. This witness was a boy about 13 years old, and he testified that on the morning of said September 12, 1900, the day the fire is alleged to have been started, he went from his home, with a younger brother, about 6 o'clock in the morning, in search of a cow. He described the route which he and his brother took to the gulch on respondents' land where the fire started, which was between 3½ and 4 miles from his home. He testified that he and his brother set fire to a rat's nest in said gulch; that they tried to put out the fire, and could not do so; that, not wanting any one to see them, they went home by a route which he described, finding the cow on the way, and driving her with them, and, after going home, went about a mile further to school, and reached the schoolhouse before school opened. According to this story, he must have traveled at least about eight miles. The appellants offered to prove that the route which Wyman said he took after setting the fire was so covered with brush and débris that he could not have traveled it. This offer was objected to as immaterial and not in rebuttal, and the objection was sustained. This ruling was erroneous. The evidence evidently tended to weaken the testimony of the boy, and should have been allowed.

We see no other points calling for special notice. There must be a reversal for errors in instructions to the jury as above noticed. The judgment and order appealed from are reversed.

We concur: LORIGAN, J.; HENSHAW, J.

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147 Cal. 57

KUSEL v. KUSEL. (S. F. 3,651.)

(Supreme Court of California. May 27, 1905.)

SEPARATE MAINTENANCE — ALLOWANCE OF LUMP SUM.

Under Civ. Code, § 137, authorizing a wife deserted by her husband to sue him for permanent support and maintenance, and declaring that the final judgment may be enforced by such orders as the court, in its discretion, may deem necessary, and they may be varied, altered, or revoked at the discretion of the court, and section 140, providing that the court may require the husband to give security for making any payments required, a lump sum, instead of a periodical allowance, should not be awarded, at least in the absence of peculiar circumstances.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Caroline Kusel against Solomon A. Kusel. Judgment for plaintiff. Defendant appeals. Reversed.

Monroe & Cornwall and Truman & Oliver, for appellant. Riordan & Lande, for respondent.

SHAW, J. The defendant appeals from a judgment in favor of the plaintiff. The appeal was taken within 60 days after the rendition of the judgment, and the evidence is made a part of the record by bill of exceptions.

The plaintiff is the wife of the defendant, and the action is brought to obtain a decree to compel the defendant to maintain her while living separate and apart from him. The complaint, which was filed July 2, 1902, alleges that the plaintiff and defendant intermarried on February 6, 1896, and that on June 30, 1902, the defendant deserted the plaintiff and refused to furnish the plaintiff any support or maintenance, he having the ability so to do; that the plaintiff has no estate or means; and that the defendant is possessed of property of the value of $30,000, consisting chiefly of real estate in San Francisco. The answer denies the desertion, and avers that he owns no property of any kind. The court made findings to the effect that the defendant deserted the plaintiff on the 30th of June, 1902, as alleged, and continued to live separate and apart from her, and refused to support or maintain her; that she had no means of her own; that the defendant was the owner of the real estate described in the complaint; and that the same was worth $30,000. As conclusions of law, the court declared that the defendant had deserted the plaintiff; that she was entitled to a decree for permanent support and maintenance; that, under the circumstances surrounding the case, instead of ordering defendant to pay a certain fixed sum monthly, a lump sum should be awarded to her for her support; that she was entitled to have a decree awarding her $10,000 as the total and final amount to be paid to her by the defendant for her separate support and maintenance; and that the same should be declared a lien upon the real estate. Judgment was entered in pursuance of this conclusion awarding plaintiff $10,000 for her support and maintenance, and declaring the sum a lien upon the real property.

We think the court erred in awarding plaintiff the sum of $10,000 for her support and maintenance, instead of a periodical allowance. The action is maintained under the provision of section 137 of the Civil Code, which is as follows: "When the husband wilfully deserts the wife, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children. * * * The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered or revoked at the discretion of the court." Section 140 provides: "The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." It will be observed that there is nothing in the statutory provisions above quoted expressly authorizing the court in suits for maintenance to divide the property of the husband, or to give to the wife, in lieu of periodical payments for her support, a gross sum out of the husband's estate. Originally "alimony," in its technical significance, meant an allowance of money payable in periodical installments, not in gross. "Alimony is not a sum of money nor a specific proportion of the husband's estate given absolutely to the wife, but it is a continuous allotment of sums, payable at regular intervals, for her support from year to year." 1 Bouvier's Dict. (Law. Ed.) 131; Phelan v. Phelan, 12 Fla. 456; Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 488. The same rule applies in actions for maintenance, or in the similar action for a judicial separation without an absolute divorce. The case of Wallingsford, above cited, was an action for maintenance without divorce. Mr. Bishop lays down the rule with reference to the nature of alimony, thus: "When he is delinquent, in consideration whereof the law gives her alimony, it is not a gross sum, or a specific part of the husband's estate in specie, but it is a continuous allotment of sums, payable at regular periods, for her support from year to year; hence the court cannot decree to the wife, as alimony, a gross sum, an absolute title in specific property, or a sale of part of her husband's estate for her use." 2 Bishop, Mar. & Div. §§ 834, 835. It is well understood that alimony in gross is not allowed unless it is authorized by some statute. 2 Ency. of Law, p. 129; 2 Bish. supra. The following authorities are all suits for maintenance simply, or for divorce, a mensa et thoro, and they fully support the rule above quoted: Crain v. Cavana, 62 Barb. 121; Doole v. Doole, 144 Mass. 279, 10 N. E. 811; Burr v. Burr, 10 Paige, 22; Russell v. Russell, 4 G. Greene (Iowa) 29, 61 Am. Dec. 112; Lockridge v. Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Maguire v. Maguire, 7 Dana (Ky.) 181; Almond v. Almond, 4 Rand. 662, 15 Am. Dec. 781; Murray v. Murray, 84 Ala. 363, 4 South. 239. It is clear from these authorities that in the absence of statutory authority a sum in gross should not be allowed in suits for maintenance.

The provisions of the Civil Code above quoted should not be construed to authorize such an allowance. In Robinson v. Robinson, 79 Cal. 515, 21 Pac. 1095, it was held that the language of section 139 of the Civil Code, authorizing the court, upon the granting of a divorce for the offense of the husband, to make a "suitable allowance to the wife during her life, or for a shorter period," was broad enough to confer the power in a decree of divorce to give the wife a gross sum instead of periodical payments. But that section does not apply to an action for maintenance, and the opinion in that case was based largely upon the decisions of other states ascribing this signification to the words "alimony" or "allowance," contained in statutes relating to the authority of the court to provide for the wife upon granting her a divorce. In several of the same states it is held that in actions for maintenance or for judicial separation there is no authority for a sum in gross. The different character of the action not only authorizes, but requires, a different construction of the provisions of section 137 relating to maintenance. The action does not contemplate a divorce, but, on the contrary, that the parties shall continue to remain as they were before —husband and wife. The rights of the wife in the remaining property of the husband are not destroyed or affected in the least by the decree or judgment. The necessity for the separate maintenance may terminate at any time by reconciliation of the parties, or by the death of one of them. The law favors the reconciliation of the parties, and it should not be construed so as to afford a temptation for the wife to press an action for maintenance, rather than to seek restoration to her marital rights. There is nothing in the statute which requires us to depart from the prevailing rule that the right to alimony or maintenance, where the marriage is not dissolved, contemplates periodical payments during such time as the necessity for the maintenance continued, and not an absolute allowance out of the estate.

And if we concede that it is a matter resting in the sound discretion of the court, there is nothing in the circumstances of this case which justifies the order made. The husband's estate consisted entirely of real property, and his subsistence was derived from the rentals therefrom. It is not claimed that he had any ready money. The only means by which he could pay the large sum allowed would be by the sale of the whole or a large part of his estate. The effect of such a decree would be equivalent to an order for the sale of his property. No necessity is shown for such a large allowance. The income from the property is neither found nor proven, but it is not claimed that it exceeds $210 a month, out of which must come taxes, insurance, repairs, and expenses. The court does not find any facts indicating that the husband could, if he chose, in any manner defeat an order for periodical payments. Under section 140, above quoted, there was ample power to secure the payment of such sums by making the same a lien or charge upon the real property which constituted his estate. It may be that under some circumstances the court in such an action would be justified in awarding a lump sum of a small portion of the husband's estate for the wife's support for a limited period. As to this we need express no opinion. It was an abuse of discretion, under the circumstances of this case, to award the wife the equivalent of one-third of the husband's estate, instead of a periodical payment for her support.

The findings of the court are challenged by specifications that they are unsupported by the evidence. We do not think that it is necessary, in view of the fact that the judgment must be reversed, to consider these alleged errors. It may be proper to say that the evidence strongly indicates bad faith on the part of the plaintiff, but, as upon another trial it may be different, or the court may take a different view, we deem it unnecessary to say anything further on the subject.

The judgment is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; McFARLAND, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

147 Cal. 52

KUSEL v. KUSEL. (S. F. 3,340.)

(Supreme Court of California. May 27, 1905.)

1. APPEAL — REVERSAL — ABSENCE OF FINDINGS.

Judgment for defendant in an action for divorce on the ground of desertion will be reversed, in the absence of a finding on the issue of desertion, or of findings inconsistent with desertion, or showing that desertion was cured.

2. DIVORCE—DESERTION—RETURN—FINDINGS.

A finding that, long prior to the commencement of the action for divorce, defendant returned to plaintiff, is not a finding that she returned within a year of the desertion, so as to cure the desertion, under Civ. Code, § 102.

3. SAME—SEEKING CONDONATION.

Under Civ. Code, § 102, providing that if a husband or wife desert the other, and, before expiration of the statutory period required to make the desertion ground for divorce, returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured, a finding to show cure of desertion must show not only a return, but, in connection therewith, the seeking of condonation.

4. SAME—PENDENCY OF ACTION FOR DIVORCE.

If the pendency of an action by a wife for divorce will prevent her separation from him constituting desertion, the action must have been begun in good faith; and there is no presumption that she acted in good faith where there was no foundation for her action.

5. SAME—PENDENCY OF ACTION FOR SEPARATE MAINTENANCE.

That a wife is maintaining an action against her husband for separate maintenance will not prevent her absence from him amounting to desertion.

In Bank. Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by Solomon A. Kusel against Caroline Kusel. Judgment for defendant. Plaintiff appeals. Reversed.

H. H. North, Henry E. Monroe, and Truman & Oliver, for appellant. Riordan & Lande, for respondent.

SHAW, J. This is an appeal by the plaintiff in an action for divorce from a judgment in favor of the defendant. The evidence is made part of the record by a bill of exceptions. The cause of divorce alleged in the complaint is desertion. The charge is that the defendant on December 8, 1896, without cause, deserted and abandoned plaintiff, without his consent, and with the intention to desert and abandon him, and ever since has and still continues, willfully and without cause, to desert plaintiff and live separate and apart from him against his will. The answer denies each of these allegations, and, for an affirmative defense, alleges that on the 29th of May, 1899, in good faith, she went to the plaintiff's residence and offered to return to and live with the plaintiff, and requested that plaintiff receive her into his home as his wife and live with her as his wife, and that the plaintiff refused to receive her, and still refuses to live with her or give her any support, and has deserted her.

We think the judgment must be reversed by reason of the failure to find upon the issues thus presented. There is no finding at all upon the allegations of the complaint with respect to the desertion. Other facts are found which the defendant claims exclude the possibility of there having been a desertion of the plaintiff by the defendant. Findings 9 and 10 are as follows: "(9) That long prior to the commencement of this action, this defendant personally and in good faith returned to the family dwelling place and to plaintiff, and offered in good faith to fulfill the marriage contract, and to live and cohabit with plaintiff as husband and wife. (10) That plaintiff refused such offer, and such refusal was and is unjustified." It is claimed by the defendant that these findings show that the desertion charged in the complaint was cured, under the provision of section 102, Civ. Code. This contention cannot be maintained. That section is as follows: "If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of action of divorce, returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured. If the other party refuse such offer of condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal." The findings quoted do not come within the provisions of this section, for two reasons: First. It does not state that the defendant solicited condonation in connection with her return and offer to fulfill the marriage contract. The section quoted makes this an essential part of the offer. Condonation implies something more than a mere resumption of marriage relations. By section 115, Civ. Code, it is declared that "condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce." By section 116 the reconciliation and remission of the offense by the injured party is made necessary to condonation; and by section 117 it is provided that condonation implies the condition subsequent; that the forgiving party must be treated with conjugal kindness. It does not appear that the defendant acknowledged any fault, expressed regret, or asked forgiveness. There is nothing in the findings from which it can be assumed or implied that she solicited condonation. Second. The finding does not show that the offer referred to was made before the expiration of the statutory period required to make the desertion a cause of divorce. Benkert v. Benkert, 32 Cal. 467. The allegation is that the desertion took place on the 8th of December, 1896. The claim of the defendant that these findings preclude the possibility of there having been an effective statutory desertion necessarily implies that there had been a desertion, but that it was cured by reason of the offer to return. The statement that this offer to return was made long prior to the commencement of the action is not equivalent to a statement that it was made within one year after the 8th of December, 1896. For the purposes of this question, we must presume that to have been the date of the act of desertion. These findings were manifestly made in response to the affirmative defense of the answer, which avers that the offer was made on May 29, 1899. This action was begun July 1, 1899—but little over a month after the time at which it was alleged the offer to return took place. There is no evidence of any offer to return, except at the time alleged, and the insufficiency of the evidence to show any other offer is asserted by a specification to that effect. In view of these circumstances, we cannot assume, in support of the judgment, that these findings refer to an offer to return at some other date than that alleged.

Defendant contends further that the facts stated in finding 8, concerning intermediate litigation between the parties, show that there was no desertion by the defendant, or that if she did commit the act of desertion by leaving him on December 8, 1896, the subsequent separation did not maintain for one whole year the character of a statutory desertion. Finding 8, in substance, is that the defendant on December 8, 1896, began a suit against the plaintiff for divorce on the ground of extreme cruelty; that upon the trial of said action a judgment of nonsuit was entered on August 10, 1897; that thereafter, on November 22, 1897, she began another suit against him for maintenance; that in the action for maintenance, on March 13, 1898, he filed a cross-complaint asking for divorce; that this action was tried on March 6, 1899, and on May 23, 1899, judgment was ordered therein dismissing his cross-complaint, and in his favor on the question of maintenance; that on June 12, 1899, and before entry of judgment, she filed a supplemental complaint in the action for maintenance, and on July 1, 1899, he withdrew his cross-complaint in that action, and on the same day began the present action of divorce. The finding further states that there had been no extreme cruelty committed on the defendant by this plaintiff, nor any threats of bodily harm made by him against her, nor any acts on his part from which bodily injury could be reasonably apprehended by her. The proposition contended for by the defendant is that it is not desertion for one spouse to live apart from the other while an action for a divorce is pending between them. This proposition cannot be sustained in the broad sense in which it is made. It may be admitted, for the purposes of the case only, that where a wife in good faith begins an action for a divorce against the husband, and immediately separates herself from him, for the reason that it would not be proper for her to live with him while she was prosecuting an action for divorce against him, such separation will not constitute desertion, within the meaning of the law, although in fact the suit was unfounded. But on the other hand, it will not be contended that a wife who intends to desert her husband can, with that intent, leave his residence and live separate from him, and at the same time destroy the effect of the desertion by immediately beginning an unfounded action for divorce against him. The action must be begun in good faith in order to have the effect contended for. Under the facts found in this case, there can be no presumption that the wife acted in good faith. She has the burden of proving that fact. The court expressly finds that there was no foundation for the action; that there had been no extreme cruelty inflicted by him upon her. As we have said, in the consideration of this question it must be assumed that she left his house as alleged, on December 6, 1896. The contention of the defendant is that the particular findings we have mentioned are necessarily inconsistent with the allegations of the complaint characterizing the separation as desertion by the wife. Where the particular facts found are relied upon as a substitute for a finding upon the ultimate fact alleged, the particular facts must be inconsistent with the fact which they tend to negative, and every particular fact necessary to constitute this negation must be stated in the finding. We cannot, under the particular facts found, assume that the suit of the defendant against the plaintiff for divorce on the day she left him was begun in good faith. The finding that no such cruelty existed, although it may not exclude the possibility of the suit having been begun in good faith, would at least destroy any presumption to that effect. In the absence of good faith, it is clear that the beginning of the action cannot transform a causeless abandonment of the marital domicile into an innocent absence, or into a separation brought about through the fault of the husband. The subsequent action for maintenance could have no effect whatever upon the running of the statutory period of one year necessary to make the wife's desertion a cause of divorce. It implies a belief on her part that he had deserted her. That being the case, there was no impropriety in her returning to him and offering to again live with him. If he accepted the offer, there would be no necessity for the suit. If her belief was a mistaken one, and she was herself the deserting party, her action for maintenance would not excuse or give an innocent character to her continued absence. These findings are therefore not inconsistent with the allegation that she deserted the plaintiff on December 8, 1896. The record stands with no finding on that issue. It is well settled that, where the court fails to find upon a material issue, the judgment is unsupported, and will be reversed upon appeal. Speegle v. Leese, 51 Cal. 415; Golson v. Dunlap, 73 Cal. 161, 14 Pac. 576; Leviston

v. Ryan, 75 Cal. 294, 17 Pac. 239; Connolly v. Hingley, 82 Cal. 643, 23 Pac. 273; Monterey v. Cushing, 83 Cal. 510, 23 Pac. 700.

The judgment is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; McFARLAND, J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

147 Cal. 108

In re WILSON'S ESTATE. (S. F. 4,045.)*

(Supreme Court of California. June 7, 1905.)

1. EXECUTORS AND ADMINISTRATORS—NOTICE TO CREDITORS—PUBLICATION — DECREE—VACATION—RES JUDICATA.

Code Civ. Proc. § 1490, requires every executor or administrator to publish a notice to the creditors, as directed by the judge, not less than once a week, for four weeks. Section 1491 provides that the time expressed in the notice shall be ten months after the first publication if the estate exceeds $10,000 in value, and four months if it does not; and section 1492 declares that after notice, on proof of due publication filed, the court may make an order or decree of due notice given. *Held*, that a decree vacating a formal decree establishing due notice after publication for four months, because of a doubt entertained by the court as to the value of the estate, was not res judicata of the issue of the value of the estate, and did not preclude the court from determining, on an application for distribution, that the estate had never exceeded $10,000 in value, and that the notice to creditors was proper.

2. SAME—APPEAL—REVIEW.

Where a decree establishing due notice to creditors was embraced in a decree settling the executor's account and making final distribution of the estate, it was reviewable on appeal from such distribution decree.

Department 2. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Proceeding for the distribution of the estate of Ezekiel Wilson, deceased. From a decree settling the executor's final account, making distribution, and establishing due notice to creditors, Laura Le Tourneux appeals. Affirmed.

Charles F. Hanlon, for appellant. J. F. Leicester and James A. Ballentine, for respondent.

HENSHAW, J. The court made its order of publication of notice to creditors in the above-entitled estate in due form as required by law. The administrator caused said notice to be published in accordance with the order, and with sections 1490 and 1491 of the Code of Civil Procedure, directing the presentation of claims within four months after such publication, and upon the usual proofs, ex parte, the court made its decree establishing that due notice to creditors had been given.

Laura Le Tourneux was an alleged creditor of the estate. She failed to present her claim within the four months prescribed in the notice, but did present it within ten months. Moreover, she made application to the court in probate, based upon affidavit, to vacate its decree establishing due notice to creditors, asserting that the value of the estate exceeded $10,000; and the court, after hearing, made its order vacating that decree, and stating in the order of vacation that it found the estate to be in value greater than $10,000. The administrator, resting upon the sufficiency of the publication already made, did nothing further until, the time arriving for the final settlement and distribution of the estate, he filed his petition, in due form, seeking the settlement of his account and distribution of the estate, and asking that a decree should be entered establishing due notice to creditors. This matter was heard by the court, and the showing was indisputable that the estate did not and never had equaled in value the sum of $10,000. The court so found, and further found that the publication of notice to creditors had in all respects been duly made in accordance with law, and again made its decree establishing that due notice to creditors had been given. Laura Le Tourneux's claim was in litigation. The very obvious effect of the decree was to deprive her of all standing in that litigation, because, admittedly, she had not presented her claim within the four months required by law, if, in truth, the estate was of less value than $10,000. Accordingly she appeals. Her contention upon the appeal is that when the court made its order vacating its first decree establishing due notice to creditors, it found that the estate exceeded in value $10,000, that this finding was absolute and determinative of the question, that all parties were foreclosed by the finding, and that it was not a question open for future and later consideration. Upon the other hand, it is contended that the sole effect of the order vacating the decree establishing due notice was to set the question of the publication of due notice at large, leaving its determination for some appropriate future action.

Such we conceive to be the true meaning of the order, and, indeed, the proper method of procedure. It will not often happen that the question of the value of an estate is a close one, but when this is the case the provisions of our law in meeting it are somewhat singular. The judge in the first instance does no more than to direct a publication of notice in some designated newspaper of the county as often as he shall require, but not less than once a week for four weeks. He does this without knowledge of the actual value of the estate. The administrator, in turn, is required to publish the notice in the newspaper for the length of time directed, calling upon all persons having claims against him to exhibit their claims, with the necessary vouchers, either at his place of residence or business, as specified in the notice; and he is further called upon to prescribe in this notice the time limit within which such claims must be presented. If the estate exceed $10,000 in value, then he is to call upon the claimants to present their claims within ten months from the date of the first publication; if the estate be less than $10,000, then to present them within four months. Code Civ. Proc. §§ 1490, 1491. While the executor or administrator is so called upon to designate the time, his designation is not, of course, a judicial determination of the value of the estate, and is binding upon no creditor or claimant if the time limit be not the time prescribed by the law according to the value of the estate. Section 1492 contemplates that the administrator may obtain his decree establishing due notice, after the notice has in fact been given, by presenting and filing a copy thereof, with the affidavit of due publication, and upon the production of such other testimony as may be satisfactory to the court. While, in practice, such decrees are taken almost as a matter of course upon presentation and inspection of the statutory proofs, it may sometimes happen that the question of the value of the estate is an exceedingly close one, and that valuable rights may depend upon an exact determination of the value. It is not incumbent, therefore, upon the trial judge to make his decree at haphazard, nor upon partial, and what may prove subsequently to be most unsatisfactory, proof. The wisest course to pursue in such a case might well be to wait until the time for distribution has arrived, when all the parties are regularly before the court, and when the value of the estate can be accurately determined. Such was the course which the judge here pursued. The showing made before him under the application to vacate his first decree, establishing notice to creditors, was doubtless sufficient to justify the order which he actually made vacating the decree. No binding force attaches to the further declaration that the value of the estate exceeded $10,000. It was not necessary to the order which was actually made, and cannot be construed as a final and definite determination of that issue of fact. It was sufficient for the court to have said that, "Because of doubt entertained as to the value of the estate, I will vacate the decree, leaving the matter open for full consideration and final determination when the estate comes to be closed." It follows, therefore, that the order of the trial court vacating its decree establishing due notice to creditors was in no sense a judgment upon the facts, so as to constitute res judicata between the parties, and had no other or further effect than to clear the way for a proper determination of this disputed point. In effect, it reserved the determination until the time for distribution arrived, at which time it was made clearly to appear that the estate was, and always had been, of less value than $10,000. Such being the fact, the publication of notice to creditors was sufficient, both as to form and substance, and, proper proofs having been made to the court, its decree establishing due notice was in all respects regular.

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*Rehearing denied July 7, 1905.

While an appeal does not lie from a decree establishing due notice to creditors, as such, in this instance that decree was embraced in the decree settling the final account of the executor and making final distribution of the estate, and the appellant, in terms, appeals from such decree.

The decree appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

147 Cal. 106

PACIFIC DEBENTURE CO. v. CALDWELL. (S. F. 3,402.)

(Supreme Court of California. June 7, 1905.)

INJUNCTION—EQUITY—JURISDICTION — ILLEGAL TRANSACTION.

Where a judgment by default is taken on a cause of action arising out of a lottery transaction, a court of equity will not assume jurisdiction to enjoin the enforcement of the judgment.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 77–80; vol. 30, Cent. Dig. Judgment, § 784; vol. 33, Cent. Dig. Lotteries, § 12.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Suit by the Pacific Debenture Company against William Caldwell. From a judgment in favor of defendant, and from an order dissolving a preliminary injunction, plaintiff appeals. Affirmed.

W. C. Cavitt, C. A. Elliott, and D. E. Alexander, for appellant. Louis S. Beedy and John T. Pidwell, for respondent.

HENSHAW, J. This appellant, having suffered judgment by default in the justice court of the city and county of San Francisco, filed its bill in equity in the superior court of that city and county to procure an injunction restraining the enforcement of the judgment. A preliminary restraining order was obtained. Respondent demurred to plaintiff's bill, his demurrer was sustained, and an order of court was entered dissolving the preliminary injunction. From the judgment on demurrer and from this order, plaintiff appeals. Upon its appeal it presents certain technical objections as reasons why the injunction should have been granted. It urges that the justice court entered its default within the time allowed to it by law to plead. It urges that the plaintiff in the justice court had split a single demand of $521.50, and commenced, or caused to be commenced, two separate suits—one for $299 and one for $222.50—without its consent, and without remitting in either suit the excess over and above the sum of $300, as to which the justice court had jurisdiction. Code Civ. Proc. § 894. But this court will not enter upon the consideration of any of these matters. Plaintiff's bill is wholly without equity, for, when it comes to present its defense upon the merits to the action in the justice court, it makes it appear by its pleading in the superior court, and by the argument in its brief, that it was engaged in an unlawful business; that it was a "get rich quick" concern, conducting a lottery; that its business was opposed both to public policy and to the express mandate of the law. Upon this very subject, and as a reason why a court of equity should restrain a court of law from enforcing its judgment, appellant, in its brief, employs this remarkable language: "We have shown all of these facts in our complaint, and more. We have also shown that the contract out of which this demand arises is one which is contrary to public policy, and, under the decisions of the court, as soon as that fact appeared the lower court should at once have set its seal of condemnation upon it. A court should not permit a judgment based upon such a contract to be enforced in any manner, nor should it allow a plaintiff who had engaged in such a contract, nor his supposed assignee, to enforce such a judgment." In other words, plaintiff, proclaiming itself a wrongdoer and a violator of the law, asks equity to restrain a creditor who has obtained a judgment in law against it, because forsooth, its business is illegal, and therefore courts of law and of equity will refuse their aid to either party. It is not, perhaps, surprising that this plaintiff, under the circumstances, should be blind to the fact that it itself is seeking the affirmative aid of a court of equity to protect it in the fruits of its illegal and forbidden contracts. The superior court, in equity, could have done no other than it did—refuse a hearing to the bill because of its absolute lack of equity.

The judgment and order of the trial court are affirmed, with costs, and with damages against appellant in the sum of $100 for a frivolous appeal.

We concur: McFARLAND, J.; LORIGAN, J.

(147 Cal. 95)

In re DUNPHY'S ESTATE.

FLOOD v. DUNPHY et al. (S. F. 4,086.)*

(Supreme Court of California. June 6, 1905.)

1. WILL—TRUST—CONSTRUCTION.

Testator by his will created a trust as to all of his property, and divided his estate into fifths, and provided in his will that as to the first and second devisees each was to have one-fifth of the income during life, and at the death of the devisee the devise was to go to her children, or, if she left no children, the devise was to go to testator's heirs at law. As to the third devisee, the will provided that one-fifth of the principal of testator's estate should be paid as the devisee might by will direct. As to the fourth devisee, the will provided that at her death one-fifth of the principal of testator's estate should be transferred and distributed as the devisee might by will direct, the third and fourth devises concluding as in the devise to the other devisees. In the fifth devise the language was the same as in the fourth, except that there was no provision for the devisee's children. *Held*, that the will sufficiently disclosed testator's intention to make direct devises to the remaindermen, and a contention that there was an invalid trust to convey real property to beneficiaries was untenable.

2. SAME.

As to one of the devises, the will provided that one-fifth of the income of testator's estate should be paid to a daughter of testator, "to be applied as follows: so long as my granddaughter shall remain in the custody of my family during her minority a sufficient sum out of said fifth shall be applied to the support and maintenance of my granddaughter," etc. The granddaughter was a ward and member of the family of the daughter, to whom the income was to be paid for the benefit of the granddaughter. *Held*, that a contention that the provision to pay the income for the support of the granddaughter was discretionary and therefore void was untenable.

3. SAME.

A contention that the provision for the payment of the income for the support of the granddaughter was void because to be applied by the daughter was also untenable in view of Civ. Code, § 857; authorizing the creation of trusts to receive the rents and profits of real property and pay them to or apply to the use of any person for himself or his family.

4. SAME—EQUITABLE CONVERSION.

Where testator by his will created a trust as to all of his property, real and personal, some of which was real property in different states, with direction to his executrices to sell it all and invest the proceeds in real estate in a certain city, the property mentioned in the will would in equity be considered as real property in the city designated by testator.

5. SAME—STATUTE.

A will directing the testator's executrices to sell all of the real and personal property of the testator and invest the proceeds in real estate in a certain city, and to pay the income thereof to devisees for life or during determinate periods of their lives, and disposing of the remainders by direct devises, is valid under Civ. Code, § 857, declaring the purposes for which trusts may be created.

6. APPEAL—HARMLESS ERROR—EVIDENCE.

In a proceeding under Code Civ. Proc. § 1664, for determining the rights of persons in the estate of a decedent, where the question of the validity of the will creating a trust was involved, and a construction was adopted by the California courts in favor of the validity of the will under the California laws, the admission in evidence of the Constitution and statutes of a state in which some of the property belonging to the estate was located, showing that there was in that state no provision on the subject of express trusts of real property and that the common law of England was in force there, was not cause for reversal irrespective of whether the laws of such other state were applicable to the case.

7. LAWS OF ANOTHER STATE—PRESUMPTION.

The law of other states, in the absence of proof, is presumed by the courts of California to be the same as the law of California.

8. WILL—WIDOW—ELECTION—TIME FOR EXERCISING.

Where testator included community property when making his will, and made provision for the contingency of the widow's election not to take under the will, but did not limit the time within which she should exercise the right, the mere fact that she gave written notice of her intention to assert her rights in the community property did not preclude her from changing her mind and taking under the will, the statement not having been shown to have caused any other person to do anything detrimental to his interest.

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*Rehearing denied July 6, 1905. BEATTY, C. J., dissenting.

Department 2. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

In the matter of the estate of William Dunphy, deceased. Action by Mary D. Flood against Carmen O. Dunphy and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Myrick & Deering, for appellant. Charles S. Wheeler, Bishop, Wheeler & Hoefler, Lloyd & Wood, J. H. Meredith, Sullivan & Sullivan, and George W. Haight, for respondents.

McFARLAND, J. The plaintiff is the daughter and one of the heirs at law of William Dunphy, deceased; the other heirs of said deceased are the defendants, Carmen O. Dunphy, his surviving wife, Jennie C. Dunphy, another daughter, James C. Dunphy, a son, and Viola Piercy, a minor child of a deceased daughter of said decedent. The defendant Jennie C. Dunphy is guardian of said Viola. This action was brought by plaintiff, under section 1664 of the Code of Civil Procedure, for the purpose of having the rights of all persons claiming heirship, ownership, or interest in the estate of said deceased judicially ascertained and determined. The judgment of the superior court was adverse to plaintiff, and from the judgment and an order denying her motion for a new trial she appeals.

The deceased left a will by which he created, or attempted to create, a trust. Appellant contends that this trust is void, for reasons assigned; respondents contend that it is valid. The decision of the court was that the trust is valid, and the main issue in the case is whether or not that decision is right.

By the will a few bequests are given to some religious and charitable societies which need not be considered, and the defendants Carmen and Jennie C. are appointed executrices, without bonds. The parts of the will which present the main issue on this appeal are as follows:

"I give, devise and bequeath to my wife Carmen Ovil Dunphy and my daughter Jennie C. Dunphy all my property and estate real and personal wherever situate to have and to hold to them or the survivor of them in trust for the uses and purposes hereinafter named. * * * My said trustees shall convert all my personal property in the County of Monterey, State of California, into cash and all my personal and real property in the State of Nevada shall also be sold by them for cash as soon as practicable for the best price obtainable; * * * and they shall invest the proceeds of such sale in real estate in the City and County of San Francisco, State of California, improved or unimproved; if unimproved sufficient money shall be retained to improve the same, and shall be so used as that the property be made to bring in a reasonable revenue; my object being to have all my property invested in real estate in such a way that it will produce a steady and reasonable income. The net income of my whole estate after paying all taxes, expenses and outlays of every kind, shall be divided into five equal shares or parts, one-fifth of said income shall be paid quarterly to my wife during her life, and upon her death one-fifth of the principal of my estate shall be transferred and distributed as she may by will direct, if she shall have made no direction said one-fifth shall go to my heirs at law.

"One-fifth of said income shall be paid quarterly to my daughter Mary Flood during her life. Upon her death one-fifth of the principal of my estate shall go to her children, and if she leaves no child said one-fifth shall go to my heirs at law.

"One-fifth of said income shall be paid quarterly to my son James C. Dunphy during his life, and at his death one-fifth of the principal of my estate shall be paid as he may by will direct; if he shall have made no such directions, then such fifth interest shall go to his children; and if he shall leave no child, it shall go to my heirs at law.

"One-fifth of said income shall be paid quarterly during her lifetime to my daughter Jennie C. Dunphy; at her death one-fifth of the principal of my estate shall be transferred and distributed as she may by will direct, and if she shall have made no such directions it shall go to her children, and if she leave no child it shall go to my heirs at law.

"One-fifth of said income shall be paid to my daughter Jennie C. Dunphy to be applied as follows: so long as my granddaughter Viola Carrie Carmen Piercy shall remain in the custody of my family during her minority a sufficient sum out of said fifth shall be applied to the support and maintenance of my granddaughter. The residue of the said one-fifth income shall be paid to my wife and three children until my said granddaughter attains the age of twenty-one years after which time the said one-fifth income less the sum of ten thousand dollars expended by me in procuring the custody of her person, shall be paid to her quarterly during her life. * * * At the death of my granddaughter one-fifth of the principal of my estate shall go to her children, and if she leave no child to my heirs at law. * * * To my said executors and trustees I give full power and authority to make any and all sales and investments and outlays without applying to any court or judge for leave to do so."

The principal contention of appellant is that by this will the testator undertook to create an invalid trust to convey real property to beneficiaries; that its terms are in this regard substantially the same as those of the attempted trust which was held void in Estate of Fair, 132 Cal. 533, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70, and that the said Fair Case is determinative of the question here under discussion in favor of appellant. We do not think that this contention is maintainable. Of course, it is a fundamental principle that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction, and that it will not be held to contain a void trust unless the invalidity of the trust be beyond question; and therefore it will not be held that a will creates an unwarranted trust to convey unless its language clearly shows an intent to create such a trust, and cannot be reasonably construed otherwise. Now, in the Fair Case it was held by the court that the testator devised all his property to his trustees, and provided no way by which it could vest in any other person except by a conveyance by said trustees, and, moreover, clearly expressed his intent that it should so vest only by a conveyance by the trustees. The only words used on the subject in that will constituted express directions to the trustees to "transfer and convey." That express direction was used many times, and, in the opinion of the majority of the court, the will contained no language that could possibly be construed into a direct devise to the beneficiaries or any intent to make such devise, and that, on the contrary, it clearly appeared that he did not intend to make such a devise, but did intend that no title should pass to a third person except by a conveyance by the trustees. All that there was in the will on the subject was repeated directions to his trustees to "transfer and convey." With respect to this question now under consideration, the will involved in the case at bar is very different from the will of Fair. As to two-fifths of the property no question is raised; Mary Flood is to have one-fifth of the income during her life, and upon her death one-fifth of the principal is to "go to" her children, or, if she leaves no child, then it is to "go to" the testator's heirs at law, and upon the death of Viola Piercy another fifth is to "go to" her children, or, if she leaves no child, to the testator's heirs; and the words "go to" are usual and sufficient words of devise. The question arises only as to the other three-fifths. With respect to the James C. Dunphy fifth, the words used are, "at his death one-fifth of the principal of my estate shall be paid as he may by will direct; if he shall have made no such direction, then such fifth interest shall go to his children, and if he shall leave no child, it shall go to my heirs at law." As to the Jennie C. Dunphy fifth, the words are, "at her death one-fifth of the principal of my estate shall be transferred and distributed as she may by will direct; if she shall have made no such direction it shall go to her children, and if she shall leave no child it shall go to my heirs at law"; and the language is the same as to the Carmen fifth, except that there is no provision for her children—the principal, if she shall make no disposition by will, "shall go to my heirs at law." Now, with respect to these last-named three-fifths, there is no direction whatever to the trustees to convey the property to the remaindermen, and no direction to them at all upon that subject. There is nothing in the language used (as there was in the will of Fair) which necessarily means that title could pass only by a conveyance by the trustees, or which embarrasses the court in upholding the will by construing the language as constituting valid devises, and not an invalid trust to convey. In each of the three cases, in the latter part of the language, clear words of direct devise—"go to"—are used; and to support appellant's contention it must be rigidly held that prior words—in two instances "shall be transferred and distributed," and in the other "shall be paid"—necessarily mean that the title to the property could pass only by the trustees' conveyance. The word "distributed" is not a technical word in conveyancing, and is not usually found in deeds. If it have any legal technical meaning, it has such meaning with reference to decrees of distribution in probate courts. The use of this word, therefore, contains no intimation of an intent to create a trust to convey, or that the testator supposed that a conveyance by the trustees was necessary to pass title. Neither does the word "transfer" necessarily mean a passing of the title to land by a trustees' conveyance, and it would not have that meaning even if there had been a direction to the trustees to transfer. And the words "shall be paid," while inapt as applied to real property, simply mean, unless we are to defeat the testator's will by holding them to have no meaning, that the property is devised to the remaindermen. There is nothing in them implying a conveyance of the title by the trustees. The contention of appellant that, because the property is devised in the first instance in trust to trustees, therefore it could be "distributed" or "transferred" or "paid" only by a conveyance executed by them, and that therefore the will must necessarily be construed as an invalid trust to convey, is not maintainable. A trustee takes only such estate as is necessary for the performance of his trust, and it terminates when the trust ends. Of course, as the trustees would be in possession of the property at the time of the death of any one of the persons named, they would have to transfer it by delivering possession thereof to the remaindermen.

This would be so even in the case of Mary Flood or Viola Piercy, where the only words used are shall "go to." The words used in the will are not all very apt; evidently different phrases are sometimes employed to express the same thing; but considering all the language together, and each part with reference to the context, it clearly enough appears that the testator intended to make, and did make, direct devises to the remaindermen. And certainly the will should not be construed as creating an illegal trust by implication; such an illegal trust must clearly and necessarily appear before the will, for such reason, can be upset. The foregoing determines the main question in the case, and the purpose of the action was evidently to have that question determined. Some other points, however, are made by appellant, and we will notice them briefly.

It is contended that the provisions that James C. Dunphy and others may direct by will to whom certain fifths of the property shall go are invalid. It may be said that section 781 of the Civil Code, which provides that "a general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed," as well as some other Code provisions, seems to contemplate the validity of the provisions of the will in the case at bar now under discussion. However, as this question is involved in other cases, we will not here definitely determine it, for the invalidity of these provisions, if conceded, would not invalidate the devises to the heirs. By the will the title vests in the heirs, subject to be divested by a valid appointment; and the title remains in the heirs if no appointment shall have been made, or if there be no legal authority to make such appointment.

It is contended that the provision to pay an income for the support of Viola Piercy is discretionary, and therefore void under the rule in Estate of Sanford, 136 Cal. 97, 68 Pac. 494. But the point is not tenable. The language is that "a sufficient sum out of said fifth shall be applied to the support and maintenance of my granddaughter" during her minority. Under this language a court could at any time ascertain the amount necessary for the purpose stated, and compel it to be devoted to that purpose. In the Sanford Case the language was that the trustees were to apply an income to the support of certain persons "to such extent" as "in their judgment may be proper," and was held void because it clearly left to the discretion of the trustees what amount of the income, if any, should be applied. The case at bar is in this respect within the decision in the Estate of Reith, 144 Cal. 314, 77 Pac. 942. Nor is the provision void because the income is to be applied to Viola's support by Jennie C. Dunphy. Viola was a member of the latter's family and her ward, and the guardian was the proper person to provide for the ward's support. Section 857 of the Civil Code expressly provides for a trustee to receive the income of real property and apply it to the use of any person for himself or his family, and, even if the will is to be construed as making Jennie C. the sole trustee as to this one-fifth of the income, such construction would not invalidate the provision.

The point is not tenable that the trust in question is generally not one permitted by the Code. The property mentioned in the will is, under well-recognized equitable doctrine (1 Pom. Eq. 371 [2d Ed.]), to be considered as San Francisco real property, and the trusts in relation thereto are among those stated in section 857 of the Civil Code.

It is contended that the court erred in allowing respondents to introduce in evidence the Constitution and statutes of the state of Nevada, the evidence showing that there was in that state no constitutional or statutory provision on the subject of an express trust of real property, and that the common law of England is in force there. But, whether or not the admission of this evidence was erroneous, the appellant could not have been prejudiced by it. The trust in question is, as we have held, valid under the law of California; the evidence objected to merely showed, unnecessarily perhaps, that it would also have been valid under the laws of Nevada, if, indeed, those laws were in any sense applicable to the case; but if the evidence had been rejected, then the presumption would have been that the law of Nevada was the same as the law of California, and the result would have been exactly the same.

There is only one more point that need be noticed. The testator stated some facts in his will which left it very doubtful how much of his property is his separate property, and how much, if any, is community property, and it is evident that the determination of that question would involve serious litigation. By the will the estate is divided into five fifths, as above stated, upon the condition that the wife will take one-fifth under the will, and will not claim one-half of the community property; and it is provided that if she elects to assert her right to one-half of the community property, then the balance of the property shall be divided into four parts, and shall go in fourths to said Mary Flood, James C. Dunphy, Jennie C. Dunphy, and Viola Piercy, "on the same terms, conditions, provisions and limitations, as provided in the divisions of fifths of my estate"; and before the time of the trial of this case the surviving wife, Carmen, did file a written statement that she claimed one-half of the estate as community property. The court did not find that said Carmen had finally elected not to take under the will but to claim one-half of the community property, and held that she had until the time of distribution to make her final election. Appellant contends that this finding and decision were erroneous; that the court should have made a finding on the question, and should have found that the wife had made a final election not to take under the will but to claim the one-half of the community property; and that, for these reasons, the judgment should be reversed. There was a stipulation of the parties by which it was "agreed that all questions as to whether the whole or any part or portion of the estate of William Dunphy, deceased, was at the time of his death community property, shall be excluded from consideration and decision by the court at this time." The findings and decree fully provide in detail for the proper distribution of the estate whether the widow shall or shall not finally elect to take under the will, so that the only question here involved is whether or not the court should have found that the wife had finally and conclusively elected not to take under the will, and should have entered a decree to that effect, which would have been final and binding forever upon her and her successors in interest; but we do not think that the court erred in not so finding and decreeing. There is no provision in the will as to the time when the widow shall make her election, and there is no provision in the laws of this state that we know of prescribing any time within which such an election must be made. Of course, a final decree of distribution would be conclusive on the subject, but clearly, so far as any mere limitation of time is concerned, the election may be made at any time before such decree, unless the party shall have done some act to which all the elements of an estoppel apply. In the case at bar the only act done by the widow which is relied on as precluding her from making her election before distribution is her said written statement that she intends to assert her rights in the property as community property. But considering the condition of the estate here involved, the difficulty of ascertaining what part, if any, is community property, and the danger of the widow getting nothing out of the estate if she abandons her right under the will, we think that the court was right in not forever precluding her from changing her mind if after further investigation and knowledge on the subject she should find it to be clearly her interest to do so. Under the will she gets a large interest in a very valuable estate, while under her claim to community property she might not get anything; and, as courts should always be careful to guard the interests of widows in the estates of their deceased husbands, she should not be rigidly bound by her first impressions as to what course would be advantageous to her. And there is here no principle of estoppel involved, the objection being the mere technical one that she should be inexorably bound by a statement which has not caused any other person to do anything detrimental to his interest. No authorities have been cited where the facts are exactly like those in the case at bar, although the following cases, cited by respondents, are somewhat in point: Garn v. Garn (Ind. Sup.) 35 N. E. 394; Evans' Appeal, 51 Conn. 436; Ward v. Ward, 134 Ill. 417, 25 N. E. 1012. No California cases have been cited, and upon our own examination we have discovered none, exactly in point, although in several it is assumed that the election may be made at any time before distribution, and in Estate of Smith, 108 Cal. 120, 40 Pac. 1039, it is said: "Before the widow can be denied her right to elect upon distribution, it must be found that, with the knowledge of her rights by unequivocal acts evincing her intent, she has so dealt with the property left her by the will that it would be inequitable to permit her to avoid these acts and disclaim her intent." Our conclusion is that the finding and decree of the court on this subject are right.

The judgment and order appealed from are affirmed.

We concur: **LORIGAN, J.; HENSHAW, J.**

(147 Cal. 31)

TYLER v. CURRIER. (S. F. 3,298.)

(Supreme Court of California, May 27, 1905. Opinion in Bank, June 26, 1905.)

1. HUSBAND AND WIFE—DEED BY WIFE—FAILURE TO RECORD.

Where a wife conveyed property to her husband, the fact that he refrained from recording the deed on the erroneous belief that, if he should die first, she could destroy the deed and revest herself with the title, did not affect the validity of the conveyance.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 239, 240.]

2. SAME—EVIDENCE.

In a suit to set aside a deed from wife to husband on the ground that it was not delivered with intent to pass title, it was not error for the court to sustain an objection to a question whether the husband took the deed with the understanding on his part that, in the event of his dying first, the wife could get control of and destroy the deed, and "thus revest herself with the title."

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 239, 240.]

3. SAME—PAYMENT OF TAXES.

Where a wife had access to her husband's separate bank account, the fact that after she conveyed certain property to her husband, who was a member of a real estate firm, the husband's partner charged certain taxes on the land to her, or that she knowingly paid the same, was not material, as showing that the conveyance was not intended to pass title.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 865, 866; vol. 26, Cent. Dig. Husband and Wife, §§ 239, 240.]

4. SAME.

Where, after delivery of a deed by a wife to her husband, a fire policy on the property was taken out in her name by oversight on the part of the husband's partner, such fact was not material, as showing an intent that the deed should not operate as a conveyance.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 865, 866; vol. 26, Cent. Dig. Husband and Wife, §§ 239, 240.]

5. SAME—ESTOPPEL—RECONVEYANCE.

Where a wife conveyed certain property to her husband by a deed which he did not record, and thereafter a deed of trust was executed by both to secure a loan, which recited that if the loan was paid the trustees should reconvey the land to the wife, "her heirs and assigns, at her request and cost," such deed of trust did not operate as a reconveyance to the wife, or estop the husband from denying that she was the owner of the property.

Department 2. Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by Louise W. Tyler against Christopher Bodwell Currier. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

Edward C. Harrison, for appellant. A. P. Van Duzer and E. W. McGraw, for respondent.

McFARLAND, J. The plaintiff is a daughter and an heir at law, and defendant is the surviving husband, of Emily F. Currier, deceased. The said decedent left a will in which she bequeathed and devised certain property to named persons, and gave the residue of her estate to the defendant herein for life, with remainder over to plaintiff and her sister, Letitia C. Hendry. During her lifetime the decedent executed a deed to defendant, conveying to him in fee the certain lot of land described in the complaint herein; and this action was brought to have said deed set aside and annulled on the grounds, first, that it was never "signed, executed, acknowledged, or delivered by said decedent in her lifetime"; and, second, that if it was signed, delivered, etc., its execution was procured by the undue influence of defendant. The prayer of the complaint is that the deed be declared void, and that said land be decreed to be part of the estate of the decedent, and that defendant be forever debarred from asserting any interest therein except as a tenant for life, etc. The findings and judgment were for defendant, and plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

There was no evidence of the undue influence charged, and in his briefs and argument counsel for appellant makes no attempt to sustain the averment on that subject. It is also entirely clear that the decedent signed the deed in question, duly acknowledged it before a notary public, and on December 27, 1895, made actual delivery of it to respondent, who took it and kept it in his own exclusive possession from that time until after her death; and these facts are not controverted by appellant. But the contention and the only contention of appellant is that notwithstanding the actual manual delivery of the deed to respondent, and its continued possession by him as aforesaid, still the delivery, for certain averred reasons, should not be considered as, and was not, a delivery, in law. We see no ground upon which this contention can be maintained. The delivery of the deed was fully proven by the testimony of respondent and of the witness George M. Mitchell, who was present at the time of the delivery and made a memorandum thereof. There was at the time no limitation whatever as to the character or purpose of the actual delivery. It was, so far as the evidence shows, unconditional. It was intended by the wife as a deed of gift to her husband, and delivered to him as such. She had told a friend, who was a business man, that she wanted to give the house and lot in question—which was the family home—to her husband, and was advised by him how this could be done, and informed of the difference between a devise to him by will, and a deed actually delivered to him in her lifetime. As to the possession of the deed after delivery, respondent testified: "The deed remained in my possession from that time until after my wife's death. It would have been impossible for her to have obtained it again. It was in my safe deposit box, and she didn't have access to it." But appellant relies on certain circumstances hereinafter noticed as showing no delivery, in law, of the deed.

1. Respondent did not record the deed until after his wife's death, and appellant contends that something which he said about that matter in his testimony tends to show that the delivery of the deed was not with intent to pass title. Respondent said: "I did not refrain from recording it at her request. I refrained from recording it for fear that I might die first." Appellant's counsel then said to him: "Your idea was that, if it was not recorded, she could destroy it and revest herself with the title?" and he answered: "Yes, sir." There is no merit in this contention. The fact that respondent had the erroneous notion that if he should die before his wife, and after his death she should get possession of the deed and destroy it, the title would revest in her, has no pertinency to the issue of the delivery of the deed. See Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547. And for the same reason the court did not err in sustaining an objection to the question whether respondent took the deed with the understanding on his part that, in the event of his dying first, the wife could get control of and destroy it, and "thus revest herself with the title." Indeed, the use of the word "revest" assumes that the title had by the delivery of the deed vested in the grantee.

2. The respondent is a physician, and, in addition to practicing his profession, was a partner with one Mitchell in the real estate business under the firm name of Currier & Mitchell; and the firm did some business with the decedent. Mitchell also attended to insurance business. After the delivery of the deed, Currier & Mitchell rendered an account to the decedent, which included, among

other things, taxes on the said lot of land for two years. It does not appear that she objected to this charge; neither does it appear that her attention was called to it, or that she paid it, or that respondent personally knew of it. Appellant argues that the charge for taxes is strong evidence to the point that the title had not passed, but this circumstance was really of no material importance. It is quite likely that charging her with the taxes for a year or two after the deed had passed was the mere inadvertent continuance of the accounts as they had formerly been kept, and was overlooked by her; but, if she paid the tax account knowingly, it was a matter of indifference to her, for she had the privilege of drawing on her husband's separate bank account, and in no event could this payment of taxes affect the legal value of the previous delivery of the deed.

3. After the delivery of the deed a fire insurance policy on the premises was taken out in the name of the decedent. Appellant attaches importance to this circumstance, but it was of no consequence. The respondent paid all the premiums on the policy; it does not appear that the decedent had any knowledge that the policy was in her name; and Mitchell testified that it was through his oversight and error that the policy in existence at the time of the deed was not transferred to respondent. If a policy was taken in a wrong name, that fact might have affected its validity as against the insurance company, but it could have no effect upon the validity of the title which passed by the deed.

4. In 1899, which was after the delivery of the deed, the respondent made application in his own name to the Savings & Loan Society for a loan of $2,000, to be secured by the property here involved. The application was accepted, and, instead of a mortgage, there was prepared a certain form of a deed of trust, which has been held by this court to be a valid form of security for loan of the money. See Sacramento Bank v. Alcorn, 121 Cal. 383, 53 Pac. 813, and cases there cited, and Hodgkins v. Wright, 127 Cal. 691, 60 Pac. 431. The deed of trust was executed by the respondent and also by his wife, the said decedent. It purports to convey the land here in controversy to two trustees; recites that it is intended to secure a loan of $2,000; provides that, if the money loaned should not be paid as agreed on, the trustees may sell the property, and apply the proceeds to the payment of the debt, and convey the land to the purchaser, etc., but that, if the money be paid, the trustees shall reconvey the property to the decedent, "her heirs and assigns, at her request and costs." The loan secured by this deed of trust was paid, and it does not appear whether or not the trustees ever reconveyed the property to any one. It is contended by appellant that by executing this deed jointly with the decedent, respondent is estopped from denying that she was the owner of the property, and also that the deed of trust was in effect a reconveyance to the decedent, because it provided that, in the event the loan should be paid, the trustees were to convey to her. Neither of these contentions is maintainable. As the title appeared on the record to be in the decedent, respondent had either to procure her to sign the deed of trust or record his own deed, which he did not desire to do, and we see nothing in this that has any of the elements of an estoppel. And while the deed of trust, in one sense, passed the title, yet it did so only for the purpose of security, and was, except as to the form and the procedure by which the loan could be enforced, substantially a mortgage. When the money secured by it was paid, the trust ceased, and the estate of the trustees ceased; and while in such case the trustees could, no doubt, be compelled to reconvey in order to make the record title clear, still, when the trust estate terminated the title was left in the grantor, in whom it was vested at the time of the execution of the trust deed. While this form of trust deed has been held valid so far as it operates as a security for the payment of loaned money, and gives the trustees power to sell for the purpose of enforcing such payment, and to convey to the purchaser who buys at the sale made for that purpose, still it could not be upheld as a trust to convey to any person other than the owner for any purpose other than the enforcing of the payment of the debt, for it would then be an attempt to create an unwarranted and void trust to convey within the rule declared in the Fair Case (Cal.) 68 Pac. 306.

In conclusion, it may be said that the contentions of appellant as above noticed would, under the most favorable view for her side, only constitute some conflicting evidence as to the issue whether the deceased delivered the deed in question to respondent, and do not afford any ground for disturbing the findings of the court that she did deliver it, and that the title thus passed.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

On Rehearing.

In Bank.

PER CURIAM. Rehearing denied. The stipulation in the trust deed as to the payment of the surplus, if any, to Mrs. Currier, should not be held to necessarily estop the husband from claiming the property. What was said in the opinion in Hoeck v. Greif et al., 142 Cal. 119, 75 Pac. 670, as to a similar question, was not necessary to a decision therein, and, in our view, is not a correct statement of the law.

147 Cal. 172

LAWS v. TROUTT, Judge. (S. F. 4,328.)

(Supreme Court of California. June 19, 1905.)

JUSTICES OF THE PEACE—APPEALS—BONDS—DEPOSIT—STATUTES—APPLICATION.

Code Civ. Proc. § 926, providing that in all civil cases arising in justices' courts wherein an undertaking is required as prescribed by the Code, plaintiff or defendant may deposit with the justice a sum of money in United States gold coin equal to the amount required by such undertaking, which said sum of money shall be taken as security in place of the undertaking, authorizes a deposit in lieu of an undertaking for costs on appeal, required by section 978, cl. 1, on appeal in a civil case from a justice to a superior court.

In Bank. Application by E. C. Laws for writ of prohibition against James M. Troutt, judge of the superior court of the city and county of San Francisco. Writ denied.

Robert P. Troy, for petitioner. Hayden, Alderman & Oakford, for respondent.

SHAW, J. The superior court overruled the motion of the petitioner, as defendant in an action begun against him by E. J. Campion in a justice's court of San Francisco, to dismiss an appeal to the superior court taken by the plaintiff from a judgment rendered in the justice's court in favor of the defendant. The ground of the motion to dismiss was that the plaintiff and appellant in the action, after first filing an undertaking on appeal in the sum of $100 for the payment of the costs of appeal, as required by section 978, Code of Civil Procedure, had, upon exceptions taken to the sufficiency of the sureties thereto and proceedings for the justification of the sureties in pursuance of such exceptions, deposited the sum of $100 in United States gold coin with the justice in lieu of the undertaking for that amount required to perfect the appeal. The superior court, upon the denial of the motion to dismiss, set the case for trial upon the appeal in the superior court, and the respondent is about to proceed with the trial. The present proceeding is an application to this court for an alternative writ of prohibition to prevent the respondent from proceeding further in the case in the superior court.

The contention of the petitioner is that there is no authority for the deposit of money with the justice in lieu of the undertaking on appeal, and that therefore the superior court is without jurisdiction to proceed in the case. In this the petitioner is mistaken. Section 926 of the Code of Civil Procedure provides that "in all civil cases arising in justices' courts, wherein an undertaking is required as prescribed by this Code, the plaintiff or defendant may deposit with said justice a sum of money in United States gold coin equal to the amount required by the said undertaking, which said sum of money shall be taken as security in place of said undertaking." A civil case appealed, or about to be appealed, from a justice's court to a superior court is clearly a "civil case arising in a justice's court," and no valid ground appears for holding this section inapplicable to the undertaking for costs on appeal required by the first clause of section 978 of the same Code to make effectual an appeal from the justice's court to the superior court. The section quoted makes no provision for the transmission to the superior court of the money deposited in lieu of the undertaking for costs of appeal, as does a similar clause of section 978, Code of Civil

Procedure, with regard to money deposited in lieu of an undertaking for the stay of proceedings pending the appeal. This, however, is immaterial. The sum of money deposited with the justice, who is under bond and bound further by his official oath, is manifestly as good security to the respondent as an undertaking would ordinarily be, and the Legislature may give the right of appeal as well upon that security as upon the security of an undertaking. Section 926 was enacted in 1878, and was placed by the Legislature in chapter 12, tit. 11, pt. 2, of that Code, the original chapter heading of which was "General Provisions Relating to Justices' Courts." This clearly indicates an intention to make this provision applicable to all proceedings in justices' courts, and as the filing and serving of the notice of appeal to the superior court and the giving of the necessary security to make the appeal effectual are both proceedings in the justice's court, it is obvious that section 926 applies to the security to be given upon such an appeal as fully as to any other provision requiring the giving of an undertaking in a proceeding in a justice's court. The appeal in question was perfected by the deposit of the money in lieu of the undertaking, and consequently the superior court has jurisdiction of the cause, and the respondent may lawfully proceed with the trial. This question was not presented in McConky v. Superior Court, 56 Cal. 83. The application for an alternative writ is denied, and the proceeding dismissed.

We have considered this petition on the merits solely in order to settle what seems to be a disputed question of practice relating to appeals to superior courts from a justice's court, waiving, for that purpose, the technical objection that the superior court has power to determine for itself its appellate jurisdiction, which seems to be declared in Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

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147 Cal. 166

MEYER v. FOSTER et al. (S. F. 3,050.)

(Supreme Court of California. June 19, 1905.)

1. Notes—Transfer by Delivery.

A note to the order of the maker is payable to bearer, and transferable by mere delivery, when indorsed in blank before maturity with intent to pass title.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 500.]

2. Same—Right of Transferee to Sue.

Where a note is payable to the order of the maker and indorsed in blank before maturity, the fact that transfers by delivery were made for the purpose of enabling the transferees to collect the note for the benefit of the real owner does not affect the validity of the transfers, and the person so receiving the title could maintain an action on the note in his own name.

3. Evidence at Former Trial—Death of Witness—Mode of Proof.

Under Code Civ. Proc. § 1870, subd. 8, providing that evidence of the testimony of a witness deceased, given in a former action between the same parties relating to the same matter, may be given on a trial, the fact that the testimony of a deceased witness was taken in shorthand and transcribed into longhand did not preclude the admission of oral evidence of persons testifying from memory alone as to what the deceased's testimony was on a former trial.

4. Same—Appeal—Harmless Error.

In an action on a note, the rejection of evidence as to what a deceased witness' testimony was on a former trial was not cause for reversal, on appeal of an indorser, where the testimony rejected was merely corroboratory of the testimony of the appellant, given on the trial, as to the time when and place where appellant signed his name in support of the untenable defense that the date on the note was not the true date of its inception.

5. Action on Note—Evidence — Sufficiency.

Evidence in an action on a note examined, and *held* insufficient to show that the note was executed, indorsed, and transferred prior to the date appearing on the face thereof.

6. Same—Indorser's Liability—Statute.

Under Civ. Code, § 3116, providing that every indorser of a negotiable instrument, unless his indorsement is qualified, warrants to every subsequent holder thereof who is not liable thereon to him that it is in all respects what it purports to be, an indorser's delivery of a note to the maker and payee thereof on a date preceding that appearing on the face of the note binds the indorser as to holders in due course as of the date written on the face of the note.

7. Same—Notice of Dishonor — Sufficiency.

Where a note is dated, and is expressly made payable a certain time after date, the time of its maturity is to be ascertained by reference to the date written in the note, and not by reference to the actual date of delivery, and hence a notice of dishonor given on the day after the apparent maturity is sufficient to bind the indorsers, under Civ. Code, § 3147, providing that notice of dishonor, when given by the holder of an instrument or his agent otherwise than by mail, must be given on the day of its dishonor or on the next business day thereafter, though the holder received the note prior to the date written on its face.

8. Same — Evidence — Declarations of Maker.

Where the maker of a note payable to himself procured an indorsement thereof in the absence of the person to whom it was delivered by the maker, the declarations of the maker to the indorser at the time the indorsement was obtained were hearsay and inadmissible in an action against the indorser on the note.

9. Same—Real Party in Interest — Defense.

Where the plaintiff in an action on a note payable to bearer has the note in his possession ready to be delivered up, the defense that plaintiff is not the real party in interest cannot be maintained, when the defendant is unable to show that he has some defense against the person whom he claims to be the real owner, which he cannot make in the action, or that the satisfaction of a judgment against him would not protect him against other claimants.

10. Same—Defenses.

It is immaterial to an indorser having no legal defense to an action on a note as to whether subsequent transfers of the note were made in good faith for a valuable consideration and before maturity.

11. TRIAL—ARGUMENTS OF COUNSEL—READING FROM STATUTES.

It is within the discretion of the court to refuse to allow counsel in argument to the jury to read from the Civil Code.

12. SAME—INSTRUCTION—REFUSAL.

An instruction requested is properly refused, when not sustained by evidence.

McFarland, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Samuel C. Meyer against Ned Foster and J. J. Gottlob. From a judgment in favor of plaintiff, and an order denying a new trial, Gottlob appeals. Affirmed.

Knight & Heggerty, for appellant. M. H. Wascerwitz and C. M. Jennings, for respondent.

SHAW, J. This is an appeal by the defendant Gottlob from the judgment and from an order denying his motion for a new trial. The action was upon a note in these words:

"350.00. San Francisco, Octr. 8, 1895.

"Thirty days after date (without grace) promise to pay to the order of myself three hundred and fifty 00-100 dollars, for value received, with interest at one (1) per cent. per month until paid, both principal and interest payable only in United States gold coin. N. W. Foster."

Indorsed: "J. J. Gottlob."

The complaint alleges that this note, thus indorsed, was indorsed by Foster and delivered on the day of its date to S. H. Collins, who before its maturity transferred it to M. H. Wascerwitz, who, after maturity, transferred it to the plaintiff. The answer of Gottlob denies that he indorsed the note, and denies the respective transfers alleged.

The evidence was sufficient to show the making of the transfers. The note was indorsed by Foster, the payee, and by Gottlob, and was therefore payable to bearer and transferable by mere delivery with intent to pass the title (Poorman v. Mills, 35 Cal. 120, 95 Am. Dec. 90), and the testimony of the parties concerned is to the effect that such transfers were made. The fact, also disclosed, that the purpose of each transfer was to enable the respective transferees to collect the note for the benefit of Collins, or of some other person, does not destroy the effect of the transfer. It was lawful to transfer the title for that purpose, and the person thus receiving title could maintain an action on the note in his own name.

There was a technical error in the refusal of the court to admit oral evidence of the testimony of N. W. Foster, the maker of the note, upon a former trial of the case. Foster was dead at the time of the last trial, and any competent evidence of his testimony material to the case, given as a witness upon a former trial of the same case, would be admissible. Code Civ. Proc. § 1870, subd. 8; People v. Bird, 132 Cal. 261, 64 Pac. 259. The fact that his testimony at the former trial was taken down by the official reporter in shorthand, and had been transcribed into longhand writing, does not exclude oral evidence by persons testifying from memory alone. The reporter's notes would be but the written memorandum of a third person taken at the time under official sanction. If properly written out and certified, they would be admissible in evidence without further verification, and would be evidence of the former testimony, but not the only competent evidence. They would doubtless be much more reliable and satisfactory evidence, under ordinary circumstances, than any testimony from memory; but the latter is not rendered incompetent by the fact of the existence of an official report. We think, however, that the rejection of the evidence could not have been injurious. It was merely corroboratory of the testimony of Gottlob as to the time when and place where he (Gottlob) signed his name on the note as an indorser. The defense rests solely on the facts disclosed by this testimony of Gottob, in connection with the evidence of plaintiff, and we think they do not constitute a defense to the action.

The defense affirmatively alleged by Gottlob in his answer was that the note was executed, indorsed, and transferred to Collins on February 15, 1895, with the date line blank; that Collins afterwards, without his consent, inserted in the blank space the false date of October 8, 1895; and that notice of dishonor was not given to Gottlob until November 8, 1895, which, if the facts stated were true and the defendant's theory of the law were correct, would be months after its actual maturity, and he would be thereby released as indorser. The evidence does not sustain this defense. Gottlob's testimony was, in effect, that he indorsed his name on the note before the last of April, 1895, at the Bush Street Theater; that he did not indorse it on October 8, 1895, nor at any time after April of that year; that Foster asked him to indorse the note for him (Foster) at that time and place, and he then wrote his name as an indorser thereon. On behalf of plaintiff evidence was given to the effect that Collins wrote the note, except the signatures; that Foster signed it in presence of Collins on October 8, 1895, and then went out with the note to get Gottlob to sign it as indorser; that in about 10 minutes he returned with Gottlob's signature indorsed on it, and Collins then accepted it in satisfaction of a pre-existing debt. There is no evidence that the date was changed by Collins after the note was delivered to him, nor that the date was not inserted in the note at the time Gottlob indorsed his name on it, precisely as it now appears. Conceding the absolute truth of the testimony of Gottlob, it would prove nothing more than that the note, bearing the date of October 8, 1895, and payable by its terms 30 days after said date, was indorsed by Gottlob in April, 1895, at the request of Foster, who was both maker and payee, and was then by Gottlob intrusted to Foster for negotiation. In such a case he would by his indorsement warrant to each subsequent holder that it was what it purported to be on its face (Civ. Code, § 3116), and by delivery to Foster he would authorize Foster to dispose of it as a negotiable note at any time thereafter prior to the time of its apparent maturity, and bind him as an indorser thereon, to any indorsee in due course. Civ. Code, §§ 2300, 2316, 2317, 3117; 4 Am. & Eng. Ency. of Law (2d Ed.) 206, 207, 489.

Therefore, if Collins received the note prior to October 8, 1895, notice of dishonor given on November 8, 1895, the day after its apparent maturity, would be sufficient to hold the indorsers. Civ. Code, § 3147. Where a note is dated and is expressly made payable a certain time after date, the time of its maturity is to be ascertained by reference to the date written in the note and not by reference to the actual date of delivery. The statement in the note that it was to be paid "30 days after date" is to be construed to mean 30 days after October 8, 1895, the date written therein. It is not alleged or claimed that any circumstances were known to Collins, or that any existed, which devested Foster of his ostensible authority to deliver the note in the condition it was in, assuming it to have been delivered before the date it bore. The fact that it was delivered before its date would have no effect on its validity, and Collins, having notice of no other facts affecting it, would have a right to presume that it was intended to be just what it appeared to be, and to enforce it against the maker and indorsers. For these reasons we conclude that the exclusion of the evidence of the testimony of Foster given on the former trial did not injure the appellant.

The declarations of Foster to Gottlob at the time he asked Gottlob to indorse the note, Collins not being present, were not competent evidence of the consideration for the transfer of the note by Foster to Collins. Such declarations were not a part of the res gestæ of the transfer, were not evidence against Collins, and, with respect to the consideration of the transfer, were mere hearsay evidence.

Under the issues there was no error in the rulings of the court in the admission of evidence and instructions to the jury upon the contention of appellant that the assignment to plaintiff was unauthorized and that he was not the real party in interest. The note being payable to bearer, and plaintiff having it in his possession at the trial ready to be delivered up, the defense that plaintiff was not the real party in interest could not be maintained, unless the defendant shows that he has some defense against the person he claims to be the real owner which he could not make in this action, or that the satisfaction of a judgment against him in this action would not protect him against other claimants. Giselman v. Starr, 106 Cal. 657, 40 Pac. 8. None of these things are alleged or claimed to exist.

The offered testimony to show want of consideration for the transfer to Wascerwitz, and that it was made after maturity, was properly excluded. It is immaterial to an indorser, having no legal defense, whether the subsequent transfers of a note were made in good faith, for a valuable consideration, and before maturity, or not.

It was within the discretion of the court to refuse to allow counsel in his argument to read to the jury certain sections of the Civil Code. Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; People v. Forsythe, 65 Cal. 104, 3 Pac. 402; People v. Anderson, 44 Cal. 70; People v. Treadwell, 69 Cal. 238, 10 Pac. 502.

The court properly refused to instruct the jury, at defendant's request, that if Gottlob indorsed the note before its date, October 8, 1895, he was released from liability thereon. This assumes that the time of maturity of the note was 30 days after its indorsement, or after its execution, instead of 30 days after its date, as its terms declare. This, as before stated, is not the law.

The defendant asked an instruction to the effect that if Gottlob indorsed the note before October 8, 1895, and Collins, without Gottlob's consent and after such indorsement, wrote in the date of the note as October 8, 1895, Gottlob was not liable. There was, as we have seen, no evidence that the date was not written in the note at the time it was indorsed by Gottlob, nor that Collins or any other person inserted it thereafter, and the instruction was therefore properly refused on that ground.

There are no other points which require discussion. The judgment and order are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; LORIGAN, J.

I dissent: McFARLAND, J.

(147 Cal. 120)

BRUSCHI v. QUAIL MIN. & MILL. CO.

(S. F. 3,003.)

(Supreme Court of California. June 12, 1905.)

1. VENDOR AND PURCHASER — UNILATERAL CONTRACT — CONDITIONAL OPTION—NONPERFORMANCE — POSSESSION — TENDER OF DEED.

Where defendant obtained possession of certain land and mining claims under an option to purchase on certain conditions, which it failed to perform, the contract was unilateral, and the owner was therefore under no obligation to tender a deed in order to entitle him to recover possession.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 838.]

2. Same—Demands.

Where defendant mining company, in possession of certain land and mining claims under an option to purchase on certain conditions, which it failed to perform, put H. in possession, and directed him to resist any attempt of any person to take possession, an oral demand for possession made by plaintiff on H. was sufficient to entitle plaintiff to maintain an action for possession.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 838.]

3. Same—Retention of Possession — Failure of Title.

Where defendant obtained possession of certain land under a conditional option to purchase, the conditions of which it failed to perform, it could not indefinitely keep possession of the land, and refuse to pay the purchase price on the ground that the vendor could not convey a good title to a part of the land.

Department 2. Appeal from Superior Court, Mariposa County; John M. Corcoran, Judge.

Action by Demetrio M. Bruschi against the Quail Mining & Milling Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Leon Samuels (J. J. Trabucco, of counsel), for appellant. J. B. Curtin and Congdon & Congdon, for respondent.

McFARLAND, J. This is an action to recover possession of certain mining claims and some timber land alleged to be held without right and forcibly detained by defendant. The case was tried without a jury. The court made findings, and rendered judgment for plaintiff, and from the judgment the defendant the Quail Mining & Milling Company appeals.

The litigation arises out of a written contract between respondent and appellant, executed on May 31, 1899. By this contract respondent agreed to sell to appellant the premises described in the complaint upon certain named conditions. The appellant did not agree to buy. The contract merely gave to it an option to purchase upon compliance with the named conditions. The conditions were substantially these: Appellant was to make certain payments at stipulated times, and was to make the final payment of $8,500 on December 8, 1899. It was provided that, upon the execution of the contract, appellant was to be let into possession of the premises, and was to have the right "during the life of this contract" to prosecute and develop the said mining claims; and it was provided that the appellant "shall be required to commence the work of prospecting and developing at least one of the mining properties hereinabove described within thirty days from the delivery hereof, and it shall thereafter, during the life of this agreement, continue to prosecute said work with reasonable diligence, except when interrupted by accidents or unavoidable circumstances," and that "all improvements and machinery placed in or upon said property by the party of the second part [appellant] shall be deemed affixed to the soil and shall become a part thereof." The contract further provides as follows: "It is hereby expressly agreed that should the party of the second part fail to commence the work of prospecting and developing at least one of said properties within thirty days from the date of the delivery of this agreement, or should it thereafter fail to prosecute said work with reasonable diligence except when interrupted by accident or unavoidable circumstances, or should it fail to pay the purchase price of said property, or any part thereof, at the time the same or any part thereof becomes due and payable as aforesaid, or should be guilty of a breach of any of the terms, covenants or conditions of this agreement, then and in that event, or either of said events, this agreement shall at the option of the party of the first part terminate and end, and any and all payments made on account hereof, together with any and all improvements and machinery placed in or upon said properties by the party of the second part shall be deemed a payment for the use and occupation of said premises, and the same shall thereupon belong to and become the property of the party of the first part." The appellant entered into possession of the premises under the said contract, and did work in prospecting and developing the mines until December 11, 1899; but after the last-named date it discontinued work, and did no more work between that date and the time of the trial. It made all payments due before December 8, 1899, but did not make the payment of $8,500 due on said December 8th. The time for said last-named payment was extended by respondent to January 7, 1900; but on the last-named date the defendant did not pay said $8,500, or any part of it, and never paid the same or any part thereof. Appellant, however, forcibly kept possession of the premises, and prevented respondent from entering into possession thereof. The foregoing facts are either admitted or found by the court upon sufficient evidence.

Appellant contends that the judgment is erroneous because respondent did not tender a deed of conveyance of the premises. But respondent was not demanding the unpaid purchase money—he had no right to demand it, for appellant had never promised to pay it—nor was he making any demand, the validity of which depended on a previous tender of deed. The contract, so far as the relation of vendor and vendee is concerned, is unilateral. Respondent was bound to sell upon certain conditions, but appellant was not bound to buy upon any condition. It had merely an option to purchase by complying with certain conditions if it finally concluded to do so. Nor do any questions arise here about the duty of a party seeking to rescind a contract. Respondent is not seeking to rescind the contract. His claim is that there is an end to the contract in question, and therefore an end to appellant's right of possession. Therefore the cited cases to the effect that where a vendor seeks to recover purchase money, or some other thing similar to that in character, he must tender a deed, are not here applicable. A tender of a deed by respondent was not, therefore, necessary to the maintenance of this action.

Appellant specifies that there is not sufficient evidence to support the finding that respondent demanded possession of the premises before the suit was brought; but there is express evidence that such demand was made orally on one R. E. Harold, and that Harold was put into possession of the premises by appellant, and directed to hold the same, and resist the attempt of any person to take possession. Such demand was sufficient under the circumstances of this case, if, indeed, any demand at all was necessary. Moreover, it appears that any demand would have been futile.

Appellant contends that respondent could not have conveyed a good title to the piece of timber land which was to have been sold with the mine, and specifies that there was not sufficient evidence to sustain the facts found in finding 5, which showed that he could have given such title. There was, however, sufficient evidence to support that finding; but that matter is immaterial, for appellant could not indefinitely keep possession of the land while refusing to pay the purchase money. As was said in Haile v. Smith, 128 Cal. 415, 60 Pac. 1032: "If appellant desired to retain the possession which he acquired under the contract, he should have complied with his part of it. If he concluded not to comply because the title was not satisfactory to him, he was bound to restore possession to respondent. Whatever cause of action he may have for the purchase money which he paid and for the value of his improvements is another matter. It constitutes no defense to the present action."

It is argued in appellant's brief that the finding of the court that a tender of the last payment of $8,500 was never made is not supported by the evidence. In answer to this contention, it is sufficient to say that there is in the bill of exceptions no specification, nor any attempted specification, of the insufficiency of the evidence to support that finding. We may say, however, that, if that question could be reviewed here, the evidence amply warrants the finding that the tender was not made.

There are no other points which call for special notice. We see no reason for reversing the judgment.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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147 Cal. 148

O'CONNOR et al. v. MURPHY et al. (S. F. 3,923.)

(Supreme Court of California. June 17, 1905.)

1. WILLS — CONSTRUCTION — RESIDUARY CLAUSE—INEFFECTUAL BEQUESTS.

Under Civ. Code, § 1326, requiring a will to be construed so as to dispose of all testator's property, if possible, it is to be presumed that it was the testator's intention to include all ineffectual bequests in the residuary clause; and, in order to exclude such bequests, the intention so to do must appear from appropriate language or by clear implication.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 965, 967.]

2. SAME.

A will, after giving certain legacies, bequeathed all the residue of testator's property to his wife and children, in certain proportions. A subsequent clause directed that certain property should be kept and rented for the support of the wife and children until the youngest arrived at the age of 18 years. *Held*, that if the clause directing the realty described to be kept and rented was invalid, as unlawfully suspending alienation, the property became a part of the residue, and not intestate estate.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Margaret Mary O'Connor and another against Anna J. Murphy, as executrix of John Murphy, deceased, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

See 78 Pac. 960.

Edward C. Harrison and William E. White, for appellants. J. C. Bates, for respondents.

LORIGAN, J. This is an action brought to establish the title of plaintiffs to an undivided two-fifteenths interest in a lot of land at the corner of Geary and Mason streets, in the city of San Francisco. The complaint alleges that plaintiffs (two children of a deceased daughter of one John Murphy, deceased) and the defendants (his widow and four children), constitute his sole heirs at law; that said John Murphy died in the city and county of San Francisco in 1902, leaving as part of his estate and as his separate property the lot above mentioned; that a document purporting to be his last will was admitted to probate by the superior court of the city and county of San Francisco in November, 1902, and letters testamentary were issued to his widow, Anna J. Murphy, one of the defendants; that by said will, after leaving legacies to plaintiffs and others, he provided that:

"All the rest and residue of my property wherever situate, I give, devise and bequeath to my wife and four children, Julia L., John L., Charles S. and Marian C. Murphy in the following proportions, that is to say:

"To my wife one undivided one-third and to my said children two-thirds thereof, and in case any one or more of my said children die without issue, before final distribution, then his or her share is to go to my children surviving equally. My executor is hereby authorized and empowered to sell and convert into cash my real estate I die seized of, the lot of land S. E. corner Geary and Mason streets excepted.

"It is my express wish and desire that said lot of land at said corner of Geary and Mason streets be kept and rented for the support of my wife and children until Marian arrives at the age of 18 years or twelve years from date of this will. I expressly authorize and empower my executor hereinafter named or either of them who qualify, to mortgage the said lot at S. E. corner of Geary and Mason streets, to raise money to pay lessee of the building or his assigns, and also to renew the mortgage now on said property if it is necessary.

"It is my express wish that if any one named in this will contest the same he or she take nothing under this will."

It is then specially alleged that the provision of said will as to the lot in question is invalid and void, and that on account of such invalidity the testator died intestate as to that particular property. Then follows the prayer for a decree establishing their title to undivided interests in said lot of land as heirs at law of said decedent.

Defendants interposed a general demurrer to the complaint, which was sustained by the lower court, and, plaintiffs declining to amend, judgment was entered against them. This appeal is taken from said judgment for the purpose of reviewing the order sustaining the demurrer.

It is conceded on both sides that the sufficiency of this complaint is to be determined from a consideration of the provisions of the will of the testator. Appellants insist that the provision of that instrument relative to the lot in question makes an attempted disposition of it by way of a trust which unlawfully suspends the power of alienation, and hence is void, and that, such attempted disposition being invalid, the residuary clause contained in the will is ineffectual to pass said lot to the devisees named therein, and hence it descended to the heirs at law of testator as a portion of his estate of which he died intestate. It will be thus observed that, in order to give appellants any standing under their complaint, it would be necessary to determine in their favor, first, that this alleged trust provision is void; and, second, that the residuary clause was ineffectual to pass the lot affected by it.

On the part of respondents, while it is contended that, as far as the particular provision affecting the lot in question is concerned, it does not create a trust, or, if it does, that the trust is valid, it is insisted beyond all this that, conceding the provision does create a trust, and that such a trust is invalid, as claimed by appellants, still the residuary clause is effective to pass the property to respondents as residuary devisees thereunder, and hence appellants have no rights to it which they can assert under their complaint. We are inclined to agree with respondents in the view they take of the effect to be given to this general residuary clause. It is proper to say at this point that while, as we proceed, we shall refer to the provision relative to the lot in question as the "trust provision" or "trust clause," it is not to be understood therefrom that we decide that the terms of that provision constitute a trust. The view we take of the residuary clause makes it unnecessary for us to do so. We simply use the terms for convenience sake, and as assuming for the purposes of the decision the construction the appellants place on such provision.

To return to the residuary clause: It is not questioned but that under a general residuary clause in a will the devisees therein, and not the heirs at law, take all property described in a particular devise which for any reason fails to be effectual. This rule is so declared by our Code, which provides that "a devise of the testator's real property passes all the real property which he was entitled to devise at the time of his death not otherwise effectually devised by his will." Civ. Code, § 1332; Estate of Upham, 127 Cal. 92, 59 Pac. 315. But it is claimed by appellants that this rule only applies to an unqualified residuary bequest of the whole of the residue of the estate, and it is particularly insisted that the residuary clause in question here disposed absolutely of only a portion of the residue of the estate, namely, all that portion except this lot; that, as to this lot, it was the declared intention of the testator to take it out of the residuum of his estate, and otherwise dispose of it; and that, having failed to accomplish this purpose, by reason of the invalidity of the provision by which it was attempted, the residuary clause does not apply to it, and the residuary devisees do not take it to the exclusion of the heirs at law. We do not think this claim has any force when there are applied to the provisions of the will in question, and particularly these clauses, the ordinary canons of testamentary construction. The qualification to the general rule which appellants claim is applicable to the residuary devise here only obtains when it is apparent from all the provisions of a will, or from a particular provision thereof, that it was the intention of the testator to entirely exclude a certain portion of his estate from the operation of the residuary clause; that is, it must be manifest from the provisions of the will that in no event was that portion intended to fall within the residuary clause. It is not enough that it appear from a clause of the will simply that the testator intended to make a particular devise of a portion of his estate, which, however, for some reason, failed to be effectual, because. if that were the rule, it would apply to every lapsed or invalid bequest, and the residuary clause could never be effectual to carry it. On the contrary, it must appear unequivocally that it was the intention of the testator not only to make a particular devise, but it must further appear from the terms of such devise or from other provisions of the will that it was the intention of the testator that the residuary clause should not, in any event, carry such bequest, should it become inoperative for any reason. The intention to include all ineffectual bequests in the residuary clause is presumed. The intention to exclude must appear from appropriate language evidencing that intention or by clear implication. The making of a will raises a presumption that the testator intended to dispose of all his property. Residuary clauses are generally inserted for the purpose of making that disposition complete, and these clauses are always to receive a broad and liberal interpretation, with a view of preventing intestacy as to any portion of the estate of the testator; and this general rule is in harmony with the declaration of our Code that the provisions of a will must be construed, if possible, so as to effect that purpose. Civ. Code, § 1326.

Applying these rules of interpretation to the clauses of this will now under consideration, we are satisfied that it must be held to have been the intention of the testator that his estate, save what was previously given as legacies to the appellants and others, should go to his wife and children as the residuary devisees, and that this would include the lot in question if the trust clause relative thereto should, for the reasons urged by appellants, be held void. The testator, by the residuary clause of his will, in the first instance made in absolute disposition of "all the rest and residue" of his property, "wherever situate," which included the lot in question, in favor of his wife and children, in specified proportions. He thus by clear and comprehensive language gave expression to his general intention that they should take all the residue of his estate without limitation or qualification. By a subsequent clause he endeavored to create a trust with reference to a portion of said residue—this lot—and thereby place a limitation on the absolute devise thereof previously made. But it will be observed that this trust clause itself does not attempt to withdraw this lot entirely from the previous disposition made of it in the general residuary clause, and to make, as contended by appellants, a separate, different, and absolute disposition of it. It withdraws it only to the extent that is necessary to accomplish the purposes of the trust which is created relative to it. While under the general residuary clause the devise of this particular property by the testator in favor of his wife and children is absolute, under the trust provision a limitation is placed upon this absolute devise, and it only becomes effectual as such upon the termination of the trust. The estate in it, however, to which they ultimately succeed, is vested in them under the general devise, and not under the terms of the trust, because the trust makes no provision as to where the fee in this property shall go on its determination. There can be no question on this point if it be assumed that the trust is valid. And if it be conceded, as claimed by appellants, that the trust is void, still its provisions must be taken into consideration for the purpose of determining not only how far they were intended to affect the absolute estate in this property originally invested in the devisees under the residuary clause, but for the additional purpose of ascertaining from them, considered in connection with the other provisions of the will, whether it was the intention of the testator, if for any reason the trust provision was inoperative, that the property affected by it should not pass under the general residuary clause in which it was first incorporated. Now, there is certainly nothing in the terms of this trust which would indicate that it was the intention of the testator by its creation that in no event was the property affected thereby to pass under the general residuary clause. On the contrary, the reasonable inferences to be deduced from all the provisions of the will are that he did so intend, and no other reasonable conclusion can be arrived at when we apply to those provisions the rules of interpretation heretofore invoked. That the testator intended to dispose of all his property under his will is not left to presumption. The comprehensive language of the residuary clause itself discloses this, and the further clause excluding any beneficiary under the will from taking the bequest given to him, should he contest the will, emphasizes this intention. He had, in addition to bequests to others, provided for the payment of legacies to these appellants, which provision in their favor precludes any idea that he intended they should for any reason take anything further of his estate. Having made these gifts, the testator then plainly manifested, under the general residuary clause and the subsequent trust provision, an intention to dispose of all the residue of his estate for the exclusive benefit of his wife and children. To that end he made, in the first instance, an absolute devise to them of all the residue of his property; thereby evincing in explicit language a general intention that they should take it to the exclusion of all others. A subsequent provision creating a trust as to a portion of this residue was equally and exclusively for their benefit and advantage. At least, the testator so intended, and his intention is all we are now concerned with. As, then, the general residuary clause was plainly intended by the testator, in the first instance, to carry absolutely all the residue of his estate to the devisees named therein, and the trust created by a subsequent clause, even if void, still discloses that its provisions were exclusively for the benefit of the same persons named in the residuary clause, it is only a reasonable presumption to be indulged in that the testator intended, if the subsequent trust provision as to part of the residue of his estate should for any reason become inoperative, that the property mentioned therein should lapse into the general residuary devise from which it was taken, and pass to the respondents as residuary devisees thereunder. When we observe that, under both the general residuary clause and the trust provision, the testator was providing solely for the distribution of the residue of his property in favor of his wife and children, there is no room for any other presumption than that he intended the prior absolute devise to prevail in the event that the subsequent trust provision became ineffectual.

Concluding, then, as we do, that, even if the trust provision is void, still the lot affected by it passed to the respondents as devisees under the general residuary clause, by which it was first absolutely devised, and not to the heirs at law of the testator, it is obvious that any question as to the validity or invalidity of the trust, or whether the provision constitutes a trust, is necessarily eliminated from consideration. That question is one which, under the conclusion we have reached, as to the effect and operation of the residuary clause, can affect the residuary devisees alone, and is one in which the appellants or heirs at law can now have no further interest or concern.

The demurrer to the complaint was properly sustained, and the judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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147 Cal. 156

HUTTON v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 4,094.)

(Supreme Court of California. June 17, 1905.)

1. Injunction — Contempt—Punishment—Proceedings—Affidavit.

Where a contempt is committed without the presence of the court, the affidavit of facts constitutes the complaint, and is insufficient to confer jurisdiction on the court to punish the defendant, unless it shows a case of contempt on its face.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, § 146.]

2. Same—Review—Certiorari.

Where an affidavit which was the basis of a proceeding to punish petitioner for contempt was insufficient to confer jurisdiction, petitioner was entitled to have an order adjudging him guilty reviewed on certiorari.

3. Same—Intent.

Where an affidavit for contempt for violation of an injunction restraining police officers from picketing or blockading certain premises, and from intimidating or preventing persons from patronizing P.'s restaurant business, alleged that petitioner, with knowledge and notice of the injunction, arrested one D. on her way home after patronizing such restaurant, but failed to charge that petitioner had any knowledge that D. had ever been in such restaurant, or had any knowledge of facts reasonably tending to show such a situation, or that she was arrested because she was a patron of P., it was insufficient.

4. Same—Officers—Misconduct in Office.

Code Civ. Proc. § 1209, subd. 3, in specifying acts "in respect to a court of justice or proceedings therein," constituting contempts, names "misbehavior in office or other willful neglect or violation of duty by a sheriff or other person appointed or elected to perform a judicial or ministerial service." *Held*, that such section only includes misbehavior done "in respect to" such court or some proceeding therein, and does not include an unauthorized arrest not shown to be a willful disobedience of any judgment, order, or process of the court.

In Bank. Certiorari by H. W. Hutton against the superior court in and for the city and county of San Francisco to review a proceeding assessing a fine against petitioner for contempt. Judgment annulled.

Davis Louderback, for petitioner. George D. Collins, for respondent.

ANGELLOTTI, J. Certiorari to review certain proceedings culminating in a judgment adjudging petitioner guilty of contempt of court and requiring him to pay a fine of $100. The contempt charged was the alleged willful violation by petitioner of the terms of a certain decree given in an action brought by one Jean Pon against George W. Wittman, chief of police of the city and county of San Francisco and others, to which petitioner was not a party, whereby said Wittman, chief of police, and James T. Donovan, a sergeant of police, and "all police officers of the said city and county, * * * and all other persons acting under their direction or control," were perpetually restrained "from in any manner whatever entering into or upon and from in any manner whatever interfering with or infringing upon the quiet and peaceable possession and enjoyment by the said plaintiff, Jean Pon, of the premises No. 1129 Dupont street, in the said city and county of San Francisco, and from in any manner not authorized by law interfering with or intimidating or preventing any person or persons from patronizing the restaurant business or the cigar business of said plaintiff, Jean Pon, situate upon the said premises, and from in any manner whatever impairing or injuring either the said restaurant business or the said cigar business of the said plaintiff, Jean Pon, and from in any manner whatever picketing or blockading the said premises No. 1129 Dupont street, in the said city and county of San Francisco, either by means of police officers or otherwise, or at all." A copy of this injunction had been served upon petitioner prior to the date upon which the acts constituting the alleged contempt were committed.

Several points are made against the validity of the contempt proceedings, but it will be necessary to notice only one. The acts constituting the alleged contempt were committed without the presence of the court. The only affidavit presented as the basis of the contempt proceedings was that of Jean Pon. Such affidavit, so far as it attempted to allege any specific acts on the part of the petitioner in violation of the injunction, was as follows, viz.: "That * * * with full knowledge and notice of the said injunction, and of the contents thereof, the said H. W. Hutton directed and commanded two police officers of the said city and county of San Francisco, to wit, one George F. Barry and one C. E. Fennell, to arrest and imprison, and they did accordingly arrest and imprison, one Mary Duran, who was then and there a customer of the said restaurant business of the said plaintiff, Jean Pon, and who then and there was proceeding on her way home after patronizing the said restaurant. That notwithstanding said facts the said police officers, * * * acting under and pursuant to the said direction and the said order of the said H. W. Hutton, did as aforesaid arrest the said Mary Duran, and did thereby intimidate and prevent her from thereafter patronizing the said restaurant business of the said plaintiff, Jean Pon. That the said acts on the part of the said H. W. Hutton did impair and injure the said restaurant business of the said plaintiff, Jean Pon, to wit, this affiant. * * * That in respect to the said arrest of the said Mary Duran, the same was made without cause and without a warrant, writ, or process of any court or judge, and was not made or had for any offense or crime committed within the view or presence of the said Hutton or the said Fennell, and was not made or had for treason, felony, or breach of the peace, nor for any other crime or offense whatever; but the said arrest was made maliciously and without reasonable or probable cause. * * * That by reason of the said arrest and imprisonment of the said Mary Duran she was thereby intimidated and prevented by the said H. W. Hutton from thereafter patronizing the said restaurant of the said plaintiff, Jean Pon, situate upon the said premises No. 1129 Dupont street. * * * That the said arrest was made without authority of law, and against the will and without the consent of affiant or of the said Mary Duran." Other allegations, which were inserted merely as the deponent's conclusions from the specific facts alleged, are immaterial.

We are satisfied that this affidavit does not state facts constituting a violation of the injunction, and therefore does not state facts constituting a contempt of court. It is well settled that, where the contempt is committed without the presence of the court, the affidavit of facts forming the basis of judicial action must show upon its face a case of contempt, and, if it does not, the court is wanting in jurisdiction, and the order of contempt is void and will be annulled on certiorari. Overend v. Superior Court, 131 Cal. 280, 286, 63 Pac. 372; Rogers v. Superior Court, 145 Cal. 88, 78 Pac. 344. In such a case, it is immaterial what may be shown to the court upon the hearing, or specified and found by the court in its decree adjudging the accused guilty of contempt. The proceedings are void ab initio. The affidavit or affidavits upon which the contempt proceeding is based constitute the complaint, and, unless they upon their face charge facts constituting a contempt, the court is without jurisdiction to proceed. If it be assumed, purely for the purposes of this case, that if petitioner had known that the Mary Duran mentioned in the affidavit was, at the time of her arrest, on her way home after patronizing the restaurant of Jean Pon, his procuring her arrest would have been such an interference with the business of said Jean Pon as to constitute a violation of the terms of the injunction, it still remains that there is not the slightest intimation contained in the affidavit to the effect that petitioner had any knowledge that said Mary Duran was a patron of said Jean Pon, had ever been in his restaurant, or had ever been in the place known as No. 1129 Dupont street, or that he had any knowledge of facts reasonably tending to show such a situation of affairs. Some such knowledge on the part of petitioner was absolutely essential to a willful violation of the injunction in the respects specified in the affidavit. If petitioner was instrumental in procuring the arrest of the woman without a warrant, acting maliciously and without probable cause, he might be liable in some way in some other proceeding; but he could not be guilty of a violation of the terms of the injunction, unless he knew or had reason to know that the woman had come from the premises occupied by said Jean Pon, or was a patron of said premises, for, unless he knew this, he could not know that his acts could in any degree interfere with the business of said Jean Pon.

Contempt proceedings are quasi criminal in their nature, and an intent to commit a forbidden act is as essential to guilt as in the case of a charge of a criminal offense. The absence of any allegation in this behalf renders the affidavit fatally defective, and the subsequent proceedings absolutely void. We do not desire to be understood as deciding that the affidavit in other respects states facts sufficient to show a violation of the injunction. There is no allegation to the effect that the arrest of the woman was made because she was a patron of the business of Jean Pon, or for the purpose of keeping her away from the premises of said Jean Pon. However broadly the injunction may be construed, it cannot be construed as decreeing immunity from arrest to all patrons of Jean Pon, simply because they were such patrons, and their arrest might deprive Jean Pon of their patronage. The injunction, at most, was intended to prevent the commission of the specific acts named in the decree, such as picketing and blockading, and such other acts as might be committed for the purpose of preventing persons from patronizing the premises occupied by Jean Pon. If the affidavit contained allegations showing such an arrest, a different case might have been presented.

Questions as to the proper construction of this injunction decree and the correctness of the action of the superior court in granting the same are involved in an appeal therefrom now pending herein, and will not here be further discussed.

It was alleged in the affidavit of Jean Pon that the petitioner was, at the time of the commission of the alleged acts, a police commissioner of the city and county of San Francisco, and the superior court found that, by reason of directing the arrest of Mary Duran under the circumstances set forth in such affidavit, he was, in addition to being guilty of contempt because of disobedience of a lawful judgment, etc., guilty of misbehavior in office, constituting a contempt of court, under the provisions of subdivision 3, § 1209, of the Code of Civil Procedure. That section, in specifying what acts or omissions "in respect to a court of justice or proceedings therein" are contempts "of the authority of the court," specifies in subdivision 3 "misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service." There being no sufficient allegation showing willful disobedience of any judgment, order, or process of the court, the subdivision quoted above has no application to the facts of this case. It is not every misbehavior in office by any of the officers specified therein that constitutes a contempt of the authority of a court. The misbehavior by such an officer, to constitute a contempt of the court, must be "in respect to" such court or some proceeding therein. Eliminating the element of disobedience to the judgment, the alleged misbehavior was, at most, simply the malicious taking part in an arrest that was unauthorized by the facts. This would not be a contempt of the authority of any court.

The proceedings and judgment of contempt against petitioner are annulled.

We concur: BEATTY, C. J.; LORIGAN, J.; SHAW, J.; VAN DYKE, J.; HENSHAW, J.

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147 Cal. 143

SMITH v. SMITH. (S. F. 3,098.)

(Supreme Court of California. June 17, 1905.)

1. New Trial — Effect — Suspension of Judgment.

In an action by a wife against the husband for maintenance on the ground of desertion, she secured a decree requiring him to pay $100 a month for her maintenance. The husband commenced an action for divorce, and obtained a decree for a divorce and terminating payments under the maintenance decree at a certain date. A new trial was granted in the divorce action. *Held*, that this left the maintenance decree enforceable according to its original terms.

2. Divorce—Alimony—Previous Provision for Wife's Support.

Where a wife had, in a suit for maintenance on the ground of desertion, obtained a decree requiring certain monthly payments, the granting of alimony to the wife in a subsequent suit for divorce by the husband was error, in the absence of any showing that the provision made by the maintenance decree was inadequate.

McFarland, J., dissenting.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action for divorce by Charles A. Smith against Josephine Smith. From an order granting defendant alimony pending an appeal from an order granting a new trial, plaintiff appeals. Reversed.

See 79 Pac. 275.

Foshay Walker, for appellant. Aylett R. Cotton, for respondent.

LORIGAN, J. This is an appeal from an order granting defendant the sum of $100 per month alimony pending an appeal from an order granting a new trial, and an additional sum for attorney's fees and costs. No point is made as to the award of counsel fees or costs, the sole question being concerning the validity of the award of alimony.

It appears from the record that on April 20, 1899, the superior court of San Francisco, in an action brought by the defendant against the plaintiff for maintenance on the ground of desertion, made a decree in defendant's favor, requiring plaintiff to pay $100 a month for her maintenance, commencing May 15th of that year. No appeal was taken from this decree, and payments were thereafter made as by its terms required up to June 15, 1901. Subsequent to the entry of said decree, plaintiff commenced an action for divorce against defendant on the ground of extreme cruelty, and on December 26, 1900, a decree therefor was duly entered in his favor, by the terms of which it was provided that he should continue to pay defendant monthly the amount directed by said decree for maintenance until June 15, 1901, at which time it was provided in the decree that further payment should cease. No provision for any alimony was made in the decree of divorce. Thereafter, on motion of defendant, and on August 30, 1901, the court granted her a new trial in the divorce case, and on the 26th day of November following made the order granting alimony, from which this appeal is taken.

In addition to the foregoing, the affidavits of the respective parties to the suit were presented upon the hearing of the motion for alimony. The affidavit of defendant recited generally that she had no property or means with which to support and maintain herself, and "that the sum of $200 a month is a reasonable sum to be allowed to defendant for her support and maintenance pending such appeal." The affidavit of the plaintiff stated that he was in receipt of a salary of $375 a month; that he had no other means or property, and out of his monthly salary was supporting himself and his aged and dependent mother.

It will be noted, from what has been said above, that when the decree of divorce was granted plaintiff there was, and for a long time prior thereto had existed, a decree in defendant's favor awarded in the maintenance suit, giving her $100 a month for her support. The decree of divorce undertook to terminate payments under this maintenance decree after June 15, 1901. If we assume that this provision in the divorce decree was valid, still, when the order for a new trial in the divorce suit was granted, it set aside the divorce decree, to the extent, at least, that it undertook to affect the decree for maintenance, and left the latter enforceable against plaintiff according to its terms. Smith v. Superior Court, 136 Cal. 18, 68 Pac. 100. And after the order for a new trial was made in the divorce case, and before the payment of alimony was ordered, the defendant did, upon plaintiff's refusal to pay under the maintenance decree, proceed to enforce that judgment and compel payment by proceedings in contempt, and it was to prevent this that the application for the writ of prohibition disposed of in Smith v. Superior Court, supra, was unsuccessfully made. It appears further that the order providing for alimony, from which this appeal is taken, was made while plaintiff herein was resisting the payment under the decree of maintenance, and while his application for a writ of prohibition above referred to was pending here. As, thus, no matter what dispute upon the subject may have existed, there was in law, when the decree for alimony in the divorce case was made, a valid enforceable maintenance decree in defendant's favor for $100 a month for her support, the real effect of the alimony order was to give defendant an additional $100 per month; in other words, under two separate and distinct orders, require plaintiff to pay for the same purpose the same amount per month. We do not think the order for alimony, under the showing made upon the application for it, can be sustained.

It is true that the court is vested with discretionary power in determining whether, and to what amount, alimony pendente lite shall be awarded, and its order will not be disturbed except for an abuse of that discretion; but this not an arbitrary power. This discretion must be exercised along legal lines, and in determining the matter the court must take into consideration the circumstances of the parties, their necessities, and the financial ability of the husband, and make such an award as from these considerations is deemed proper. Now, to what extent were the circumstances and necessities of the parties shown to the court upon the hearing? The statements in the affidavit of the defendant upon the only point involved, the amount necessary for her support, were of the most general character—that she had no means to support herself during the pending of the appeal, and that the sum of $200 a month was a reasonable sum to be allowed her for her support during that period. The affidavit of plaintiff discloses that he had no means or property other than his salary of $375 a month, out of which he supported himself and his aged and dependent mother. When you eliminate from consideration the evidence relative to the decree for maintenance, the above was the entire showing upon which the order for alimony was made, from which it is apparent that, at best, it is an extremely meager one on which to support it. But the decree for maintenance could not be eliminated from consideration. And, when taken into consideration, we are unable to perceive how the order can be supported. This decree for maintenance was in fact the only substantive evidence upon the main question involved in the application for alimony, namely, what, if anything, would be a reasonable amount to require the plaintiff to pay for the support of defendant? The defendant would only be entitled to an order in the divorce case for such an allowance in the event that it appeared on the hearing that she was without means, and that no provision had been made for her adequate support by her husband. But the decree for maintenance, which was subsisting and enforceable against him, requiring him to pay her $100 a month, was evidence that such adequate provision had been made for the very purpose for which she sought the allowance under the application for alimony. And this was under a decree rendered in the same court, though a different department, in which the petition for alimony was heard and rendered, in an action where the only matter presented for adjudication, and which was in fact adjudicated, was the amount which the defendant was entitled to have paid to her monthly by her husband as adequate for her support. This was an award to the defendant, enforceable against the plaintiff, which secured to her $100 a month for her support, and the decree was, in the absence of any contrary showing, evidence that this was an adequate amount for that purpose. It gave her all she could have required from the plaintiff in the alimony proceeding—support—not only pending the appeal, but until a judgment of divorce would have severed their marital relations. She was not entitled to have awarded her this same support by an order in an independent proceeding, and separately enforceable, when the maintenance decree secured her in all that she could demand, and it was more effectually secured to her than it could be by an order for alimony, and there was nothing to show that the amount provided to be paid under that decree was inadequate. The lower court, however, seems to have given no consideration to this decree, and, notwithstanding that thereunder the plaintiff was required to pay $100 monthly for the maintenance of defendant, ordered an equal amount payable monthly under the divorce proceedings for the same purpose. And, but for this appeal, as the decree for maintenance and the order for alimony would have both been enforceable, the plaintiff would be paying $200 a month for defendant's support, when it is not pretended that any more than $100 a month was necessary for that purpose, or under either proceeding was intended to be awarded. It may be true that the defendant was not concluded by the decree awarding her maintenance from making application in the divorce proceeding for alimony. An amount awarded for maintenance may, as the circumstances, needs, and conditions of the parties in whose favor it is awarded change, become inadequate; but relief under these changed conditions may be obtained by application to the court in which the maintenance proceeding was instituted (Civ. Code, § 137), and it may be that in a divorce proceeding, upon application, the court could award an amount, in addition to what was allowed in the maintenance suit, to make up the deficiency. But in either case it is incumbent upon the petitioner to show the necessity for the increase or the existence of the inadequacy. In the matter at bar there was no attempt at such a showing, and it must be presumed that, as the sole purpose of the maintenance suit was to provide by a decree against the plaintiff for her support, that the amount awarded was adequate for that purpose, and so continued to remain. We are much inclined to the belief that the lower court, in making its award of alimony in defendant's behalf, was of the same opinion relative to this maintenance decree as was entertained by plaintiff—that the decree of divorce had relieved plaintiff from payment under it, and that the application of plaintiff (then pending in this court, and undecided at the time the alimony was ordered) for a writ of prohibition against enforcing its terms would be successful. This is the only theory upon which we think the lower court could have made the order, and it did so by eliminating the matter of the maintenance decree from consideration, in the belief that it provided defendant with no further support under it. This view, if entertained, was erroneous. As held in Smith v. Superior Court, supra, the maintenance decree was still subsisting and enforceable, and provided, as far as any showing to the contrary is concerned, and more effectually than any order for alimony could have been done (because the maintenance decree had become final), the adequate provision for her support which the order of the court under the alimany proceeding had simply the effect of duplicating.

We are of the opinion that the order, as far as it directs payment of $100 per month for defendant's support, is erroneous, and it is to that extent reversed.

We concur: BEATTY, C. J.; HENSHAW, J.; VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.

McFARLAND, J. I dissent. Of course, the lower court had jurisdiction to make the order appealed from notwithstanding the existence of the former order, and I do not think that it sufficiently appears that the court had abused its discretion in making the order now reversed.

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147 Cal. 175

VOLKMAR v. VOLKMAR. (L. A. 1,603.)

(Supreme Court of California. June 19, 1905.)

DIVORCE—PERMANENT ALIMONY—FINDINGS.

In an action by a husband for divorce for desertion, findings that defendant had never deserted plaintiff, but that the parties had lived apart for a considerable time, were insufficient to justify an order requiring the husband to pay the wife permanent alimony; there being no finding that the husband was guilty of desertion, or that the wife had ever offered to live with him.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by William S. Volkmar against Caroline Vose Volkmar. From a judgment for defendant, plaintiff appeals. Modified.

Frank James, for appellant. Jones & Weller, for respondent.

ANGELLOTTI, J. This is an appeal by the plaintiff, upon the judgment roll, from a judgment given in an action for divorce, on the ground of desertion, whereby it was adjudged that the plaintiff should take nothing by his action, and that he pay to the defendant, as alimony, the sum of $30 per month.

The contention of plaintiff is that the judgment for alimony is not supported by the findings. The complaint alleges, in the ordinary form, a desertion by defendant, commencing on December 9, 1901, and continuing to the date of the commencement of this action, August 4, 1903. The affirmative allegations of the answer, upon which the claim for alimony is based, are, of course, all deemed denied. The findings, so far as material, are as follows, viz.: Plaintiff and defendant intermarried on December 7, 1899, and have ever since been husband and wife. The defendant has never deserted plaintiff. Plaintiff and defendant have lived separate and apart ever since December 9, 1901, but there has never been any intention on defendant's part to desert or abandon plaintiff. Ever since December 9, 1901, defendant has been willing and ready to live with the plaintiff as his wife. Defendant has no property or means by which to support herself, and is now, and for some time has been, dependent upon the charity of friends for her support and maintenance. Plaintiff is in receipt of an income of $105 per month, and is financially able to contribute to defendant's support. The judgment for alimony must find its entire support in these findings.

Counsel have discussed very fully the questions as to whether under our statute (sections 136, 137, Civ. Code), a court, in denying a divorce to the husband in an action brought by him, is authorized to provide for the permanent maintenance of the wife, who has not sought a divorce, or shown a willful desertion by him, and whether an action for support and maintenance by the wife can be maintained by her on any other ground than that of the husband's willful desertion. We do not deem it necessary to consider these questions, for it is clear that in no case should a court decree permanent alimony to the wife living separate and apart from her husband, in the absence of facts showing an obligation on the part of the husband to support her under such conditions. The effect of the decree here is to compel the husband to support the wife while she continues to live separate and apart from him. It is not intimated by the findings in this case that the original separation between these parties was due to any fault of the plaintiff husband. The wife, it is true, is found, in response to the allegations of the complaint, not to have deserted the husband; but it was not found, nor was it claimed by the answer, that the husband had deserted the wife, nor was it found that he had been guilty of willful neglect, cruelty, or any other misconduct. So far as appears, they simply voluntarily separated on December 9, 1901, and have since been living separate and apart. Although it is found that she has been ready and willing at all times to live with him as his wife, it is not found that she ever communicated her readiness and wishes in this regard to him, or that he has ever refused to allow her to live with him. If the wife was not guilty of desertion, and was ready and willing to live with the husband, and in good faith offered so to do, and he refused her offer, there would have been some ground for a claim that he had been guilty of desertion, warranting the relief given. Section 101, Civ. Code. But the findings present no such case, and we doubt whether the issues made by the pleadings were broad enough to warrant a finding of desertion on the part of the husband, had one been made. A wife, living separate and apart from her husband, cannot, in the absence of special agreement therefor, compel him to support her while living so separate and apart, unless such separation is caused by misconduct on his part. The obligations arising from the contract of marriage are mutual. It is as much the duty of the wife to live with her husband as it is his duty to support her, and the duty of support will not be enforced against the husband in favor of the wife, who, without cause, fails to perform the correlative duty of living with him. See McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554; Civ. Code, § 175. What misconduct on the husband's part would justify a court in requiring him to support his wife while she continues to live apart from him, it is, as already said, not necessary here to consider, for no reason at all why the wife does not return to her husband appears in the facts found by the trial court. It may, however, be said that it has been held that, under our statute, an action for permanent maintenance, independent of any suit for divorce, can be maintained by a wife only where the husband has been guilty of acts constituting willful desertion on his part. Hardy v. Hardy, 97 Cal. 125, 127, 31 Pac. 906.

Our conclusion is that the judgment, so far as it awards permanent alimony to the defendant, is not supported by the findings. It is ordered that the judgment be and the same is hereby modified, by striking therefrom the following provision, viz.: "That plaintiff pay to the defendant as alimony until the further order of the court the sum of $30 per month, the first payment to be made on or before the 1st day of March, 1904, and a like sum on or before the 1st day of each and every month thereafter"—and, as so modified, the judgment is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.

147 Cal. 112

OLSEN v. GRAY et al. (S. F. 3,184.)*

(Supreme Court of California. June 10, 1905.)

1. MASTER AND SERVANT—PERSONAL INJURIES—ASSUMPTION OF RISK — QUESTION FOR JURY.

In an action by a servant for injuries resulting from being struck by a bundle of shingles while assisting in the loading of a vessel, evidence held to justify submission to the jury of the question whether plaintiff had assumed the risk.

2. SAME—NEGLIGENCE OF FELLOW SERVANTS—PROXIMATE CAUSE.

In an action by a servant for injuries alleged to have been caused by failure of the master to furnish a proper table to receive bundles of shingles as they came down a chute and were pushed by plaintiff toward the hatchway of the ship, it appeared that plaintiff was struck by a bundle of shingles, and knocked into the open hatchway. *Held*, that negligence, if any, of fellow servants, in failing to cover the hatchway, was no defense, as the uncovered hatchway was not the proximate cause of the injuries.

Department 2. Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by Ole Olsen against George D. Gray and others. From a judgment for plaintiff and from an order denying a motion for a new trial, defendants appeal. Affirmed.

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*Rehearing denied July 10, 1905.

J. N. Gillett and F. A. Cutler, for appellants. Denver Sevier and T. H. Selvage, for respondent.

HENSHAW, J. Plaintiff sued defendants to recover damages for personal injuries sustained by him while in their employ. Trial was had before a jury, and plaintiff recovered. From the judgment which followed and from the order denying defendants' motion for a new trial, they appeal.

Appellants contend that plaintiff was injured through one of the ordinary risks of the employment in which he was engaged, and that for such injury so received they are not responsible. Respondent's answer is that he was a young man, inexperienced in the work to which he was put; that he was set about his task without instruction or warning as to the danger which he was incurring; and, moreover, that the appliance furnished for the work was inadequate and unsafe. Plaintiff was a young man about 20 years of age, and had taken employment to help load a lumber vessel with shingles. In the language of the first officer of the ship, he was a "green hand," a "greenhorn," and could not talk English very well. His first employment was in the hold of the vessel, placing the bundles of shingles. Later in the day he was ordered on deck, and put to work shoving bundles of shingles across a table into an open hatchway. The table was about three feet wide, one end of it was placed on the railing of the steamer, and it ran out across the hatchway and rested on a bundle of shingles on the other side of the hatchway. It was, according to the testimony of the first officer of the ship, a permanent piece of work, which was kept and used on board the ship all the time. The shingles from the landing came down a slide or chute onto this table, and were pushed across it into the hold. The table was without side guards or flanges to hold the bundles in place. Plaintiff was called by the captain from his work in the hold, and, without any warning or instruction as to the character or danger of the work, was told to go up and shove shingles across the table. He had been engaged in this work about 10 minutes when the swaying of the ship started the bunches of shingles rapidly down the chute, and one of them leaving the table struck the plaintiff while he was pushing shingles on toward the hatchway, and knocked him from the deck to the bottom of the hold, a distance of 12 or 14 feet.

Under the evidence it is at least debatable, and was therefore a matter for the jury, whether the perils and risks of the employment were so obvious to the eye and to the understanding that there was no occasion for the employer to instruct his servant in putting him at this new task. It appears that this was the first time the plaintiff had ever been engaged in this particular operation. But, even resolving this question in favor of appellants, it was certainly for the jury to say, under the evidence submitted, whether or not the appliance furnished by the defendants through their ship's officers was reasonably safe and suitable for the work to be performed. And upon this point it is sufficient, as showing the conflict in evidence, to quote from the appellants' witness Peter Hansen, who had been engaged in the manufacture and shipping of shingles from the place of the accident for 20 years. He says: "It would be better if they had a guard on each side of the table to keep the shingles from falling off, but it is not customary to do so. They never take the pains." It is true, as is said in Sappenfield v. R. R. Co., 91 Cal. 48, 27 Pac. 590, that when an appliance or machine not obviously dangerous has been in daily use for a long time, and has uniformly proved safe and efficient, its use may be continued without the imputation of imprudence or carelessness. But the very question to be resolved by the jury in this case was whether the appliance was not obviously inadequate or dangerous. And if it shall appear to the jury, as in this case it did, that it was an unsafe appliance, the danger from the use of which could have been eliminated by the simple addition of side guards or flanges, it becomes such a question as that considered by this court in Monaghan v. Rolling Mill Co., 81 Cal. 193, 22 Pac. 591, where it is said: "Appellant argues that the evidence was insufficient to prove that the machinery was defective or unsafe. * * * It is argued that it had hung suspended there for some years without accident; but that circumstance is only a matter of wonderment, and is an instance of how good luck will sometimes protect carelessness for long periods."

Appellants complain of the court's refusal to give an instruction to the effect that if the jury found that there was material for covering the hatchway provided by defendants, and that by using this material to cover the hatchway it would have been safe, so that the plaintiff could not have fallen into the hold of the ship, and it was negligence not to cover up said space in said hatchway, then that plaintiff was injured by the acts of his fellow servants in not so covering up the hatchway, and defendants are not liable. This instruction the court correctly refused to give. It mistakes the gravamen of the action. The negligence charged against the defendants was not in failing to cover the hatchway, but it was negligence in furnishing an unsuitable table, because of which plaintiff was struck by a flying bunch of shingles and injured. It is true that the bunch of shingles precipitated him down the hatchway, but that was a mere incident to his misfortune. Negligence is not predicated by plaintiff upon the open hatchway, nor would it have exonerated defendants from liability had the hatchway been closed. Plaintiff would still have been struck by the shingles, and no one could declare what injuries might have resulted to him—whether they would have been less or greater than those actually received, even if he had not fallen down the hatchway.

The judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

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147 Cal. 115

GETZ BROS. & CO. v. FEDERAL SALT CO.

(S. F. 3,367.)*

(Supreme Court of California. June 10, 1905.)

1. Contracts—Construing Together.

Civ. Code, § 1642, provides that several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together. A written contract recited that plaintiffs sold salt on board ship to defendant, who agreed to pay the original cost price of the salt, including freight, insurance, etc., and, in addition, $10,000 in cash, the receipt of which was acknowledged, plaintiffs agreeing to assign to defendant all their rights to purchase salt, and all the options they had, or might within the ensuing two years, secure, and to sell to defendant at 10 per cent. below actual cost any salt purchased by them from any one but defendant. By a contemporaneous written agreement plaintiffs for a consideration of $10,000, guarantied that they and all persons or firms with or in which they might be interested, would purchase their entire demands for salt from defendant exclusively for a period of two years; that they would not import or bring any salt to the Pacific Coast other than such as they might purchase from defendant, and that they would discourage any such shipments or importations of salt by any other parties. Plaintiffs brought suit on two checks, each for $5,000, payable to them, drawn by defendant on the same day and date with the contracts. *Held*, that the checks and contracts formed substantial parts of one transaction, and were to be construed together.

2. Same—Contracts in Restraint of Trade — Statutory Provisions — Anti-Trust Law.

The contracts violated Civ. Code, § 1673, forbidding contracts in restraint of trade (with certain exceptions), and the Sherman Anti-Trust Act, § 1 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and, the terms of the contracts not being severable, no recovery could be had in an action on the checks.

Department 2. Appeal from Superior Court, City and County of San Francisco; F. H. Kerrigan, Judge.

Action by Getz Bros. & Co. against the Federal Salt Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Naphtaly, Freidenrich & Ackerman, for appellant. Louis Titus (P. F. Dunne, of counsel), for respondent.

HENSHAW, J. This is an action upon two checks, each for the sum of $5,000, drawn by the defendant upon the Bank of California, and payable to the order of plaintiff. The checks were drawn December 18, 1901, were presented for and refused payment December 31, 1901. Defendant, for answer to the action, set up as an affirmative defense that the checks were made and delivered as an integral part of a certain transaction between the parties, evidenced by written contracts. The court found the facts as set up in the answer; found further that the written contracts between the parties were against public policy, in restraint of trade, and in violation of an act of Congress known as the Anti-Trust or Sherman Act; and gave judgment for defendant accordingly. The court's decision in this regard is presented for review upon this appeal.

The written contracts were executed upon the same day and date with the checks, and as a part of the same transaction. They recited that the plaintiff owned 1,336 tons of factory filled salt, 100 tons of coarse common salt, and 80 tons of dairy salt, all of which were on board ship in transit from Liverpool to San Francisco, and that the defendant, Federal Salt Company, desired to purchase the same; wherefore Getz Bros. & Co. sold all of the salt to the Federal Salt Company, which agreed to pay the original cost price of the salt, including freight, insurance, duty, and all expense of landing the salt in San Francisco, and it agreed in addition thereto to pay to Getz Bros. & Co. the sum of $10,000 in cash, the receipt of which was acknowledged by Getz Bros. & Co. Getz Bros. & Co. then further agreed to assign to the Federal Salt Company all their rights to purchase salt, and all the options which they had or might thereafter secure within a period of two years, either in England or elsewhere; and they agreed further that any salt which they might then own or have contracted for, or which they might thereafter purchase within two years, other than such salt as might be purchased from the Federal Salt Company, should be sold by them to the Federal Salt Company at 10 per cent. below the actual cost. Such was the substance of the first contract. The second contemporaneous agreement declared: "This agreement made this 18th day of December, 1901, by and between Getz Brothers & Company, a corporation, and Louis Getz, the parties of the first part, and the Federal Salt Company, a corporation, the party of the second part, Witnesseth: That in consideration of the sum of ten thousand ($10,000) dollars to the parties of the first part in hand paid, the receipt of which is hereby acknowledged, the parties of the first part and each of them hereby guarantee that they and all persons or firms with or in which they may be interested, will purchase their entire demands for salt from the said party of the second part, at the list prices of said party of the second part for a period of two (2) years from the date of this contract, and they will not purchase any other salt from any other parties, and will not import or cause to be imported, or bring any salt to the Pacific Coast of North America other than such salt as they may purchase from the party of the second part. And said parties of the first part further agree that they will discourage in any possible manner any such shipments or importations of salt by any other parties. And whereas it would be extremely difficult from the nature of the case to ascertain the actual damages, in case the parties of the first part violate this contract, it is hereby agreed between the parties that in case the parties of the first part violate this contract in any particular, that they will pay to the party of the second part the sum of five thousand ($5,000) dollars as liquidated damages for such violation." Getz Bros. & Co. were paid in full according to the terms of the contract the original cost price of the salt, including freight, insurance, duty, and all expenses of landing in San Francisco, and this action brought upon the two checks is in fact for the $10,000 stipulated in the agreements to be paid. Unquestionably the checks in suit, together with the written agreements, form substantial parts of one transaction, and are to be construed together. Civ. Code, § 1642. A reading of these contracts establishes that by no reasonable intendment can it be said that the $10,000 was to be paid as the purchase price of the salt. To begin with, provision is made for the purchase of the salt at cost, with incidental expenses; and, in the second place, by the very terms of the agreement which is above quoted that $10,000 is made the consideration of the agreement by the plaintiffs to refrain from purchasing salt from any other parties than the defendant, and to refrain from importing, or causing to be imported, or in any way bringing any salt to the Pacific Coast of North America, other than such as may be purchased by the defendant. But the agreement does not even stop here. The plaintiffs engaged themselves actively to discourage any such shipments or importations of salt by any other person. And, finally, it may be said that if, by the extremest liberality, it should be held that the $10,000 was in any way or to any extent to be regarded as mere profit to the seller for the cargo of salt sold to defendant, nevertheless it must be plain that it was not wholly nor separately such profit, but that part of it at least was a consideration for the other covenants into which plaintiffs entered with defendant. In this view, how much of the $10,000 was mere profit upon the single salt sale, and how much was the consideration for the other covenants, it is obviously impossible to say, and, if it be true that the other covenants imported a base or illegal consideration, the terms of the contract not being severable, it is wholly void. Prost v. More, 40 Cal. 347; Arnot v. The Coal Company, 68 N. Y. 558, 23 Am. Rep. 190; Embrey v. Jemieson, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172.

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*Rehearing denied July 10, 1905.

That these covenants are illegal as being in restraint of trade, against the express mandate of the law of this state and of the United States, we entertain no doubt. Section 1673 of our Civil Code is as follows: "Every contract by which one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by the next two sections, is, to that extent, void." The only exceptions contemplated by the succeeding sections are to the effect that a vendor who sells the good will of his business may agree not to carry on a similar business within a single specified county or city so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein; and that a partner, in anticipation of the dissolution of a partnership, may agree not to carry on a similar business within the city where the partnership business was transacted. Saving for these two classes of agreement, all others which restrain the exercise of a lawful business, trade, or vocation are void. Santa Clara Mill Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; Vulcan Powder Co. v. Powder Co., 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242. The Sherman anti-trust act, by its first section, declares as follows: "Every contract, combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. In the contract under consideration it cannot for a moment be denied that there are present the illegal elements forbidden both by our state and our national law. There is not only the direct agreement to refrain from purchasing salt within the state, and to refrain from purchasing it abroad, but there is, moreover, a specific agreement to "discourage in any possible manner any such shipments or importations of salt by any other parties." The Supreme Court of the United States, in construing this act, has held, it is true, that while the restraint may be slight (U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007), it still must be a direct restraint upon commerce. That is to say, it must restrain primarily, and not secondarily or incidentally. E. C. Knight Case, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. Both of these vicious elements are found in this contract. There is not only an obvious restraint upon trade, but the direct and primary purpose of the contract is to effect such restraint. It may be added that this precise contract has come under the review of the federal court in the case of U. S. of America v. Federal Salt Co. et al. (No. 13,303, Circuit Court of the United States, Ninth Jud. Cir.)[1] Both of the parties to this action were parties to that action, and the

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[1] No opinion filed.

Circuit Court, decreeing the contract to be in violation of the Sherman law, granted its injunction restraining both parties to this action from "further going on, carrying out, maintaining, or acting in any way, shape, manner, or form" under this contract.

The judgment and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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147 Cal. 135

WADLEIGH et al. v. PHELPS. (Sac. 1,316.)*

(Supreme Court of California. June 14, 1905.)

1. APPEAL—NOTICE—CONSTRUCTION.

A notice of appeal from a judgment which also specially enumerated numerous unappealable orders as orders appealed from was a notice of appeal from the judgment alone, and a single undertaking was sufficient.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2097, 2098, 2144–2147.]

2. SAME — UNDERTAKING — SUFFICIENCY — STATUTE.

Where an unsuccessful litigant gave notice of appeal from a judgment before ruling on a motion for new trial was had, and filed an undertaking sufficient only for one appeal, and after a new trial was denied gave a second notice of appeal, specifying three subsequent orders separately and independently appealable, neither of which would be reviewable on appeal from the others, the second notice was a notice of three appeals, and the undertaking was not merely insufficient, within Code Civ. Proc. § 954, providing that no appeal can be dismissed for insufficiency of the undertaking thereon if a good and sufficient undertaking, approved by a justice of the Supreme Court, be filed before the hearing on the motion to dismiss the appeal, but was in legal effect no undertaking at all, constituting a defect which could not be cured by the filing of another undertaking.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2086–2088, 2098, 2144.]

3. SAME—MOTION TO DISMISS—ESTOPPEL.

Where notice of appeals were given, and no undertaking was filed, a motion to dismiss on the ground of the insufficiency of the undertaking does not estop the appellee to insist on a dismissal of the appeals on the ground that no undertaking was filed, merely because the appellant endeavored to cure the defect by the filing of an undertaking in pursuance of Code Civ. Proc. § 954.

In Bank. Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Action by W. I. Wadleigh and others against Josephine A. Phelps, executrix, etc. From a judgment in favor of plaintiffs, an order denying a motion for a new trial, and sundry other orders, defendant appeals. On motion to dismiss appeals. Motion sustained in part.

George F. Witter, Jr. (D. M. Delmas, of counsel), for appellant. C. W. Cross, for respondents.

BEATTY, C. J. This is a motion to dismiss eleven separate appeals, or attempted appeals, from the judgment, verdict, and various orders entered in the cause. The suit is in equity to redeem lands mortgaged by deed of conveyance in form absolute. The decree rendered June 29 and entered June 30, 1903, was in favor of the plaintiffs, directing a reconveyance of the lands upon payment or tender of about $11,000 found to be due the defendant, less plaintiffs' costs of suit. The defendant moved for a new trial, and pending proceedings upon that motion, on July 27, 1903, served and filed the following notice of appeal: "To W. I. Wadleigh, Anna F. Smith, and Elias Smith, the plaintiffs herein, and to C. W. Cross, their attorney, and to F. L. Arbogast, clerk of the superior court of Nevada county, state of California. You, and each of you, will please take notice that the defendant in the above-entitled action hereby appeals to the Supreme Court of the state of California from an order made July 2, 1902, denying defendant's motion to strike out part of plaintiffs' amended complaint; and from an order made November 21, 1902, denying defendant's motion to strike out part of plaintiffs' second amended complaint; and from the special verdict of the jury rendered by the jury November 29, 1902; and from an order made December 22, 1902, denying defendant's motion to set aside the special verdict rendered by the jury November 29, 1902; and from the order made December 22, 1902, adopting the special verdict of the jury rendered December 29, 1902; and from the decision, orders, and judgment made and rendered against her on the 29th day of June, 1903, and filed and entered on the 30th day of June, 1903 (all of said orders, decisions and judgment rendered in said action in said superior court in favor of the plaintiffs in said action and against said defendant in said action), and from the whole thereof." To perfect this appeal she, on the same day, filed the following undertaking: "Whereas, the defendant in the above-entitled action is about to appeal to the Supreme Court of the state of California from an order made July 2, 1902, denying defendant's motion to strike out part of plaintiffs' amended complaint; and from an order made November 21, 1902, denying defendant's motion to strike out part of plaintiffs' second amended complaint; and from the special verdict of the jury rendered November 29, 1902; and from an order made December 22, 1902, denying defendant's motion to set aside the special verdict rendered by the jury November 29, 1902; and from the order made December 22, 1902, adopting the special verdict of the jury rendered December 29, 1902; and from the decision, orders, and judgment made and rendered against her on the 29th day of June, 1903, and filed and entered on the 30th day of June, 1903, in said action, in said superior court in favor of the plaintiffs for $1,193.15, costs of suit. Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against her on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. J. L. Ross [Seal]. W. M. Barret [Seal]."

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*Rehearing denied July 12, 1905.

By order of this court the time for filing the transcript on this appeal was extended until after the decision upon the motion for a new trial, which was finally denied by an order entered February 25, 1904. On March 1, 1904, defendant served and in due time filed the following notice of appeal: "Notice of appeal from order sustaining plaintiffs' objection to the hearing of the motion and renewal of motion for a change of place of trial herein, from the order denying defendant's motion to strike out the items of costs and retax the costs herein, and from the order denying defendant's motion for a new trial. To the clerk of the superior court and to C. W. Cross, attorney for the plaintiffs above named: You, and each of you, will please take notice that the defendant in the above-entitled action hereby appeals to the Supreme Court of this state from the order made on the 27th of July, 1903, sustaining plaintiffs' objection to the hearing of the motion and the renewal of the motion for a change of the place of trial herein; and from the order made by the court herein on the 27th of July, 1903, denying defendant's motion to strike out the items of costs in the memorandum of costs herein and to retax the costs herein; and from the order denying defendant's motion for a new trial herein, made and entered in the said superior court on February 25, 1904, in said action, and from the whole thereof. Dated March 1, 1904."

To perfect these appeals the following undertaking was filed on March 3d: "Whereas, the defendant in the above-entitled action is about to appeal to the Supreme Court of the state of California from an order made and entered against her in said action in said superior court in favor of the plaintiffs in said action, on the 25th day of February, 1904, denying the defendant's motion for a new trial in the above-entitled action, and from an order made July 27, 1903, sustaining plaintiffs' objection to the hearing of motion and renewal of motion for change of the place of trial herein, and from an order made by the court July 27, 1903, denying defendant's motion to strike out items of costs in the memorandum of costs and to retax the costs herein. Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against the defendant on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. Willis G. Witter [Seal]. J. C. Franks [Seal]. Dated this 1st day of March, 1904."

One transcript, embracing all these attempted appeals, was filed in this court June 20, 1904, and on July 19th the respondent served the following notice of motion to dismiss: "Notice of Motion to Dismiss Appeals. To said appellant and George F. Witter, Jr., her attorney: You will please take notice that on Monday, the 1st day of August, A. D. 1904, at 10 o'clock a. m., or as soon thereafter as the same can be heard, the respondents, by their attorney, will move the said court in bank, at the place of holding said court in San Francisco, to dismiss the following appeals in said cause: (1) Appeal 'from an order made July 2, 1902, denying defendant's motion to strike out part of plaintiffs' amended complaint' (vide Transcript, folios 399-400), on the ground that the same is not an appealable order. (2) Appeal 'from an order made on November 21, 1902, denying defendant's motion to strike out part of plaintiffs' second amended complaint' (vide Transcript, folio 400), on the ground that the same is not an appealable order. (3) Appeal 'from the special verdict of the jury rendered by the jury November 29, 1902' (vide Transcript, folio 400), on the ground that the same is not an appealable order. (4) Appeal 'from an order made on December 22, 1902, denying defendant's motion to set aside the special verdict rendered by the jury November 29, 1902' (vide Transcript, folios 400-401), on the ground that the same is not an appealable order. (5) Appeal 'from the order made December 22, 1902, adopting the special verdict of the jury rendered December 29, 1902' (vide Transcript, folio 401), on the ground that the same is not an appealable order. (6) Appeal 'from the decision made and rendered against her on the 29th day of June, 1903, and filed and entered on the 30th day of June, 1903' (vide Transcript, folio 401), on the ground that no appeal lies from said decision. (7) Appeal 'from orders made and rendered against her on the 29th day of June, 1903, and filed and entered on the 30th day of June, 1903' (vide Transcript, folio 401), on the ground that no appeal lies from said orders or either or any of them. (8) Appeal 'from the judgment made and rendered against her on the 29th day of June, 1903, and filed and entered on the 30th day of June, 1903' (vide Transcript, folio 401), on the ground that no sufficient undertaking on appeal from said judgment has ever been executed, given, or filed, and on the ground that no undertaking on appeal from said judgment has ever been executed or filed (vide Transcript, folios 370 to 397-8 and 4776 to 4779). (9) Appeals 'from the order made on the 27th day of July, 1903, sustaining plaintiffs' objection to the hearing of the motion and the renewal of the motion for a change of the place of trial herein; and from the order made by the court herein on the 27th day of July, 1903, denying defendant's motion to strike out the items of costs in the memorandum of costs therein, and to retax the costs herein; and from the order denying defendant's motion for a new trial herein, made and entered in the said superior court on February 25, 1904, in said action and from the whole thereof' (vide Transcript, folios 4427-8), 'on the ground that no sufficient undertaking on said appeals has ever been executed or filed' (vide Transcript, folios 4782-5)."

After various continuances this motion was submitted in department, where it was denied as to the appeal from the judgment and from the order overruling the motion for a new trial. A rehearing was subsequently granted, and the motion has now been resubmitted to the full court.

Respondent contends that the first six appeals should be dismissed because they are from nonappealable orders. This is true, but an order dismissing these appeals would be a vain act for the simple reason that each and every of the enumerated orders is reviewable on the appeal from the judgment, and if that appeal stands the case would be in exactly the same condition after such order as it is in now—the orders would still be reviewable. And this, in our opinion, is a fact which determines the true construction of the notice. It is, in substance and effect, a notice of appeal from the judgment and nothing more. The special enumeration of the various orders reviewable on that appeal is mere surplusage, and ought to be so treated, for nothing can possibly come under review on the hearing which would not have been equally subject to review if such enumeration had been altogether omitted. This was the ground upon which a similar motion to dismiss was denied in Williams v. Dennison, 86 Cal. 430, 25 Pac. 244, and that ruling we entirely approve.

This view disposes of the objection that but one undertaking was filed upon seven appeals. There was but one appeal, and but one undertaking was required.

It is next objected that the undertaking is insufficient to support that one appeal because it does not intelligibly describe or refer to the judgment in the cause. The undertaking is properly entitled in the cause, and states correctly the date of rendition and entry of the judgment. This was sufficient in itself to bind the sureties and to enable the respondent to recover without being put to the proof of any matters in pais. The specification of one item or incident of the judgment—the $1,193.15 costs of suit—cannot invalidate what is otherwise sufficient.

As to the appeal from the judgment, the motion to dismiss must be denied.

The second notice of appeal specifies three orders separately and independently appealable, neither one of which would be reviewable on appeal from the others. It is therefore a notice of three appeals, and was not perfected by the undertaking originally filed. Estate of Heydenfeldt, 119 Cal. 346, 51 Pac. 543, and cases cited. And that undertaking was not merely insufficient, within the meaning of section 954 of the Code of Civil Procedure, which allows the filing of a new undertaking, but was in legal effect no undertaking at all. Estate of Heydenfeldt, supra. Appellant contends, however, that since the motion to dismiss these appeals was based solely upon the ground that the original undertaking was "insufficient," and as she filed before the hearing of the motion an undertaking approved by one of the justices of this court in support of her appeal from the order denying a new trial, that appeal cannot be dismissed; for, she says, the respondent must be held strictly to the grounds of his motion, and if the undertaking was only insufficient she has, in pursuance of the statute, cured the defect.

A party is undoubtedly limited to the grounds of the motion specified in his notice, but, while a notice is strictly construed against any attempt to mislead an opponent or to ambush an attack which with timely notice could be guarded against, the rule of construction ought not to be so strict in a case like this, where the defect in the undertaking was incurable at the date of the notice, and where, in view of the settled practice of the court, the terms of the notice were sufficient to advise the appellant of the real and only objection to the undertaking.

The three appeals specified in the second notice are dismissed. The motion to dismiss the appeal from the judgment is denied.

We concur: VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

ANGELLOTTI, J. I concur in the judgment and in all that is said in the opinion. As to the appeal from the judgment, the distinction between this case, where all the other orders specified in the notice and undertaking are reviewable upon the appeal from the judgment, and the enumeration thereof merely an idle and useless ceremony which can in no way affect the substantial rights of either party, and cases involving appeals from separate and independent orders, where an appeal from each order is essential to a review thereof by the appellate court, is obvious. Most of the cases relied on by respondent are cases of the latter class. Carter v. Butte Creek, etc., 131 Cal. 350, 63 Pac. 667; Centerville, etc., v. Bachtold, 109 Cal. 111, 41 Pac. 813; McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16; Home, etc., v. Wilkins, 71 Cal. 626, 12 Pac. 799; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815. The only case cited by respondent where the material facts may be held to be the same as in the case at bar is the Estate of Heydenfeldt, 119 Cal. 346, 51 Pac. 543, where the obvious distinction here made does not appear to have received the consideration of the court. The general rule declared in the opinion in that case and the other cases cited herein is applicable to the attempted appeal from the order denying the motion for a new trial and two orders made after judgment, but should not be held applicable to the appeal from the judgment.

I concur: SHAW, J.

(147 Cal. 264)

COLLINS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 4,350.)

(Supreme Court of California. June 27, 1905.)

Prohibition—Jurisdiction—District Court of Appeal.

Where a case is such that an appeal from the judgment of the lower court would properly be taken to the district court of appeal, a petition to prohibit the proceedings should be addressed to that court.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, § 65.]

In Bank. Petition by George D. Collins for prohibition restraining the superior court of the city and county of San Francisco from trying petitioner on an indictment. Transferred to district court of appeal.

George D. Collins, in pro. per.

BEATTY, C. J. The petitioner asks this court to issue its writ prohibiting the superior court from proceeding to try him upon an accusation presented in the form of an indictment, but which he contends is no indictment, because, as he alleges, it was presented by an illegal body, and does not, as he contends, state facts constituting any offense of which the superior court has jurisdiction. We express no opinion upon either of these questions, nor upon the propriety of issuing any writ, because we think the cause is not properly here. It is, no doubt, within our jurisdiction, if we chose to exercise it. But the Constitution confers upon the newly created district courts of appeal the same power to issue writs of mandamus, certiorari, prohibition, and habeas corpus that has been conferred upon this court, and since the charge laid, or attempted to be laid, against the petitioner is bigamy—an offense within the jurisdiction of the district court of appeal by direct appeal from a judgment of conviction—we think it is to that court the petition for a writ of prohibition should have been addressed.

We desire in the outset to make a precedent to be followed in like cases hereafter: When a case is such that an appeal from the judgment of the lower court would properly be taken to the district court of appeal, a petition to prohibit the proceeding should be addressed to that court.

As to this proceeding, it is ordered in pursuance of the authority conferred upon us by section 4 of article 6 of the Constitution, that the cause be heard and determined by the district court of appeal for the First District. The clerk will transmit the petition and brief of petitioner to the clerk of that court.

We concur: LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.

(147 Cal. 195)

ARKLEY v. UNION SUGAR CO. (L. A. 1,348.)*

(Supreme Court of California. June 21, 1905.)

1. Lease of Quarry—Sale—Eviction.

Where a lease of a quarry grants the exclusive privilege of removing lime rock therefrom, reserving to the lessor the right of quarrying thereon, and the lessor sells the land on which the quarry is located, the purchaser cannot escape liability for excluding the lessee on the ground that the covenants in the lease do not run with the land, as the purchaser took the estate of the lessor, but not that of the lessee.

2. Same—Damages—Pleading.

Where a lease grants the exclusive privilege of quarrying, and the gravamen of an action against a purchaser of the premises from the lessor is that it wrongfully excludes plaintiff from entering on and enjoying his interest in the quarry, it is immaterial that plaintiff alleges a certain amount of rock was taken from the quarry, and that such an allegation does not show a violation of his right.

3. Same—Sufficiency.

Where a lease grants the exclusive privilege of taking rock from a quarry in such quantities as the lessees may see fit, in an action against the purchaser of the premises for excluding plaintiff therefrom, an allegation that by his wrongful acts plaintiff has been obliged to abandon negotiations instituted for the sale of the rock was sufficient without an averment that plaintiff was exercising the privilege of taking rock from the quarry in such quantities as he saw fit.

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*Rehearing denied July 21, 1905.

4. APPEAL—REVERSAL—NOMINAL DAMAGES.

In an action against the purchaser of leased premises for excluding plaintiff, the lessee, therefrom, where the main purpose of the action is to enforce a permanent right, a reversal of a judgment rendered on sustaining a demurrer cannot be denied, because plaintiff, at most, can recover only nominal damages.

5. SAME—EVICTION.

In an action against a purchaser of leased premises, where plaintiff alleges that defendant, by the erection of a fence, excluded plaintiff therefrom, and continued to hold exclusive possession, a contention that the erection of the fence did not prevent plaintiff from exercising his rights is without force.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 695, 696, 702.]

Department 2. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Charles Arkley against the Union Sugar Company. From a judgment for defendant, plaintiff appeals. Reversed.

Sheridan & Fox and Richards & Carrier, for appellant. Canfield & Starbuck, for respondent.

McFARLAND, J. This action was brought to recover damages for an alleged wrongful interference by defendant with plaintiff's interest in a certain lime rock ledge or quarry. A general demurrer to the plaintiff's second amended complaint was sustained, and judgment was rendered for defendant. From this judgment plaintiff appeals.

The material averments of the complaint are these: On the 21st day of August, 1898, George W. Frick and other persons also named Frick were the owners of land—called the "Frick Ranch"—on which the lime rock ledge is situated, and which is described as 100 feet in breadth and 500 feet in thickness. On that day the Fricks, as parties of the first part, and plaintiff and one Hebert, as parties of the second part, executed a certain instrument designated on its face as a lease, a copy of which is set out in the complaint; and the material parts of this instrument, which we will call for convenience a lease, are as follows: "That the parties of the first part do by these presents grant unto the parties of the second part the exclusive right and privilege of mining, quarrying and taking lime rock in such quantities as they may see fit from that certain quarry bed or deposit situate on the land belonging to the first parties and known as the Frick ranch. * * * Said exclusive privilege hereby granted to said second parties shall not interfere with the right of said first parties, either themselves or by agents or lessees to mine, quarry, and take lime rock from said deposit for the purpose of burning the same and making lime therefrom; said burning to be done upon said Frick ranch, but the right to mine, quarry and take lime rock from such deposit for the purpose of burning the same into lime, said burning to be done upon said ranch, is hereby expressly reserved and excepted unto said first parties and from the operation of this indenture." There is then a provision in the instrument giving the second parties the right to maintain roads through the land for the purpose of ingress and egress, and an agreement by the second parties to pay a certain sum for every ton of rock which they shall take out. The instrument then proceeds as follows: "This agreement shall be in force for one year from date hereof, and the said second parties shall have the privilege of continuing the same in force for the four years then next ensuing by giving first parties written notice of such intention at least one month prior to the expiration of said year, unless said first parties shall, within nine months from the date hereof, sell and dispose of the ranch upon which said quarry and deposit is located. In the event of the disposition and sale of said ranch by said first parties within nine months from the date hereof the stipulation hereinbefore in this agreement contained for a continuance of said agreement in force shall be absolutely null, void, and of no effect." At least one month prior to the expiration of the first year the parties of the second part gave written notice to the parties of the first part of their intention to continue the lease for the next succeeding four years. Afterwards, in September, 1899, the said Hebert assigned all his interest to the plaintiff. The Fricks did not sell or dispose of the ranch within nine months after the date of said instrument. Afterwards, in June, 1899, the respondents herein purchased the said ranch of the Fricks, and have since been and now are the owners of the same. At the time of the purchase, and long prior thereto, respondents had full knowledge of said lease and of the rights of appellant thereunder. It is further averred "that on or about the said 20th day of June, 1899, the defendant, without the consent or permission of plaintiff and said Hebert, or either of them, and regardless of their rights in the premises, entered into the exclusive possession of the premises described in said lease, to wit, said Frick ranch, and of said lime rock thereon, and inclosed said quarry of lime rock with a fence and excluded plaintiff therefrom, and ever since said date have continued to hold exclusive possession of said premises and all thereof, and to exclude plaintiff therefrom," and "that immediately after such entry upon said land defendant proceeded to quarry and carry away from said limestone ledge large quantities thereof, and up to the commencement of this action have carried away therefrom 4,800 tons of lime rock and converted the same to its own use; that, by reason of the occupation of said quarry by defendant, plaintiff has been entirely excluded therefrom, and has been unable to go upon said premises to exercise the rights granted by said lease, and has been obliged to abandon negotiations that he had instituted for the sale of rock from said quarry, and has been prevented from exercising any of the rights granted by said lease." The prayer is for damages in the sum of $4,800 and costs of suit.

In our opinion, the decision of the court sustaining the demurrer and rendering judgment for defendant was erroneous. Our only knowledge of the grounds upon which the demurrer was sustained is that gathered from the briefs of respondents, and we do not think that the positions taken there are tenable. It is contended that the present respondent is not liable because, as is said, the covenants in the said lease do not "run with the land"; but this is not a case where the question of covenants running or not running with land, at all, arises. By the instrument in question a certain interest or estate is carved out of the land and granted to appellant, and respondent, by its subsequent deed, took only what was left. The rule applicable here is the one upon which rests the plain proposition that the grantee of leased land takes the estate of the lessor, but not that of the lessee.

It is contended that, notwithstanding the use of the word "exclusive" in the lease, its subsequent provisions show that the Fricks and their successors were also entitled to take rock from the quarry; that therefore appellant's right is not exclusive; and that, consequently, the averment that respondent took 4,800 tons of rock does not show a violation of his rights, and does not show damage, for it does not appear that the taking of said rock by respondent materially diminished the value of appellant's interest in a quarry of such large dimensions. But whether or not the averment about the 4,800 tons is of any consequence is immaterial. Appellant is not asserting any exclusive right to mine the quarry. His claim is that respondent has not such exclusive right, and the gravamen of the action is that respondent wrongfully excludes appellant from entering upon or enjoying his interest in said quarry.

It is contended that the complaint is defective because it does not aver that appellant has been or is exercising the privilege of taking rock from the quarry "in such quantities as they may see fit." This contention is not maintainable. There is an averment that by the wrongful acts of respondent appellant "has been obliged to abandon negotiations that he had instituted for the sale of rock from said quarry"; and, moreover, appellant was not obligated to take out rock at any particular time or in any particular quantity; he could exercise his right to take rock at any time within the five years.

It is contended that appellant, at most, could recover only nominal damages, and the rule is invoked that when there has been a judgment for a defendant upon a nonsuit, or upon the sustaining of a demurrer to a complaint, the court will not reverse the judgment, although erroneous, if it appears that the plaintiff could not have recovered more than nominal damages. But, in the first place, it does not necessarily appear that appellant could only have recovered nominal damages. The complaint does not preclude him from proving and recovering actual damages. Moreover, the rule invoked does not apply to a case where a permanent right is involved. This matter is discussed in Sutherland on Damages, vol. 1, § 11 (3d Ed.), and we find there this statement of the law: "If the object of the action is to determine some question of permanent right, and through error the plaintiff is deprived of the judgment he is entitled to, the fact that he can recover only nominal damages will not be reason for denying a new trial;" and the principle thus stated is fully supported by cases cited. See Bungenstock v. Drainage Dist., 163 Mo. 198, 64 S. W. 149; Ely v. Parsons, 55 Conn. 83, 10 Atl. 499; Merrill v. Dibble, 12 Ill. App. 85. Respondent cites on the point Kenyon v. W. U. Tel. Co., 100 Cal. 454, 35 Pac. 75, and Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618. In the Kenyon Case the court refers to and recognizes the rule declared by Sutherland as above quoted, but says that in the Kenyon Case there is no question of "permanent right" involved; and in the Hancock Case there was clearly no question of permanent right involved, and that subject is not mentioned. In the case at bar the main purpose of the action was to protect and enforce a permanent right. The exclusion of appellant from the quarry by respondent, as alleged in the complaint, is a legal wrong destructive of appellant's right in the quarry, and an action for damages is one of the proper remedies for such wrong and for establishing appellant's right; and upon proof of the said averments of the complaint appellant would be entitled to a judgment for, at least, nominal damages, and a judgment denying him such damages would be reversed.

Counsel say that the fencing of the ledge by respondent may have been for the mere purpose of preventing the intrusion of outsiders, and does not support the conclusion that appellant was thereby prevented from exercising his rights. But this suggestion has no weight in the face of the averment in the complaint that respondent, from the date of the erection of the fence, had "excluded plaintiff therefrom, and from such date has continued to hold exclusive possession of said premises, and all thereof, and to exclude plaintiff therefrom."

The foregoing covers the points made by respondent. We are not able to see any fatal defect in the complaint, and in our opinion it states facts sufficient to constitute a cause of action.

The judgment appealed from is reversed, with direction to the trial court to overrule the demurrer to the second amended complaint.

We concur: LORIGAN, J.; HENSHAW, J.

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147 Cal. 228

WOOD et al. v. ETIWANDA WATER CO.

(L. A. 1,328.)

(Supreme Court of California. June 24, 1905.)

1. WATER RIGHTS—ABANDONMENT.

The abandonment of an old or dilapidated flume is not an abandonment of the right to divert and use the water conveyed through the flume.

2. SAME—INTENT.

The mere intention to abandon the right to divert and use water, if not coupled with an actual yielding up of possession or a cessation of user, does not constitute abandonment; nor will nonuser alone, without an intention to abandon, amount to an abandonment.

3. WITNESSES — ATTORNEY AND CLIENT — WAIVER OF PRIVILEGE.

Under the express provisions of Code Civ. Proc. § 1881, subd. 2, the advice of an attorney to his client may be given in evidence by the consent of the client.

4. WATER RIGHTS—ABANDONMENT.

On an issue whether the right to divert and use water had been abandoned by the substitution of an iron pipe for part of a flume, evidence by officers of the corporation which owned the flume as to the intent with which the substitution was made was competent.

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by F. W. Wood and others against the Etiwanda Water Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Curtis & Curtis and J. S. Chapman, for appellants. Otis T. Gregg and E. R. Annable, for respondent.

VAN DYKE, J. On November, 1893, plaintiffs commenced an action in the superior court of San Bernardino county against the Etiwanda Water Company and the California Improvement Company for the purpose of obtaining a perpetual injunction restraining the defendants from maintaining a pipe across the lands of the plaintiffs, and from diverting water from the East Cañon, or Etiwanda creek, through that pipe; the plaintiffs being the owners, as tenants in common, of a considerable tract of land, through which said creek flowed. Upon the trial of said action the court found that the stream of water known as "East Cañon Creek" rises in the mountains above the lands of the plaintiffs, and, in its natural course, flows down through said lands; that in 1882 the Etiwanda Water Company constructed and used a flume in lieu of an open ditch which many years before had been used by said defendant's grantors for the diversion of said water, and that said flume was not an original diversion of water, but was a continuation of the diversion before made by the grantors of the defendant; that more than 20 years before the commencement of said action the defendant's grantors appropriated and diverted all the water of said Cañon creek at a point near where the said creek flows from the cañon for household and domestic use and irrigation upon lands then owned and possessed by them, and conveyed said water to their said lands for such use, and that ever since, and down to the commencement of the said action, said defendant and its grantors have diverted and used said water for said purposes, to the extent of 125 inches, measured under a 4-inch pressure, and all the water so diverted had been used for said purposes. During all of said time said defendant and its grantors were, and said defendant Etiwanda Water Company now is, the owner of the right so to divert and use the said water to the extent aforesaid. It is also found that defendant in June, 1892, commenced to lay pipe across the plaintiffs' lands, and that said pipe was substituted for said flume for a portion of the distance across said lands, and was constructed and laid substantially along the course of the old flume, which latter had been wholly disused, except the first portion thereof, and that said pipe line was so constructed without the consent and against the wishes of the plaintiffs, and was without right; and, as a conclusion of law, the court found that the plaintiffs were entitled to judgment perpetually restraining the Etiwanda Water Company, defendant, from maintaining or using the pipe line described in the pleadings and referred to in said findings, and, as a further conclusion of law, found that the defendant, the Etiwanda Water Company, was entitled to judgment that it is the owner of the right to maintain the dam and flume described in the pleadings and referred to in said findings of fact, and to divert the water of East Cañon creek to the extent of 125 inches, measured under a 4-inch pressure.

The plaintiffs in that action appealed to this court from the portion of the judgment wherein it was adjudged that the Etiwanda Water Company was the owner of the right to maintain the dam and flume referred to. The defendant, however, acquiesced in the findings and decree in the lower court, and at once proceeded to, and did, remove the pipe, and thereupon restored the flume, as originally constructed, before the appeal was taken on the part of the plaintiffs. In the opinion in this court on the appeal (Wood v. Etiwanda Water Company, 122 Cal. 160, 54 Pac. 729) it is said: "The defendant, by its failure to appeal, has acquiesced in the finding and judgment that the pipe line was constructed without right, and that it be perpetually enjoined from using it—a contingency that might have been anticipated by the defendant, and the question made as to its right to construct a flume to take its place. Besides, it may well be questioned whether there is any finding that will support that part of the judgment appealed from. The court found that the flume had been used from 1882 to 1892; that it was then 'abandoned' and destroyed, except a few feet near the dam; and unless it can be said, as a conclusion of law, that the flume, having once existed, and having been voluntarily destroyed and abandoned, may be rebuilt, and the servitude upon plaintiff's lands be recreated or renewed at defendant's will, there would seem to be no basis for the judgment appealed from. * * * The question of defendant's right to reconstruct the flume has been argued in the briefs, but, as the question was not raised upon the pleadings, and the judgment in that regard being outside of the issues, and apparently not litigated upon the trial, that part of the judgment appealed from should be reversed, with leave to both parties to amend or supplement the pleadings as they may be advised."

Instead of following the suggestion of this court in remanding the cause for further proceedings by way of amendments or supplemental pleadings, the plaintiffs in June, 1896, commenced another action, for the purpose of enjoining the defendant from constructing any flume or other conduit across the said lands of plaintiff, or any portion thereof, and from diverting the waters from said stream to conduct the same across the lands of the plaintiffs. The answer of the defendant, the Etiwanda Water Company, sets forth that in the year 1882 it had constructed an open flume, and by means of such flume and dam had diverted the waters of the creek; that said diversion had existed long prior to 1882, by defendant's grantors and predecessors in interest, and was not a new or original diversion by the defendant; that the flume had been constructed and used in lieu of an open ditch which many years before had been used by defendant's grantors and predecessors, and that the appropriation and use of the waters of the stream by the defendant and its grantors and predecessors in interest extended to and included the entire flow of the stream during the irrigation season of every year, and that the flume, as so constructed, was capable of carrying 125 inches of water, measured under a 4-inch pressure; that all the waters diverted by the defendant were actually used for a beneficial purpose during all said time. After the commencement of this present action, F. W. Wood, one of the plaintiffs, died; and by order of court Leona Wood, executrix of the will of F. W. Wood, deceased, was substituted in his place, and a supplemental complaint filed. In the answer to the supplemental complaint it is further alleged on behalf of the defendant that the use and substitution of the iron pipe for a portion of said flume was a temporary use and a temporary substitution only, and that the defendant never intended to abandon and never did abandon the right to maintain and use the said flume, or any part thereof, as the same had been constructed and maintained and used by it both prior and subsequent to the said temporary use of the iron pipe. The court finds substantially that the said defendant, after constructing the flume in 1882, as stated, had used the same at all times openly and notoriously and under a claim of right, and adversely to the entire world, and continuously to the present time, and that in the month of June, 1892, it had replaced about 1,200 feet in length of said flume with an iron pipe of sufficient capacity to continuously carry said 125 inches of water; that said iron pipe was constructed along the line of said flume so replaced by it, and was used in connection with the remainder of said flume for the conduct of said water continuously until during the month of November, 1896, at which time said iron pipe was taken up by defendant and replaced with said flume in the former line thereof, and on the line of said pipe, and that it ever since has been used continuously for the conduct of said 125 inches of water precisely as the same was used before said iron pipe was used; that the use and substitution of said iron pipe for a portion of said flume was a temporary use and a temporary substitution only; and that defendant never intended to abandon and never did abandon the right to maintain and use said flume, nor any part thereof, as the same had been constructed, maintained, and used by it both prior and subsequent to the said temporary use of the said iron pipe.

Judgment was entered upon the said findings in favor of the defendant, from which judgment, and also from the order denying plaintiff's motion for a new trial, the appeal herein is taken.

In appellants' brief one of the points made is that the court erred in admitting in evidence the question of abandonment of the flume. It will be seen, however, that this court on the former appeal held that the question of defendant's right to reconstruct the flume could not be determined on the pleadings as they then stood, and for that reason the case was remanded for further proceedings upon amended or supplemental pleadings, as the parties might be advised. The very question involved in the present case, therefore, is whether the defendant company had the right to restore the portion of the flume replaced by the iron pipe after being enjoined from using said iron pipe, and on this issue the pleadings in the present action properly present the case for decision; and the decision of the trial court, as already stated, is in favor of the defendant. The evidence, as well as the acts of the defendant, supports the findings of the court that the defendant never abandoned the right to convey and use the water as had been its custom for some 20 years prior thereto. The abandonment of an old or a dilapidated flume is altogether different from the abandonment of the right to divert and use water conveyed through such flume. The substantive right is the right of diversion and use of the water. The flume is a mere means of conveying the water. In McGuire v. Brown, 106 Cal. 672, 39 Pac. 1064, 30 L. R. A. 384, it is said: "But the plaintiff had the prior right to the use of the water to the extent of the appropriation made by his predecessors, Beekman and Crawford, through the old ditch, prior to the defendant's settlement, together with the right to maintain such ditch. Brown's claims as a homestead settler were subordinate to those interests, and his land was subject to a servitude for the support of the same. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Wells v. Mantes, 99 Cal. 583, 34 Pac. 324. It would be inflicting a severe penalty for the trespass committed by Crawford on the land of Brown, and the attempt to shift the location of the ditch, to hold that by that circumstance alone Crawford lost for himself and his successor, the plaintiff, all prior right to the flow of the water itself. He certainly did not intend to abandon his interest in the water." In Utt v. Frey, 106 Cal. 397, 39 Pac. 809, it is said: "The right which is acquired to the use of water by appropriation may be lost by abandonment. To abandon such right is to relinquish possession thereof without any present intention to repossess. To constitute such abandonment, there must be a concurrence of act and intent, viz., the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. Judson v. Malloy, 40 Cal. 299; Bell v. Bed Rock, etc., Co., 36 Cal. 214; Moon v. Rollins, 36 Cal. 333, 95 Am. Dec. 181; St. John v. Kidd, 26 Cal. 272; Richardson v. McNulty, 24 Cal. 345; Willson v. Cleaveland, 30 Cal. 192. The mere intention to abandon if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone, without an intention to abandon, be held to amount to an abandonment. Abandonment is a question of fact to be determined by a jury, or the court sitting as such."

Appellants' counsel also contend that the court erred in admitting the evidence as to the advice of defendant's attorney, Goodcell, in the matter, and also in overruling the objection to the testimony of the witness Gurley as to what advice said Goodcell gave, and also in overruling the objection to testimony of the witness Gurley as to whether the defendant intended to abandon the right to maintain a flume where the pipe line was. It is further claimed by appellants that the court erred in admitting over objections similar evidence by witnesses English and Scott on the part of the defendant. "The communication or advice of an attorney to his client may, however, be given in evidence by the consent of the client." Code Civ. Proc. § 1881, subd. 2. In this case the testimony of Attorney Goodcell was given at the instance of his client, the defendant.

The witnesses referred to in the objection of appellants' counsel were directors or officers of the defendant company, and their evidence was in reference to the action taken by the defendant in replacing a portion of the flume with an iron pipe, and why it was done, and it is said: "Whenever evidence of the motive or intent with which an act was done is relevant, direct testimony is admissible, although, of course, not conclusive evidence of such motive or intent." Am. & Eng. Encyc. of Law (2d Ed.) vol. 11, p. 507. For instance, in the testimony of the witness English, he says: "The flume was out of repair. In fact, it virtually had to be renewed. It had been repaired so often, it virtually had to be renewed; and it was just a question with the board whether we should renew it as it was before, * * * or to try if we could to work it with a pipe, and get the benefit of it in that respect, to have it unobstructed by the leaves falling, and branches and earth sometimes getting into it. Messrs. Goodcell and Leonard were then the attorneys for the company, and Goodcell was the counsel. I remember that he was consulted by the board in regard to the substitution of that pipe line." And on cross-examination English's answers to plaintiffs' counsel were as follows: "Q. You say you intended to rebuild that flume when you put in the pipe? A. Yes, sir; virtually rebuld it. Q. You intended to do so? A. One or the other. Q. What do you mean by 'one or the other'? A. What I mean is that we had to renew that flume in some shape. It was so out of repair that we had to renew it in some shape. It was absolutely necessary to do something even amounting to a renewal of the flume. Q. Well, now you determined to put in the pipe? A. Our engineer advised us it would be better, for the reasons I have stated, to put in the pipe. Q. I didn't ask you about the advice of the engineer. You did determine to put in the pipe? A. Yes, sir; to try the pipe. Q. You put it in? A. To try the pipe. Q. Now, in answer to further questions, you said it was not your intention to abandon that flume, but that you did intend to rebuild it, did you not? A. Well, I don't know whether you mean by that term to 'rebuild it' to rebuild it identically as it was before, or to restore it in some form. We found it necessary to restore it in some form. Q. Well, did you restore it in some form? A. We renewed it by putting in the pipe for the time being. Q. Well, now we have got the pipe in. Then you were asked if you didn't intend to reconstruct that flume, and, as I understand you, that you were one of them that never intended to abandon the flume, but did intend to reconstruct it? A. In case we were not allowed to use the pipe. Q. You didn't intend when you put that pipe there ever to remove that pipe unless you were compelled to, did you? A. Well, if we had found anything better, I think we would. Q. I am leaving that out of sight. When you put that pipe there, you put it there for the purpose of maintaining it there, didn't you? A. For the time being. Q. For how long a time being? A. Until we were disturbed or found something better." All the circumstances surrounding the case, as well as the direct evidence introduced, abundantly support the findings, and show that it was never the purpose or the intention on the part of the defendant corporation to abandon its right to the diversion and use of the water by means of the flume, should the iron pipe not be permitted to remain.

The judgment and order are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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147 Cal. 227

CARR v. SUPERIOR COURT OF MONTEREY COUNTY. (S. F. 4,338.)

(Supreme Court of California. June 21, 1905.)

WRIT OF PROHIBITION—APPEAL — ADEQUATE REMEDY.

Where it appears from a petition for a writ of prohibition to restrain a court from further proceeding in a cause that it has been submitted after hearing and the court has directed counsel to draw findings and the form of an interlocutory decree, an appeal from the decree, when entered, will afford an adequate remedy, and the writ must be denied.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, § 5.]

In Bank. Petition for writ of prohibition by Sterling D. Carr against the superior court of the county of Monterey. Writ denied.

John T. Williams, Jesse W. Bryan, and Williams, Bryan & Carr (J. H. Andresen, of counsel), for petitioner.

PER CURIAM. This is a petition for a writ of prohibition to restrain the superior court of Monterey county from further proceeding in a suit for partition of lands, of which it is contended that court has no jurisdiction. It appears from the petition that there has been a hearing and submission of the cause, and that the judge has directed counsel for the plaintiff to draw findings and the form of an interlocutory decree.

An appeal from such decree, when entered, will afford the defendant in the action, petitioner here, a plain, speedy, and adequate remedy for any injury it may occasion, and for that reason the writ of prohibition should be denied. If it was clear that the court was proceeding in excess of its jurisdiction, and that a trial involving great expense was yet to be gone through, it might be proper to grant the writ in order to save the parties the useless expense; but here all the expense of the trial has already been incurred, and to review the error and correct the excess of jurisdiction, if any there has been, an appeal is just as plain, speedy, adequate, and effective as prohibition.

Writ denied.

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147 Cal. 186

VON SCHROEDER v. SPRECKELS. (S. F. 3,382.)

(Supreme Court of California. June 20, 1905.)

1. APPEAL—ORDER GRANTING NEW TRIAL.

A general order granting a new trial will not be reversed unless it appears that the order itself was an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3860, 3862.]

2. SAME—REVERSAL—NOMINAL DAMAGES.

The rule that a case will not be reversed to allow the recovery of nominal damages applies only to cases arising ex contractu, and not to a suit for libel.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4553.]

Department 2. Appeal from Superior Court, Marin County; F. M. Angellotti, Judge.

Action by J. H. Von Schroeder against John D. Spreckels. There was verdict for defendant, and from an order granting a new trial he appeals. Affirmed.

E. F. Preston and D. M. Delmas, for appellant. Maguire & Gallagher (Peter F. Dunne, of counsel), for respondent.

PER CURIAM. This was an action to recover damages for libel. The cause was tried before a jury, which rendered a verdict for defendant, and plaintiff moved for a new trial. The court granted a new tiral, and from its order so made defendant appeals. The order of the court granting a new trial was general. It is well settled that this court will not reverse such an order unless it appears that the order itself was an abuse of discretion. Cole v. Wilcox, 99 Cal. 552, 34 Pac. 114; Brooks v. S. F., etc., 110 Cal. 178, 42 Pac. 570. It cannot be said in this case that any such abuse of discretion was shown. Appellant further contends that the gist of the libel was a charge of improper, immoral, and scandalous conduct upon the part of plaintiff, and that acts of this nature were sufficiently proved, so that if the justification was not absolutely as broad as the charge, still it was sufficient so that this court will hold, as matter of law, that at the utmost plaintiff could recover merely nominal damages, and that a new trial will not be ordered where nominal damages alone could be obtained after a rehearing. It may be true, as appellant says, that plaintiff will not recover more than nominal damages, but this court cannot say, as matter of law, that such must be the limit of recovery, if plaintiff recovers at all. The rule contended for has application to cases arising ex contractu (Hancock v. Hubbell, 71 Cal. 537, 12 Pac. 618; Kenyon v. Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75), and its application to cases of libel is distinctly denied (Lick v. Owen, 47 Cal. 252; Taylor v. Hearst, 107 Cal. 272, 40 Pac. 392).

The order appealed from is affirmed.

147 Cal. 245

KLEINCLAUS et al. v. DUTARD et al. (S. F. 3,857.)

(Supreme Court of California. June 26, 1905.)

1. Equity—Laches—Stale Demands.

Entirely independent of any statutory period of limitations, equity will not enforce stale demands where the complainant has inexcusably slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 204–209.]

2. Same—Express Trusts—Laches.

The defense of laches may be invoked in every class of cases, even against an alleged express trust.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 571.]

3. Same—Laches — Mode of Raising Defense.

The defense of laches may be raised by demurrer.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 498.]

4. Same—Pleading—Excuse of Delay.

A complaint seeking to enforce an express trust, which shows a great lapse of time without the assertion of any claim, and long-continued acquiescence by plaintiff in acts of the alleged trustee hostile to the claim, must state circumstances showing good faith and reasonable diligence on plaintiff's part, excusing the delay, or it will be presumed that such circumstances do not exist.

5. Same—Inexcusable Delay—Impossibility of Doing Justice.

The merits of a claim of the existence of an alleged express trust under which a son carried on his father's business for the benefit of the family would not be considered after an unexcused lapse of 35 years, when the son and many of the alleged beneficiaries were dead, where the son had conducted the business during that period without recognizing the interest of the alleged beneficiaries or rendering an account or paying any money to them, except in the support of his mother, and by his personal efforts and diligence had accumulated a large fortune from the small capital invested in the business by his father, and it would be impossible for the court to do justice between the parties even if the claim should be established.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Theklay Dutard Kleinclaus, administratrix, etc., and others, against Eliza Dutard and others, in which the administrator of the estate of Joaquina Dutard Labadie filed a cross-complaint. From a judgment for defendants, plaintiffs and cross-complainant appealed. Affirmed.

Knight & Heggerty and T. C. Coogan, for appellants. Bishop, Wheeler & Hoefler and Finlay Cook (William Rix, of counsel), for respondents.

ANGELLOTTI, J. This action was brought to obtain a decree establishing that all of the property possessed by Hyppolite Dutard at the time of his death was the property of the estates of his deceased father and mother, Bernard Dutard and Joaquina Dutard, held in trust by him for their heirs at law. The plaintiffs are a brother and sister of said Hyppolite Dutard, and the said sister as administratrix of the estates of the father and mother. The sister claims, as heir at law, to be the beneficial owner of an undivided one-fifth part of said property. The defendants are the executors of the will of said Hyppolite, his surviving wife, the administrator of the estate of Joaquina Dutard Labadie, a deceased sister, and the children of a deceased brother and another deceased sister. A demurrer was interposed to the second amended complaint by the representatives of the estate of Hyppolite and other defendants, and this was sustained, without leave to amend. The defendant administrator of the estate of Joaquina Labadie filed a cross-complaint, containing substantially similar allegations to those of the complaint, claiming an undivided one-twelfth of the property. A demurrer interposed by the other defendants to this cross-complaint was sustained. Judgment was thereupon entered in favor of the demurring defendants against plaintiffs and the administrator of the estate of Joaquina Labadie. From this judgment both the plaintiffs and the administrator of the estate of Joaquina Labadie appeal.

The allegations of the amended complaint present a most remarkable case. Substantially, and so far as is material here, the case is as follows, viz.: At the time of his death, October 13, 1865, the father, Bernard Dutard, was the owner of a small produce and commission business in San Francisco, the value of the same and the property thereof being $15,000, which was the community property of said Bernard and his wife, Joaquina. He died intestate. Upon the death of his father, Hyppolite, then a young man of the age of about 20 years, in accordance with the expressed wish of his father, assumed the control of said business. His father had requested him "to continue after his death to carry on and conduct the said business and manage the property thereof for his mother, sisters, brothers, and himself," and he had promised so to do. At the death of his father he promised and agreed with his mother, brothers, and sisters that he would, "during the life of his mother, and thereafter and as long as they would permit him, and until they should require him to give unto them their respective shares and interests therein, accept and take upon himself the said trust, take charge of, build up, and enlarge, carry on, conduct, and extend, the said business, and manage the property thereof in trust for them and himself in their respective shares under the law as heirs of his father." He so managed the business and the property thereof that at the death of his mother, in the year 1875, the same was of the value of $100,000. Upon the death of his mother he renewed his promises, and continued to manage the business and property, investing and reinvesting the proceeds, all apparently in his own name and as absolute owner, until his death, April 15, 1900, when he left an apparent estate of the value of $2,500,000, consisting of money, bonds, stocks, ships, accounts, and other personal property, exceeding in value $750,000, and many parcels of real property situate in the states of California, Oregon, and Washington. The whole of this property is alleged to be the proceeds of said business, enhanced by the care and management of Hyppolite during the 35 years, and to be the property of the beneficiaries of the trust which it is claimed was created when Hyppolite took and retained control of the business upon the promises stated. It was alleged that the mother, brothers, and sisters had great confidence and trust in him; that "he never denied or repudiated said trust or his said agreements and promises, but always kept and lived up to them"; that "he did always * * * from his father's death until his own death admit and acknowledge his said promises and agreements, and that he did receive and hold * * * and build up the said business" under said trust, and that all the property held by him was property held under said trust; and that he always promised to account and pay over the respective shares whenever the same were demanded. It was in terms alleged that no accounting was ever had, and that nothing was ever paid or delivered by Hyppolite to any of the beneficiaries, except that he did partially support his mother during her life. It is upon these allegations that the plaintiffs come into a court of equity after the death of the alleged trustee, and more than 35 years after the creation of the alleged trust, and seek to have it adjudged that the whole of this vast estate, which is necessarily almost exclusively the product of the personal work and business ability of Hyppolite, is trust property, the proceeds of the little commission business of the year 1865.

One of the grounds of demurrer was that it appeared on the face of the complaint that the cause of action therein set forth was barred by the laches of plaintiffs, and this ground of demurrer was held to be well taken. The plaintiffs here have invoked the aid of a court of equity, and are bound by the rules applicable to equitable proceedings. Following the maxim that equity aids the vigilant, and not those who slumber on their rights, it has been universally declared that only conscience, good faith, and reasonable diligence can call a court of equity into activity, and that, entirely independent of any statutory period of limitations, stale demands will not be aided where the claimant has slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof. Where such is the condition, the demand is, in a court of equity, barred by laches. As has often been said, there is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine. Each case as it arises must necessarily be determined by its own circumstances, or, as said by this court in Bell v. Hudson, 73 Cal. 285, 288, 14 Pac. 791, 2 Am. St. Rep. 791, "In other words, the question is addressed to the sound discretion of the chancellor in each case." Where the lapse of time in the assertion of the claim and the enforcement thereof, taken in connection with the circumstances disclosed, is such as to show inexcusable delay on the part of the claimant, considerations of public policy and the difficulty of doing entire justice obtain, and are often sufficient to warrant a court of equity in declining, upon the ground of laches, to commence an investigation. See, on defense of laches, Cahill v. Superior Court (Cal.) 78 Pac. 467, 469. The doctrine of laches may be invoked in every class of cases—even in the case of an alleged express trust. It may well be that the relation of trustee and cestui que trust may be so acknowledged to exist and to continue to exist as to prevent the application of the doctrine, but, as said by Story in this connection: "Where this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust." Story, Eq. Jur. § 1520a. See, also, Bell v. Hudson, 73 Cal. 285, 287, 288, 14 Pac. 791, 2 Am. St. Rep. 791; Seculovich v. Morton, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106; Taylor v. Blair, 14 Mo. 437, 440.

It is settled in this state by the two California cases last cited that the defense of laches may be raised by demurrer; the defense being, in substance, as said in one of the cases, that the bill does not show equity, or, in the language of our statute, that the complaint does not state facts sufficient to constitute a cause of action. It therefore devolves on one seeking the aid of a court of equity in a case of this character, where the complaint shows great lapse of time without the assertion of any claim, and long-continued acquiescence in acts hostile to the claim, to allege in his complaint the circumstances showing good faith and reasonable diligence on his part. The complaint will be construed most strongly against the pleader, and, if circumstances that might excuse the delay are not alleged, it will be presumed that they do not exist. See Bell v. Hudson, 73 Cal. 289, 14 Pac. 791, 2 Am. St. Rep. 791; Badger v. Badger, 69 U. S. 87, 95, 17 L. Ed. 836.

Plaintiffs here are compelled to rely entirely on the allegation to the effect that the alleged trust was never repudiated by Hyppolite, but was often acknowledged by him to them to continue to exist; and they invoke the doctrine that, so long as the rights of the cestui que trust are admitted, laches cannot be set up. These allegations constitute the only basis for a contention that this most remarkable claim was not long ago barred by laches. But in determining as to the sufficiency of this complaint, we are not bound by the bare allegations of acknowledgment by the alleged trustee. We must take the whole complaint together, and, so taken, it presents a case where every act of the alleged trustee was openly and notoriously hostile to the claim of plaintiffs. No such relation between the parties is evidenced by the complaint as would justify the plaintiffs in disregarding these acts and relying upon the mere words of Hyppolite. For 35 years Hyppolite dealt with all property acquired as absolutely his own. He carried on a produce and commission business in his own name. He invested and reinvested the profits thereof in his own name in all kinds of property, in several different states, accumulating a great fortune. He never by any act recognized any other person as having an interest therein. He kept no accounts with any of the alleged beneficiaries and rendered none to them. He paid not a cent from his revenues to any of them, except that, in the discharge of a filial duty, he maintained or assisted in maintaining his mother during her life. Four of the alleged original beneficiaries died many years ago, (the mother 25 years before Hyppolite, and a sister 24 years before, a brother 22 years before and a sister 15 years before), each leaving children entitled to succeed to their parents' property; but these changes brought forth no accounting, no payment of money or delivery of property, no change in the manner of dealing with the property. There is no contention that the acts of Hyppolite in relation to the property were not open and notorious, or that he was ever guilty of any fraudulent concealment or misrepresentation. All these things are inferable from the complaint, and such facts could not be disregarded by the alleged beneficiaries. They show a case where there was in fact no such acknowledgment of an existing trust as would excuse the enforcement of the claim for 35 years, and until after the death of the alleged trustee. They show also a case of acquiescence by the alleged beneficiaries under such circumstances as to practically compel the conclusion that their claim is without foundation in fact. According to the allegations of the complaint, the trust—the management of this business for their benefit—was to continue until they should demand their shares. It would hardly be contended that the object of such a trust was simply the accumulation of a fortune solely for the heirs of the beneficiaries. If the business belonged to them, they certainly were entitled to something from the profits thereof, which they might enjoy during their lives. It is incredible that plaintiffs should, if their claims be well founded, have refrained from seeking even a portion of the income of their heritage during all these years, and have made their first demand for anything, and their first attempt at enforcement, only after the lips of the alleged trustee had been sealed by death.

The circumstances of this case are such as to make it apparent that a court could not hope to do justice betwen these parties, were the trust relation clearly shown; and this constitutes another ground for the application of the doctrine of laches, for the difficulty is due entirely to the inexcusable delay. It was said by the learned judge of the trial court in sustaining the demurrers: "It is manifest that it would be impossible after the death of Hyppolite Dutard to do justice to the parties by attempting to ascertain what property was left by Bernard Dutard at the time of his decease, and tracing it in all its mutations and transformations down to the time of the death of Hyppolite Dutard. It might almost be said to shock the conscience of a chancellor that he should be asked to undertake such an investigation with any expectation of reaching a conclusion which would be just and equitable to all parties. The parties plaintiff here should have asserted what rights they claim in this property during Hyppolite Dutard's life. By reason of his death it has now become morally impossible for the court to do what it is asked to do by this complaint." In this we entirely concur.

Taken altogether, the case is clearly one where a court of equity is justified in refusing, on the ground of laches, to even enter upon an inquiry as to the merits of the claim. We have examined the cases cited by learned counsel, and find that, in such as involved the question of laches, the facts were so different from those in the case at bar as to render the cases inapplicable here.

What has been said in regard to the second amended complaint is equally applicable to the cross-complaint.

The conclusion we have reached upon this question renders it unnecessary to consider the other points made in support of the ruling of the court on the demurrers.

The trial court, in sustaining the demurrer to the second amended complaint, refused to allow leave to amend. Plaintiffs excepted to such refusal, and urge that the judgment should be reversed on account thereof. The record does not show in what manner they desired to amend—what change they proposed to make in their complaint—and there is nothing to indicate that they specified in the superior court the nature of the proposed amendment. Under these circumstances, we cannot say that the superior court abused its discretion in denying leave to amend. Dukes v. Kellogg, 127 Cal. 563, 565, 60 Pac. 44; Burling v. Newlands, 112 Cal. 476, 499, 44 Pac. 810; Martin v. Thompson, 62 Cal. 618.

The judgment is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; VAN DYKE, J.; McFARLAND, J.; HENSHAW, J.

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147 Cal. 253

In re DUTARD'S ESTATE. (S. F. 3,858.)

(Supreme Court of California. June 26, 1905.)

1. Administrators—Distribution—Absence of Debts.

A decree of distribution under Code Civ. Proc. § 1661, authorizing such a decree where the estate is but little indebted, and the share of the applicant for the decree may be allowed to him without loss to the creditors, cannot be disturbed on appeal where at the time of the presentation of the petition the time for filing claims had expired, and all allowed claims had been paid, with the exception of those of a certain claimant, which had made arrangements for the payment of its claims by the petitioning distributee, and had joined in the petition.

2. Same—Rejected Claims—Actions.

In an action upon a rejected claim against an estate, the claimant can recover only upon the cause of action set forth in the claim.

3. Same—Creditors—Who are.

One who claims that the estate left by a decedent was held by him in trust for claimant and others, and claims under the trust a definite proportion of the estate, and makes no claim that the trustee confused the trust funds with his own, so as to render them insusceptible of identification, is not a creditor of the decedent's estate, within the meaning of the property law, in such sense as to be required to present a claim as a creditor, or to be entitled to object to a distribution of the estate.

4. Same.

Nor does the fact that the claimant adds a claim for an accounting and settlement of the account of decedent as administrator of an estate of which claimant was also administratrix change the character of the claim so as to make the claimant a creditor, within the property law.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Hyppolite Dutard, deceased. From a decree of partial distribution, Theklay Dutard Kleinclaus, as administratrix, etc., and individually, and others, claimants, appeal. Affirmed.

Knight & Heggerty, for appellants. Bishop, Wheeler & Hoefler, Finlay Cook, J. M. Allen, and J. F. Bowie (William Rix, of counsel), for respondents.

ANGELLOTTI, J. This is an appeal from a decree of partial distribution, whereby certain ranch property situated in Santa Barbara county, with the live stock and other personal property thereon, all appraised at $163,881, was distributed to Eliza Dutard, the surviving wife and sole devisee and legatee of the deceased. The appellants are the same persons who were parties plaintiff in the case of Kleinclaus, etc., v. Dutard et al. (S. F. 3,857) 81 Pac. 516, in which the judgment of the superior court in favor of the defendants therein has been this day affirmed. Plaintiffs presented written objections to the granting of the petition, alleging that they were creditors of the estate who had duly presented claims for an amount which exceeded $2,500,000, that such claims had been rejected by the executors of the will of deceased, and that actions had been duly commenced thereon, which were still pending. They further alleged that there were unpaid allowed claims aggregating $400,000, that the estate was greatly indebted, and that no part of the estate could then be safely distributed. The superior court found that the estate is but little indebted, and that the said property might now be distributed without loss to the creditors of the estate. It further found that none of the appellants is a creditor of the estate of the deceased, or has any claim against the same, or had presented any claim, but that they simply claim certain property described in the inventory, adversely to the estate, and had presented their claims therefor within the time allowed for the presentation of claims against the deceased, and upon the rejection of their demands had commenced actions, which actions were still pending. The case of Kleinclaus, etc., v. Dutard et al. (S. F. 3,857) 81 Pac. 516, was one of such actions. Upon these findings, distribution was ordered, and delivery to the distributee ordered upon the giving of a bond, conditioned as provided by law, in the sum of $10,000.

At the time of the presentation of the petition, the time for presenting claims against the deceased had expired, and all allowed claims had been paid, with the exception of certain claims of the Bank of California. Said bank joined in the petition for partial distribution, and requested that distribution be made to Eliza Dutard in accordance therewith; an agreement having been entered into by Mrs. Dutard and said bank for the application of the proceeds of the said property, which was to be sold, to the payment of the claims of the bank. There were no other persons who claimed to be unpaid creditors, except the appellants. As already stated, the distributee, Eliza Dutard, was the sole devisee and legatee. It is therefore manifest that unless the claims presented by these appeals show them to be "creditors of the estate," and show an apparent indebtedness on the part of the estate, the conclusion of the superior court that the estate is but little indebted, and that distribution might be made without loss to the creditors of the estate, cannot be disturbed. The finding to this effect of facts essential to justify the court in making the decree (Code Civ. Proc. § 1661; Estate of Hale, 121 Cal. 125, 127, 53 Pac. 429) is, of course, entirely dependent on the finding that appellants are not creditors of the estate, for, if they are such for the amount specified in their so-called claims presented, it is apparent that it cannot be said that the estate is but little indebted.

An examination of the so-called claims of appellants shows that the alleged facts upon which they are based are substantially the same as the facts alleged in the amended complaint in Kleinclaus v. Dutard, supra, as the basis for a decree adjudging the property left by Hyppolite to be trust property. Upon these alleged facts, Theklay Dutard Kleinclaus claimed, first, as administratrix of her father's estate, the whole of the estate left by Hyppolite, or its value, alleged to be $2,500,000; second, as administratrix of her mother's estate, one-half of said estate, or its value, alleged to be $1,250,000; and third, in her own right, as an heir of her father and mother and a beneficiary of the alleged trust, an undivided one-fifth share of all of said property, or its value, alleged to be $500,000. Upon the same alleged facts Leonce Dutard claimed an undivided one-twelfth share, or its value, alleged to be $208,333. So far as these claimants are concerned, it is apparent that the claimants were not seeking to enforce any claim against property of the decedent. The claimants proceeded entirely upon the theory that the property held by Hyppolite Dutard in his lifetime, and by his legal representatives after his death, which was sought to be recovered, was in fact trust property, and did not belong to his estate at all. The claimants did not assume to stand in the character of creditors of the decedent, seeking to enforce a debt of the decedent against his property, but purely in the attitude of persons seeking to recover from the representatives of the estate specifically described property, upon the ground that it did not belong to the estate, but was in fact their own property. The fact that the claim in question not only asked for the property itself, but also, in the alternative, for its value, did not change their character or alter the position of the claimants.

It is well settled that one who claims as his own, adversely to an estate, specific property held and claimed by the estate, cannot be called a creditor of the estate, within the meaning of the probate law. The decisions are clear and conclusive upon the proposition that, where one seeks to recover from the representatives of an estate specific property alleged to have been held in trust by the decedent at the time of his death, he is not seeking payment of a claim from the assets of the estate, is not required to present a claim as a creditor, and is not a "creditor of the estate." His action is not founded upon a claim or demand against the estate. See Gunter v. Janes, 9 Cal. 643, 658; Myers v. Reinstein et al., 67 Cal. 89, 7 Pac. 192; Roach v. Caraffa, 85 Cal. 436, 443, 25 Pac. 22; Byrne v. McGrath, 130 Cal. 316, 62 Pac. 559, 80 Am. St. Rep. 127; Elizalde v. Elizalde, 137 Cal. 634, 642, 66 Pac. 369, 70 Pac. 861. This does not appear to be disputed by appellants, but they rely upon the rule stated in several of our decisions, to the effect that where the identical trust property, or its product in a new form, cannot be traced by the beneficiary into the estate and identified, the beneficiary must rely on the personal liability of the trustee, and, so relying, has only a claim against the estate. Lathrop v. Bampton, 31 Cal. 17, 23, 89 Am. Dec. 141; McGrath v. Carroll, 110 Cal. 79, 83, 42 Pac. 466; Byrne v. Byrne, 113 Cal. 294, 299, 45 Pac. 536; Orcutt v. Gould, 117 Cal. 315, 49 Pac. 183. We cannot perceive the applicability of this rule to the claims under consideration. We have already stated the character of these claims. Specifically described property was thereby claimed by the appellants as their own, and this was the whole of their claim. The property sought was absolutely and entirely identified—the whole of the estate, one undivided one-half of the estate, one undivided one-fifth thereof, and one undivided one-twelfth thereof. There was no intimation that the alleged trust property could not be traced and identified, but, as we have seen, the allegations were directly to the contrary. There was no pretense that the claimants appeared as general creditors seeking to enforce against the decedent's estate a personal liability of the decedent. In an action upon a rejected claim a claimant can recover only upon the cause of action set forth in that claim. Lichtenberg v. McGlynn, 105 Cal. 45, 47, 38 Pac. 541; McGrath v. Carroll, 110 Cal. 79, 83, 42 Pac. 466. There is a clear distinction between a demand for certain specific property on the ground that it is the property of the claimant held in trust by the decedent, and a claim of personal indebtedness on the part of the decedent, based upon the fact that he has so mingled the trust property with his own as to make it impossible for the beneficiary to follow and identify it. The latter may be a proper claim against the estate of the decedent, upon the ground that there has been a breach of the trust, and a personal liability has therefore arisen, while the former cannot possibly be such a claim. Elizalde v. Elizalde, supra. It is true, as said in McGrath v. Carroll, supra, that the claim of personal liability in such a case has its origin in the trust, and depends for its validity upon the legality and sufficiency of the trust. But it was not intended by the court in that case to hold, as intimated by appellants, that the nature of the demand is the same whether the claim be for the claimant's specific property adversely held by the estate, or for money alleged to be personally due the claimant from the decedent on account of the mingling of the trust property with his own so as to make it impossible to follow it. In the sense that the basis of the demand is the same, and that the claimant is seeking something on account of the trust, the nature of the demand is the same, and this is all that was meant by the language quoted from the opinion in that case; the question there under discussion being as to what the claim in such a case should indicate. But the remedy of the beneficiary in such a case is very different from that of the beneficiary who asks for his own property. As said in Byrne v. Byrne, 113 Cal. 294, 300, 45 Pac. 536, by the same justice who wrote the opinion in McGrath v. Carroll, supra, the beneficiaries who cannot trace their property "are relegated to the position of general credtors" of the estate. They must present their claims as such, showing a personal liability, and, unless they do this, cannot maintain an action based upon personal liability. A claim for certain specific property upon the ground that it is the property of the claimant, and not that of the estate, does not show any such personal liability.

One of the claims (that of Theklay Dutard Kleinclaus as administratrix of the estate of Joaquina Dutard) was not only for the undivided one-half of the property possessed by Hyppolite at the time of his death, but it was also stated therein that it was a claim for an accounting and settlement of his account as administrator of the same estate; it being alleged that letters of administration of the said estate had been issued to him on November 10, 1891, but that, although such letters had never been revoked, no further proceedings had ever been taken by him in the administration of said estate. This additional demand in no way changed the character of the claim, which upon its face showed that it was simply a demand for specific property alleged to have been held in trust by the decedent at the time of his death.

The conclusion of the superior court that the so-called claims presented did not show the claimants to be "creditors of the estate" was correct.

The decree appealed from is affirmed.

We concur: SHAW, J.; VAN DYKE, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

BEATTY, C. J. I concur. It would not always follow that a probate court, in passing upon an application for partial distribution, would be warranted in disregarding claims like those of appellants, simply because they did not constitute an indebtedness of the estate in a technical sense. The pendency of a suit to recover valuable estate inventoried as property of a decedent, upon the ground that he held it as trustee, or upon any tenable ground, and the possible success of such suit, would be an important consideration in any case where the loss of the property in litigation might result in a deficiency of assets to pay debts and expenses of administration. But no such case is presented by this record.

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147 Cal. 201

ANDERSON v. SEROPIAN et al. (S. F. 3,312.)*

(Supreme Court of California. June 21, 1905.)

1. MASTER AND SERVANT — DEFECTIVE MACHINERY—NOTICE—ASSUMPTION OF RISK.

Where an automatic feeding machine worked defectively, and plaintiff, removing the feeder, undertook to operate it by hand, whereupon defendant ordered him to proceed more rapidly with the work, on a promise that the defect would be remedied in a given time, plaintiff did not assume the risk of operating the machine in its defective condition with ordinary care and caution, unless the danger was so glaringly obvious that no prudent man would have undertaken it; and whether there was such obvious peril arising from the defect, and whether plaintiff understood or appreciated its existence, were questions for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 587, 610–624, 645, 650, 1083.]

2. PROMISE TO REPAIR.—DEFINITENESS.

Defendant's promise that the automatic feeder would be fixed as soon as plaintiff got far enough ahead with the material was not too indefinite and contingent to relieve plaintiff from the assumption of risk.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 638–640.]

3. SAME—FEAR OF INCREASED DANGER.

Where plaintiff continued the operation of a machine after defendant's promise to repair, a contention that the complaint was not made nor the promise given by reason of any fear by plaintiff of increased danger in the use of the defective machine, and that plaintiff was not induced to remain in defendant's employ by the promise to repair, cannot avail defendant where the fact that plaintiff did entertain such fear, and was induced by the promise to continue his employment, was fairly inferable from the evidence.

4. UNAUTHORIZED OPERATION.

Where defendant saw plaintiff operating the machine, and had his attention directed to the defect, and assured plaintiff it would be all right to so work it, and to go ahead, with the promise to remedy the defect, he cannot complain that plaintiff's manner of operating it was either unauthorized or improper.

5. DEFECTS EASILY REPAIRED — EFFECT ON PROMISE TO REPAIR.

Where plaintiff attempted to obtain a screw to remedy a defect in a stamping machine, and directed defendant's attention to the defective screw, and defendant made no suggestion as to where plaintiff could obtain one, only assuring him that the machine could be operated without it, he cannot claim that the promise to repair did not apply because the defect was of a kind easily repaired, requiring no mechanical skill.

6. PROXIMATE CAUSE.

In an action for injuries alleged to have been occasioned by a defective machine, whether the defect was the proximate cause of the injury was a question for the jury.

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*Rehearing denied July 21, 1905.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1016.]

7. Trial—Instructions—Matters of Fact.

An instruction referring to defects in a machine, which clearly had relation to "alleged defects," as employed previously therein, was not erroneous as a charge on a matter of fact.

8. Same—Construction—Reversal.

The instructions must be considered as a whole, and, if it appears that the jury were fairly and fully instructed on all the law applicable to the case, the judgment will not be reversed because the particular instructions taken alone may not have embodied all the law applicable.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 703–717.]

9. Same—Assumptions.

In an action for injuries alleged to have been occasioned by a defective machine, an instruction assuming that plaintiff adjusted the machine, stating that it was his duty to do so, and then submitting to the jury whether or not he could have done so, was properly refused.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 420–435.]

10. Evidence—Injured Hand—Admissibility.

Where it was claimed that plaintiff's hand was caught in a roller on the press he was feeding, and not in the portion containing the stencil, the preserved hand, showing a streak of ink along it, was admissible as showing that it had in fact passed under the stencil.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 677.]

Department 2. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by E. E. Anderson against J. M. Seropian and others. From a judgment for plaintiff and an order denying their motion for a new trial, defendants appeal. Affirmed.

L. L. Cory and M. B. Harris, for appellants. Henry Brickley and Smith & Ostrander, for respondent.

LORIGAN, J. This action was brought to recover damages for personal injuries sustained by plaintiff while in the employment of defendants. From a judgment in favor of plaintiff for $7,500, and an order denying their motion for a new trial, defendants appeal.

We epitomize the evidence, save where it is necessary to set it forth fully in order to properly understand some particular point urged by appellants relative to it.

At the time of the injury sustained by plaintiff, defendants were engaged in the city of Fresno in the business of packing raisins and other fruits, and in the conduct of such business were using machinery and other appliances operated by steam power. Plaintiff, a young man 22 years of age, was employed by defendants to operate a stamping machine or press for the purpose of stamping upon boards, to be used in the construction of boxes, letters, figures, and other characters. In this machine the stencil or plate was attached to a circular drum upon the press, which, as it revolved, impressed the figures from the stencil upon the board being printed. There was attached to the machine an automatic device called an "automatic feed," which worked back and forth in a slot upon the platform immediately in front of the roller, and which was attached to a clutch at the side, which clutch was caught by a small lug or projection upon a wheel, so that at every revolution of the roller the wheel would cause the small clutch attached to it to engage or strike the dog or lug, which would cause a small guide, working back and forth in the slot on the platform, to push the boards being printed under the roller. The plaintiff, when he went into the employment of defendants, was inexperienced in the operation of such a machine, except that he had previously run one for half a day at some other place. He had been operating this machine for defendants three days when he was injured. On the first day he operated the machine it worked fairly well, but on the second, owing to a defective screw, which served to fasten the clutch on the side in such a position as to engage the lug and operate the automatic feed, the latter would not work. The defect in the screw consisted of its having become so worn as to be constantly loosening, necessitating the stopping of the machine by plaintiff every few minutes to tighten it. He looked for another screw about the premises to replace it, but found none, and sent a young man for the same purpose, but he could not find any. The constant stopping of the machine to tighten the screw and insure an operation of the automatic feed retarded plaintiff's work, and he fell behind with it. It then suggested itself to him that he might clamp the automatic feed down, and have the type on the roller do the feeding. This he did by tightening the screw so that the clutch dropped down instead of remaining up, and clamping the guide on the automatic feed down permanently in the center of the table. Thereafter, as the roller came around, the first letter, which projected from the plate on the roller some quarter of an inch, would engage the board to be printed, and draw it through the press. In order to do this it was necessary also to move the guide on the automatic feed three or four inches nearer the rollers than when the automatic feed was working. This he did, and the result was that in guiding the board through the press it brought his hands that much nearer to the rollers. After plaintiff had clamped down the automatic feed, and was operating the machine without it, the foreman of defendants came to where he was working it, and plaintiff asked him to provide a screw for the clasp; that the one in the machine was worn out, and he could not work the automatic feed without a new one. This the foreman promised to get, but failed to do so. On the first day, when the automatic feed was working, it was feeding a board to the machine every revolution, as it was plaintiff's duty to make it do, but after he fastened it down plaintiff fed it by hand every other revolution, until the morning of the third day, when he commenced feeding it again every revolution, under the following circumstances: On the morning of that day George Seropian, one of the defendants, came to where plaintiff was operating the machine, and watched him working it. He then said to plaintiff (we quote from testimony of plaintiff): "'Anderson, you have got to work that faster. You cannot keep the box makers going at that rate.' At that time I was feeding it every other revolution just as he came in there, and he saw that I was feeding it every other revolution. He told me I would have to feed it every revolution to keep up with the box makers. I told him that I didn't like to, that I—some remarks about the machine being out of order —and then I told him about that screw on the feed that screw would work loose, the screw that held that catch on the table in an upright position, the one that was engaged by the catch on the roller. And he says: 'You will have to work that faster anyhow. Go ahead and work it. It will be all right. Go ahead, work it, and just as soon as you get far enough ahead with the material for the box makers to work on, why then we will fix the machine.' Then I went to work and fed it every revolution." That afternoon, while he was operating the machine and printing a board at every revolution, his right hand was caught between the stencil on the rollers and so badly injured as to necessitate amputation.

Upon this appeal the main question with reference to the evidence in the case is addressed to the effect of the promise made by George Seropian, one of the defendants, upon which the case of the plaintiff rests. It is not claimed that the plaintiff was negligent in operating the machine when the accident occurred, or negligent at all, excepting in so far as such negligence is asserted in the special points which appellants make in their discussion of the legal effect of the promise to repair made by appellants, or such as they claim arose from an improper use of the machine. With reference to these points it is insisted (1) that the promise to repair was too indefinite and contingent to relieve plaintiff from the assumption of risk; (2) that neither the complaint made to George Seropian about the operation of the machine, nor the promise given by him to repair it, was because of any fear on the part of plaintiff of any increased danger in the use of the defective machine, nor was plaintiff induced to remain in defendants' employment on account of such promise; (3) that the additional risk in the use of the machine because of the defect was occasioned by the unauthorized and improper use of the machine by plaintiff; (4) that the defect was one of such a kind as could have been easily repaired, requiring no mechanical skill, and should have been done by plaintiff, and the promise did not relieve him; (5) that, as the danger from the use of the defective machine was as obvious to plaintiff as to defendant, the assurance of defendant that at some future time the defect would be remedied did not absolve the plaintiff from the charge of contributory negligence in its continued use.

An orderly consideration of these points suggests that we discuss the last point first. Defendants there urge that, as the plaintiff had the same knowledge of the dangerous condition of the printing machine by reason of the defective screw as the defendants did, by continuing to operate it notwithstanding the promise he assumed the risk, and cannot hold the defendants responsible for his injuries. The general rule undoubtedly is that one who remains in the service of his employer after notice of a defect in the machine he is operating which increases the danger to which he is exposed assumes the risk which the defect increases. But there is a marked distinction in law between a case where the employé knows when he contracts to operate a machine that it is defective, or a defect is subsequently disclosed in its operation, to which he does not call the attention of his employer, but continues to operate it in its defective condition, and a case where the machine, when he takes charge of it, is in good condition, but a defect subsequently arises, which is called to the attention of the employer, and the employé continues to operate it under a promise that the defect will be remedied. In the latter case, by reason of the promise to repair, the general rule is qualified, and the employé is entitled to recover should injury result to him while the promise is in force. And while it is true that even in the latter case, if the machine upon becoming defective is so obviously dangerous that no prudent man would operate it, even in obedience to an order of the employer under a promise to repair it, and the promise under such circumstances will not protect the employé, still if under the promise, and in obedience to the direction of the employer, the employé continues in the operation of the defective machine, incurring risks which, while dangerous, are not so obviously so that they are attended with immediate injury, or where by the exercise of care and caution it is probable the machine may be safely operated, a different rule applies, and the employer will be liable for the injury. And whether the employé in continuing to operate a defective machine under promise to repair, and incurring the risks incident thereto, was acting as a reasonable and prudent man would act, is a question of fact to be determined by the jury. We find these principles of law quite uniformly sustained by the authorities, from some of which we quote, and to others make reference.

In Greene v. Minn. & St. Louis Ry. Co., 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785, the plaintiff, a locomotive engineer, had called the attention of the defendant to a defect in the engine which he was operating, and which defendant promised to repair at the end of the next trip. While making that trip the plaintiff was injured while operating the defective engine, and by reason of the defect. The court said, in discussing the effect of the promise given to him: "But it is now almost as equally well settled that if a servant who has knowledge of defects in the instrumentalities furnished for his use gives notice thereof to his employer, who thereupon promises that they shall be remedied, the servant may recover for an injury caused thereby, at least where the master requested him to continue in the service, and the injury occurred within the time at which the defects were promised to be remedied, and where the instrumentality, although defective, was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it. * * * Courts also differ as to the ground upon which this rule should be placed. Some place it upon the ground of policy and justice, upon a consideration of the unequal situation of master and servant; others upon the ground that in such cases the facts rebut the presumption of a waiver on the part of the servant; others upon the ground of a contract on the part of the employer, implied from the facts, that, if the servant continued in the service in the meantime and until the defects are remedied, the employer, and not the servant, will assume the risks. We will not attempt to determine which of these is the best or the most logical reason for the rule, except to say that the last seems to us very forcible; especially where there is a request to the servant to continue the service. It is sufficient for us that the rule has generally commended itself to the judicial mind, as it does to us, as founded in sound policy and common justice. If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant, and not at his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use under a promise thereafter to repair it."

In the case of Roux v. Blodgett & Davis Lumber Co. (Mich.) 48 N. W. 1092, 13 L. R. A. 728, 24 Am. St. Rep. 102, plaintiff was employed in defendant's sawmill upon a band saw. He was working close to adjacent dangerous machinery, which, prior to the accident, had been covered so as to prevent him from coming in contact with it. This covering had become broken, leaving the gearing exposed. Plaintiff called the attention of the mill superintendent to this condition of the gearing, and the latter promised to cover it that night. When plaintiff went to the mill in the morning he found it still exposed, and again called the attention of the superintendent to it, who promised to fix it at noon, telling plaintiff to take care of himself till noon, and it would then be fixed. Before noon the plaintiff's clothes caught upon the gearing, and his leg was crushed. On appeal from a judgment in his favor the court, quoting numerous authorities to the point (as did the court in the previous case we have referred to), said: "It is urged that plaintiff's knowledge of the exposed and dangerous condition of this gearing was equal to that of his employers, and that by continuing his work he assumed the risk. This rule is not applicable to circumstances of the present case. The risk to which plaintiff was exposed on the day of the injury was not one existing at the time of his engagement. It was a temporary peril. It did not arise until the day before the injury. * * * Plaintiff, acting as a prudent man should, had on the evening before, and again on the very morning of the accident, notified defendant of the fact that the gearing was exposed, and defendant had, in recognition of the danger, and of plaintiff's exposure thereto, promised to replace the covering, and instructed the plaintiff to continue his work until noon, when it should be done. There was no voluntary assumption of the risk on the part of the plaintiff. He proceeded under protest. It was postponed to suit defendant's convenience, and not that of the plaintiff."

In the case of Eureka Company v. Bass (Ala.) 8 South. 216, 60 Am. Rep. 152, it is said: "Where, however, the employé or servant, electing not to abandon his employment, gives notice of such defect in the appliance or instrumentalities used by him, and the employer promises to remedy the defect, the relationship of the contracting parties at once undergoes a change. The assurance of the employer that the danger shall be removed is an agreement by him that he will assume the risk incident to the danger for a reasonable time. It obviates the objection that the continuance of the servant in the service was an implied engagement by him to assume such risks pursuant to the original presumption upon his entering the service."

In Hillje v. Hettich (Tex. Civ. App.) 65 S. W. 491, the court speaks of the general rule and its limitation as follows: "The servant has a right to rely upon the assumption that the master has done his duty; but if he becomes apprised that he has not, and learns that the machinery is defective, the place unnecessarily dangerous, * * * he assumes the risk incident to the condition of affairs, unless he informs the master, and the latter promises to correct the evil. In this latter event, so long as he has reasonable grounds to expect and does expect that the master will fulfill his promise, he does not, by continuing the employment, assume the additional risk arising from the master's neglect. If he then be injured by reason of that neglect, he may recover, provided it be found that a man of ordinary prudence under all the circumstances would have encountered the danger by continuing in the employment."

Closing these quotations with one from Cooley in his work on Torts, § 555, that author says: "It has been often and very justly remarked that a man may decline any exceptionally dangerous employment; but if he voluntarily engages in it he should not complain because it is dangerous. Nevertheless, where one has entered upon the employment, and assumed the incidental risks, it is not reasonable to hold that other risks which he is directed by the master to assume are to be left to rest upon his shoulders merely because he did not take upon himself the responsibility of throwing up the employment instead of obeying the order. Many considerations might reasonably induce the servant to hesitate under such circumstances. In many cases the consequences might be very serious should he refuse to obey a lawful command of the master; and any command may not be clearly and manifestly unlawful which directs the doing of nothing beyond the general scope of the business. The servant who refused to obey must consequently expect to take upon himself the burden of showing a sufficient cause for the refusal. However clear the case might be, it is not easy to make a showing satisfactory to third parties, who would naturally assume that the order was given in good faith, and that the master understood better than another the risks to be encountered in his business. The servant also, it may reasonably be assumed, would to some extent have his fears allayed by the commands of the master, whose duty it would be not to send him into danger, and who might therefore be supposed to know, when he gave the command, that the dangers were not such or so great as the servant had apprehended."

These cases, from which quotations have been taken, are but a few among the many sustaining the qualification to the general rule. The point does not seem to have been heretofore presented to this court for consideration; at least our attention is called to no case on the subject. It has, however, previously arisen in other jurisdictions, and many authorities will be found referred to in the cases from which we have taken the foregoing excerpts, which support the qualification, and to these may be added: Ill. Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; Patterson v. Ry. Co., 76 Pa. 389, 18 Am. Rep. 412; Hawley v. Northern Cen. Ry. Co., 82 N. Y. 370; McFarlan Carriage Co. v. Potter, 153 Ind. 107, 53 N. E. 465; Schlitz v. Pabst Brewing Co., 57 Minn. 303, 59 N. W. 188; Hough v. Ry. Co., 100 U. S. 213, 25 L. Ed. 612; Conroy v. Vulcan Iron Works, 62 Mo. 35; Boyd v. Blumenthal (Del. Sup.) 52 Atl. 330; Barney, etc., v. Clark, 112 Fed. 921, 50 C. C. A. 616; Rice v. Eureka Paper Co. (N. Y.) 66 N. E. 979, 62 L. R. A. 611.

Applying these principles of law to the case at bar (unless the other points made by defendants are tenable), it is clear that by ordering the plaintiff to proceed more rapidly with the work by feeding a board every revolution, upon a promise that the defect in the machine would be remedied within a given time, the defendants assumed the risk of any injury to the plaintiff which might accrue while so operating it in its defective condition with ordinary care and caution, unless the danger to be incurred therefrom was so glaringly obvious that no prudent man would have undertaken it even under the direction and promise of the defendants. On this latter proposition it was for the jury to determine whether the defect was of such a character that no man of ordinary prudence and intelligence would have operated the machine as defendants directed.

It cannot be said, as matter of law, that plaintiff's knowledge of the defect was conclusive evidence of negligence on his part. It was not only necessary for the defendants to show (because the burden of proof was on them to show contributory negligence) that plaintiff had knowledge of the defect, but also that in obeying the order of defendants to operate the machine more rapidly in order to push the work ahead, even under the assurance that it would work all right notwithstanding the defect, the plaintiff appreciated and understood that he was incurring an obvious peril which no prudent man would hazard. Whether there was such obvious peril arising from the defect, and whether the plaintiff understood or appreciated its existence, was a question which, under the circumstances of the case, was properly left to the jury, and their finding upon the subject in favor of plaintiff is conclusive.

We will now take up the other points made by appellant, addressed to the matter of the promise to repair. It is insisted that this promise was too indefinite and contingent to relieve plaintiff from the assumption of risk; that the promise was to repair at an indefinite future time when sufficient boards were stamped to keep the box makers busy while said repairs were being made. But in taking a reasonable view of the promise it must be presumed (as was said in McFarlan Carriage Co. v. Potter, 153 Ind. 113, 53 N. E. 465) that both parties knew the time necessary, and that the promise was made and acted upon with special reference to the time required. In the case at bar the accident happened on the same day that the promise was made, and while the plaintiff was operating the machine in an endeavor to keep up with the box makers, as ordered by the defendants. It is well settled that when the injury occurs within the time at which the defect was promised to be repaired the employer is liable. McFarlan Carriage Co. v. Potter, supra; Eureka Paper Co. v. Bass, supra; Rice v. Eureka Paper Co. (N. Y.) 66 N. E. 981, 62 L. R. A. 611; Hough v. Ry. Co., supra; Greene v. Minn. & St. L. Ry. Co., supra; Roux v. Blodgett, etc., supra; Barney, etc., v. Clark, supra; Westville Coal Co. v. Wood, 96 Ill. App. 616; and cases referred to in these authorities.

As to defendants' contention that the complaint was not made, nor the promise given, by reason of any fear on the part of plaintiff of any increased danger in the use of the defective machine, and that plaintiff was not induced to remain in defendants' employ by the promise to repair. While it is true that the plaintiff does not testify explicitly to that effect, yet these facts may be fairly inferable from his testimony, and the jury, to whom was committed the determination of that question of fact, were warranted in so finding. In Labatt on Master and Servant, § 421, it is said: "When complaining of defective instrumentalities or machinery, it is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defects be remedied or repaired. It is sufficient if, from the circumstances of the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise." In Rothenberger v. N. W. Con. Milling Co., 57 Minn. 461, 59 N. W. 531, the court uses this language: "It is true, that the plaintiff when complaining of the gearing into which his hand was afterward drawn, did not notify defendants' head millwright or foreman that, unless covering were put upon the exposed and dangerous machinery, he should quit defendants' employ, nor did he say in so many words that he apprehended danger to himself; but positive assertions and statements of this character are not absolutely necessary. According to the best-considered cases the real question to be determined is whether, under the circumstances as they appear in each case, the master had a right to believe, and did believe, that the servant intended to waive his objection to the defect of which he has complained. This is a question of fact, not of law, and consequently for the jury; at least if not entirely free from doubt." Manufacturing Co. v. Morrissey (Ohio) 48 Am. Rep. 669.

On the point that the additional risk in the use of the machine because of the alleged defect was occasioned by the unauthorized and improper use of the machine by plaintiff, and the further point that the defect was of a kind easily repaired, requiring no mechanical skill, and therefore that the promise to repair did not apply, but little comment is necessary. As to the manner in which plaintiff was using the machine, whatever the law might be under other circumstances, we are satisfied that in the case at bar the circumstances are such that the appellants are precluded from raising the point. The evidence in the case shows that the defendants knew of the defect, and knew that an employé of theirs had previously worked the press in exactly the same manner plaintiff was working it when the defendant George Seropian came up. The latter saw the plaintiff was operating it with the automatic feed clamped down, and his attention was called to the defect in the screw, which prevented its being used otherwise. With this knowledge and observation of the method by which plaintiff was operating it, he assured plaintiff it would be "all right" to so work it, and "to go ahead," with the promise to remedy the defect later. Under these circumstances it does not lie in the mouth of appellants to say that plaintiff's manner of operating this machine, of which they had knowledge, which they ordered him to continue to operate in the manner he was doing, and which they assured him could be done with safety and security, was either unauthorized or improper.

As to the point that the defect was easily repaired, and required no mechanical skill to do so. The position of appellants in this point is that as to defects attendant upon the ordinary operation of machinery—the loosening of bolts, wearing of screws, dulling of knives, and kindred matters—defects which occur in the daily operating of machinery and consequent upon its use, and which are not of a permanent character, and require no mechanical skill to remedy, that it is the duty of the employé to remedy them, and that this duty was cast upon the plaintiff as to the defective screw. But we do not perceive the relevancy of this point when considered with relation to the promise of defendants and the order given by them to plaintiff, and what we have said concerning appellants' claim of the improper use of the machinery would seem to apply here. In any event, the rule contended for has application only when proper and suitable materials are furnished and at hand to remedy these ordinary defects. The evidence in the case at bar shows that when plaintiff discovered the defect in the screw he sent a young man to get one, and himself made similar search without being able to find one. He asked the foreman to get one, but he failed to supply it. He called the attention of defendant George Seropian to the defective screw, but he made no suggestion as to where plaintiff could obtain one, only assuring him that the machine could be operated without it; and, in addition to this, it is quite clear from other evidence in the case that the kind of screw required was not in stock in the city of Fresno. It is clear from these facts that, if the rule had any application in the case at bar, it was the fault of the defendants, and not that of plaintiff, that the latter did not comply with it.

This disposes of the five points above mentioned, which, however, are not the only ones urged for reversal. It is claimed that it is neither alleged nor proved that the alleged defect was the direct or proximate cause of the injury. There is nothing in this point. The complaint sets forth facts showing negligence on the part of defendants by reason of said defect. Whether the defect was the proximate cause of the injury or not was a question of fact to be determined by the jury, and there was sufficient evidence in the case to support their finding that it was.

Two instructions given by the court, numbered 11 and 12, are complained of. It is unnecessary to set them forth. The points made are that in the first the court instructed the jury on a matter of fact, and in both of them instructed the jury, in effect, that plaintiff might recover whether the defect was or was not the proximate cause of the injury. There is no merit in the first point, which assumes that the court in the first instruction complained of stated to the jury as a fact that the condition of the machine was defective. The reference by the court at the end of the instruction to "defects" in the machine clearly had relation to the "alleged defects" as the term was properly employed by the court in previous parts of the instruction, and it cannot be reasonably said, when the instruction is examined, that the court was using it or that the jury understood it in any other way. Upon the other point, as to both instructions, in considering the validity of objections to particular instructions, the instructions must be considered as a whole, and, so considered, if it appears therefrom that the jury were fairly and fully instructed on all the law applicable to the facts in the case, the judgment will not be reversed simply because the particular instructions, taken alone, may not have embodied all the law applicable. It has been repeatedly said by this court that the lower court cannot be required to state all the law applicable to a case in a single instruction. A reading of all the instructions given in the case at bar together shows that the jury were repeatedly instructed, plainly and clearly, that, in order to enable plaintiff to recover, they must find that the alleged defect was the proximate cause of the injury. The instructions, taken in their entirety, satisfy the general rule, and leave no room for the objections which appellants raise to the particular instructions considered alone.

There was no error in refusing instruction numbered 26 asked by appellants. The use of the word "adjust" therein (and the matter of the adjustment of the machine was all that was dealt with in this instruction) was misleading and improper. To "adjust" is to "place in order." The important matter before the jury was that the machine was out of order, and defective, and not adjusted. The instruction, however, assumed that plaintiff adjusted the machine, then states that it was his duty to do so, and ends by submitting to the jury whether he could have done so or not. Besides, the instruction asked for a verdict in favor of defendants on matters pertaining to the adjustment alone of the machine, ignoring entirely any consideration of the promise of defendants, and other important facts in the case.

There is one point made as to the admission of evidence. Over objection of appellants the court allowed in evidence a glass jar containing the amputated hand preserved in some fluid. While it was admitted by appellants during the trial and before the offer that the hand had been amputated, it was claimed by them that it had been caught at the edge of the roller on the press, and not in that portion containing the stencil. The preserved hand, however, showed a streak of ink along it, and was admissible as tending to show that it had in fact passed under the stencil.

There are no other points in the case properly presented to us for consideration, and, finding no error warranting a reversal, the judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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147 Cal. 218

COONAN v. LOEWENTHAL. (S. F. 3,363.)

(Supreme Court of California. June 21, 1905.)

1. Judgment—Set-Off—Motions.

Courts, in the exercise of the general jurisdiction which they possess over their judgments and suitors, may proceed on motion to offset judgments rendered therein.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1669–1677.]

2. Same — Order of Set-Off — Findings—Presumptions.

A wife, to be protected under an assignment of a judgment in favor of her husband, as against a set-off claimed by the judgment debtor, must be both a purchaser for value and without notice; and where the evidence warranted a finding against her on the latter ground, it must be presumed, in support of the order directing the set-off, that the court so found.

3. Same—Assignment of Judgment—Effect on Right of Set-Off.

Where a wife took an assignment of a judgment in favor of her husband, with knowledge that the judgment debtor was a surety for her husband on certain notes, and his liability as surety was existing when the assignment was taken, and the husband's insolvency made it certain that the judgment debtor, as surety, would have to pay the notes, an equitable right of set-off against the judgment obtained by the husband existed at the time it was obtained, and was not affected by the assignment.

4. Same — Mortgage—Indemnifying Judgment Debtor—Effect on Set-Off.

Mortgages executed by the husband to indemnify the judgment debtor as surety on the notes, did not affect the general right of equitable set-off, as their only effect was to make it uncertain how much of a claim the judgment debtor, as surety, would have against the husband, after the application of the securities towards canceling the indebtedness.

Department 2. Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by J. F. Coonan against J. Loewenthal. From an order setting off certain judgments against each other pro tanto, Mary Coonan, assignee of J. F. Coonan, appeals. Affirmed.

See 67 Pac. 324.

J. H. G. Weaver and Henry L. Ford, for appellant. Pierce E. Ryan and J. W. Turner, for respondent.

LORIGAN, J. This is an appeal taken by Mary Coonan from an order setting off certain judgments against each other pro tanto. The validity of the order is presented under this state of facts: On May 31, 1896, plaintiff, J. F. Coonan, brought an action against Loewenthal to recover something over $7,000, alleged to be due plaintiff from defendant for professional services rendered by plaintiff as attorney at law, and on August 27, 1897, plaintiff obtained a judgment for $5,000 and costs. This judgment plaintiff, on the same day of its entry, assigned to his wife, the appellant, Mary Coonan, the defendant having actual notice of the assignment to her at the time it was made. At the date of such assignment plaintiff Coonan was insolvent, and at the time of the making of the order herein appealed from still remained so. The defendant appealed from the judgment of August 27, 1897, and on July 18, 1900, it was affirmed by this court. So much as to the judgment recovered by plaintiff against defendant.

Now as to the judgment recovered by defendant against plaintiff. It appears that between September 1, 1892, and March 11, 1895, Loewenthal became surety for J. F. Coonan upon several promissory notes, payable within one year after date, the proceeds of which were received by Coonan for his individual use and benefit, and to secure Loewenthal against loss by reason of his said suretyship and to insure further indorsements said Coonan executed and delivered to him four mortgages ranging in date from March 8, 1890, to May 10, 1894, which were duly recorded. On August 28, 1897, the day following the judgment rendered against him in favor of Coonan, the said notes being due and said Coonan having failed to pay any of them, after demand made on him, and being insolvent, said Loewenthal paid and took up all said several notes, and brought an action against Coonan to foreclose the several mortgages given as security to protect him against loss from these payments. A decree of foreclosure and sale in said action was duly entered on January 20, 1899, for $8,772.65 in favor of Loewenthal, and, the mortgaged property having been sold under an order of sale, a deficiency judgment in his favor was docketed against said J. F. Coonan on June 26, 1899, for the sum of $6,599.20. An appeal was taken from the decree of foreclosure, and the judgment modified and affirmed by this court February 20, 1902. Previous thereto, and on August 21, 1900, Loewenthal served upon said J. F. Coonan and Mary Coonan, the appellant here, notice of an application to be made to the superior court of Humboldt county, in which both said judgments were rendered, for an order that the judgment for $5,000 entered in the suit of Coonan against Loewenthal in favor of Coonan on August 27, 1897, be set off pro tanto against the deficiency judgment entered in the suit of Loewenthal against Coonan, in favor of Loewenthal, on June 26, 1899, for $6,599.20. But it appearing that by reason of the appeal taken in the case of Loewenthal against Coonan the judgment in that case had not become final, the superior court, instead of acting upon the motion, properly ordered it to be retained until such judgment should become final. Thereafter, such judgment becoming final, said motion was renewed. Upon the hearing thereof Mary Coonan, the appellant, objected to the jurisdiction of the court to entertain the motion, which was overruled, and upon the merits, in addition to other evidence, affidavits were presented upon both sides, raising an issue as to whether the appellant was a purchaser and assignee of the judgment recovered by her husband against Loewenthal for a valuable consideration, and without notice of any right of set-off or other defense existing in favor of Loewenthal at the time of the assignment. The court, upon the showing, subsequently entered an order in favor of Loewenthal, directing that the amount of the judgment in Coonan against Loewenthal, calculated to date, be credited upon the deficiency judgment docketed in Loewenthal against Coonan, and that the former judgment be satisfied of record. It is from this order that the assignee, Mary Coonan, appeals.

It is insisted here, as it was on the hearing below, that the superior court had no jurisdiction to entertain the application to set off these judgments against each other on motion; that a separate action should have been instituted against appellant for that purpose. But the authorities are against appellant on this point. In at least two decisions of this court the jurisdiction of the lower court to proceed on motion to offset judgments has been expressly sustained, and the practice which has been followed here is there sanctioned and approved. The power to proceed by motion rests upon the general jurisdiction which courts possess over their judgments and their suitors. Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76; Haskins v. Jordan, 123 Cal. 160, 55 Pac. 786.

Counsel for appellant make their further points on this appeal on the assumption that appellant was a purchaser for value of the judgment in favor of her husband, and took his assignment without notice of respondent's alleged right of set-off. But whether she was such purchaser, and took without notice, was an issue in the lower court, to which evidence was addressed. The affidavit of J. F. Coonan, which furnishes the only evidence as to the consideration for the assignment, stated that it was made in payment of a pre-existing indebtedness consisting of two sums of money aggregating some $2,000, which he had borrowed from the appellant in the years 1883 and 1893. It does not appear that this indebtedness was evidenced by any note, or that any demand for payment was ever made, and it will be observed that it was outlawed many times over when the assignment was given. These facts, when taken into consideration with other circumstances surrounding the transaction, might well raise a question as to whether there ever was in fact an indebtedness, as such, existing between the appellant and her husband, sufficient to support the assignment and defeat the right of respondent, as a creditor of J. F. Coonan, to a set-off. But, without further discussing this matter of consideration for the assignment, there was, as we say, also an issue as to whether the appellant did not take the assignment with notice. Upon this issue, while it is contended by respondent that the evidence was, in legal effect, one way, and in support of his claim that she took with such notice, it was at least conflicting, and in support of the order of the lower court directing the set-off it must be assumed that, if the court did not find that appellant was not a purchaser for value, it at least found she took the assignment with notice of defendant's right of set-off. In order that appellant might be protected under the assignment against respondent's claim, it was at least necessary that she be both a purchaser for value and without notice; and as the evidence warranted the court in finding against her at least upon the latter point, it must be presumed, in support of the order directing the set-off, that it did so. This being true, her assignment did not affect the right of respondent to insist upon a set-off against the judgment obtained against him by her assignor, J. F. Coonan. Porter et al. v. Liscom, supra.

It is, it is true, insisted by respondent that, even if appellant were a purchaser for value and in good faith, nevertheless she took the assignment burdened with the right of respondent to assert his claim of set-off. As, however, it must be assumed in support of the order that she at least took with notice, we are not called upon to discuss a proposition which is not necessarily involved in the consideration of the appeal, or essential to its disposition. As, then, the effect of the order of the lower court was to find that appellant took with notice of respondent's rights and in subordination to them, further consideration of this appeal would be unnecessary, if it were not for the claim of appellant that at the time of the assignment to her there existed no right of set-off in favor of respondent. In this regard it is insisted that no such right existed, because at the time of the assignment the respondent had not actually paid the money due upon the notes for which he had become the surety of J. F. Coonan, and, further, because respondent was protected in his suretyship by the mortgages given him by J. F. Coonan, and no personal liability existed between them, or could exist, until, by foreclosure of said mortgages, it should be ascertained whether the property mortgaged was sufficient security for the amount involved. We do not think this position of appellants is maintainable. The fact that Loewenthal had not actually paid the notes at the time of the assignment to appellant is not controlling. While Loewenthal's demand against Coonan had not accrued because the notes had not been actually paid, still the contracts upon which Loewenthal's liability rested for such payment were then in existence. The notes upon which he was surety were overdue, unpaid by Coonan, and the latter was insolvent. Under these circumstances, whatever the rule at law may be, in equity the right of set-off is recognized as existing. The insolvency of a debtor is one of the principal grounds upon which the intervention of a court of equity to grant an equitable set-off rests, and when such insolvency exists a court of equity will allow the set-off notwithstanding the assignment, when a court of law would not, and in cases where, though the right to a set-off had not actually accrued at the time of the assignment, yet a liability then existed under which a right of set-off against an insolvent debtor subsequently accrues. Whitehead v. Jessup, 7 Colo. App. 460, 43 Pac. 1042; Warner v. Whittaker, 6 Mich. 136, 72 Am. Dec. 65; Nashville Trust Co. v. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710; Wood v. Steele, 65 Ala. 439; Krause v. Beitel (Pa.) 23 Am. Dec. 116; Central A. Co. v. Buchanan, 90 Fed. 461, 33 C. C. A. 598; Ellis v. Kerr (Tex. Civ. App.) 23 S. W. 1050; North Chicago Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565; Mattingly v. Sutton, 19 W. Va. 19. We make no quotations from these authorities, because in the case of St. Louis National Bank v. Gay, 101 Cal. 290, 35 Pac. 876, the doctrine which they support is in principle sustained—that the existence at the time of the assignment of the liability to pay, upon the part of the surety, was sufficient to sustain his right to a set-off notwithstanding the assignment, where payments were made subsequent thereto by virtue of that liability, and an unsatisfied demand for reimbursement existed in his favor when his right of set-off was sought to be enforced. It is there decided that the maker of nonnegotiable notes which had been assigned by the payee to a third party might set off against them the note of the payee which he had purchased before the date of the assignment, and that it was of no moment that the note sought to be set off was not due when the assignment was taken, if it was due at the commencement of the action in which it was asserted as a set-off. The proposition involved in that case, as in the case at bar, was whether the assignee took subject to a right of set-off, and it was there determined that he did, and that the fact relied on that the indebtedness was not due when the assignment was made was of no importance. In that case, the thing itself which fixed the liability of the plaintiff therein—the note, a chose in action—was existing at the time of the assignment, and it was sufficient to entitle it to be enforced as a set-off against the assignee that it was due when the action in which it was asserted as a set-off was commenced, although not due at the date of the assignment. In the case at bar the liability of Loewenthal upon his contract of suretyship for Coonan on the notes was existing at the time the assignment to appellant was made, and, as he subsequently paid the notes under it, his claim against Coonan had fully accrued at the time he sought to have set off pro tanto the judgment in Coonan against Loewenthal against the deficiency judgment which he had obtained against Coonan, and which represented Coonan's indebtedness to him under the liability existing at the date of the assignment.

We are satisfied that in principle the doctrine announced in the case referred to should be applied in the case at bar. But the natural equities in the present case also call for the application of that rule. The appellant took his assignment of the judgment with knowledge that Loewenthal was surety for her husband upon these notes. His liability as surety was an existing one when the assignment was taken by her, and the insolvency of her husband at that time and prior thereto made it as certain that Loewenthal, as surety, would have to pay the indebtedness represented by the notes, as it was certain therefrom that her husband could not do so. By reason of the insolvency of Coonan his liability to his surety, Loewenthal, became as certain and definite as if payment of the notes had actually been made by the latter; and as Coonan, at the time he obtained the judgment against Loewenthal, was insolvent, the latter, by reason of the fact that he would have certainly to pay as surety the indebtedness of Coonan, was entitled to retain any money due from him to Coonan as indemnity against that liability; and he could not be deprived of that right by Coonan's assignment of the judgment, the enforcement of which by the assignee would deprive him of the indemnity fund. This right of Loewenthal to retain, as an indemnity fund, the money due Coonan under his judgment sprung from the fact of the insolvency of Coonan at the time of the rendition of the judgment in his favor and at the time the assignment was made, and existed by virtue of the liability of Loewenthal as surety for him, and not upon whether actual payment of the notes for which he was such surety had been made by Loewenthal or not. And this right could not be affected by the assignment of appellant. If it could, then a surety, under such circumstances, would be entirely without remedy, when it is obvious that the plainest principles of justice are in his favor. Coonan himself, being insolvent, could not have enforced his judgment against Loewenthal in face of the liability of the latter as his surety on these notes, existing when such judgment was obtained; and appellant, as assignee, could stand in no better position than her assignor. In harmony with the rule as declared in the authorities we have cited, and with the principle announced in National Bank v. Gay, we are satisfied that the facts in the case at bar show that the right of set-off existed in favor of Loewenthal, under his contract of suretyship, when the assignment of the judgment in favor of Coonan was made by him to appellant; that, if the simple fact of the existence of Loewenthal's liability as a surety at the time of the judgment obtained by Coonan had not secured that right to him notwithstanding he had not then paid the notes, still the existence of that liability, the relationship between the parties (principal and surety), the fact that Coonan was insolvent when the judgment was obtained by him and when assigned, afforded sufficient ground to warrant the lower court in holding that an equitable right of set-off against the judgment obtained by Coonan existed at the time it was obtained, and was not affected by that assignment. This equitable right of set-off existing between the parties at the time of the rendition of the judgment in favor of Coonan clung to that judgment and the assignee took it subject thereto.

Neither did the mortgages given by Coonan to indemnify Loewenthal affect this general right of equitable set-off. The only effect of the mortgages was to make it uncertain how much of a claim Loewenthal would have against Coonan after the application of the securities towards canceling the indebtedness which would be represented through payment of these notes by Loewenthal under his general liability as surety. This could only be definitely ascertained after the security represented by the mortgages had been exhausted toward such payment. Loewenthal, having paid the notes upon which he was surety, foreclosed the mortgages, and applied the proceeds to the liquidation of his claim against Coonan as far as they would go, leaving a deficiency judgment in his favor. At the time the motion to set off was made, and when it was granted, the mortgage security having been exhausted, the amount of set-off which Loewenthal was entitled to claim against the Coonan judgment had been determined by the deficiency judgment in his favor, and the only question before the court then was the right to set off judgment against judgment.

There is nothing in the case of McKean v. German Am. Sav. Bank, 118 Cal. 334, 50 Pac. 656, conflicting with these views. That case involved the right of the holder of a debt secured by mortgage to apply in reduction or cancellation of the debt a claim due by the holder to the debtor. It was held that this could not be done. But in the case at bar there was no attempt to set off a judgment against the mortgage indebtedness, but to set off a deficiency judgment after the mortgage had been foreclosed and the deficiency ascertained and docketed at the time the motion to set off was made. Nor did the existence of this security at the time of the assignment of the Coonan judgment to appellant deprive Loewenthal of the right to an equitable set-off by reason of his general liability as surety. The question of an equitable set-off was not involved in the case relied on by appellant. In fact there was no reason in that case for the invocation of that doctrine. In the case at bar, however, there is. The doctrine of equitable set-off is what the respondent, Loewenthal, relies on, and the circumstances in this case entitle him to assert it. Here, at the time Coonan obtained his judgment, Loewenthal was liable as his surety in a large amount; the relation of principal and surety existed between the parties; the mortgage was given as indemnity, and was greatly inadequate and insufficient security for that purpose; and at the time of the recovery of the judgment and its assignment Coonan was insolvent. These facts, none of which appeared in the case relied on, differentiate it from this case, and furnish equitable reasons here for holding that at the time of the assignment of the judgment by Coonan an equitable right to set-off existed in favor of Loewenthal by virtue of his liability as surety of Coonan at that time on the notes, and, as the amount of his set-off against the Coonan judgment was certain and determined by the deficiency judgment in his favor at the time of his motion to set off the former pro tanto against the latter, the court properly ordered that it should be done.

The order appealed from is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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147 Cal. 178

PATTERSON v. SAN FRANCISCO & S. M. ELECTRIC RY. CO. (S. F. 3,361.)*

(Supreme Court of California. June 20, 1905.)

1. APPEAL—CONCLUSIVENESS OF VERDICT.

Verdict of the jury, supported by conflicting evidence, will not be disturbed on appeal.

2. CARRIERS—INJURY TO PASSENGERS—EVIDENCE—REBUTTAL.

Where, in an action against a street railroad company for injuries alleged to have resulted from the emission of flashes of flame from the electrical apparatus of the car on which plaintiff was a passenger, evidence was admitted as to the extent of the flashes and the resulting explosions, on plaintiff's theory that he was blown from the car by the explosions, or that they were of such magnitude he was justified in jumping from the car to escape, further evidence on behalf of plaintiff as to the extent of the flashes and explosions was not admissible in rebuttal.

3. SAME — PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF.

In an action against a carrier for injuries to a passenger, which were received under circumstances giving rise to a presumption of negligence, it is nevertheless proper to charge that the burden of proof is upon plaintiff.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1283–1294, 1334.]

4. SAME—PREPONDERANCE OF EVIDENCE.

In an action against a carrier for injuries to a passenger, received under circumstances giving rise to a presumption of negligence, defendant is entitled to a verdict if it produces sufficient evidence to balance the presumption without overcoming it by the preponderance of the evidence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1307–1314.]

5. NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence which is merely cumulative is not sufficient ground for new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 218–220.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by G. W. H. Patterson against the San Francisco & San Mateo Electric Railway Company. From a judgment for defendant, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

William J. Herrin, for appellant. A. A. Moore and Peter F. Dunne, for respondent.

LORIGAN, J. In this action plaintiff sought to recover damages for personal injuries alleged to have been sustained through the negligence of defendant. A verdict was returned in favor of defendant, and plaintiff appeals from the judgment, and an order denying his motion for a new trial.

1. On March 12, 1901, about midnight, plaintiff and his wife took passage on one of the cars of defendant, at the corner of Fourteenth and Valencia streets, in the city of San Francisco, for their home on Thirtieth

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*Rehearing denied July 20, 1905.

street in said city. The car turned into Guerrero street, and as it approached Twenty-Second street the motorman threw off the current to pass an overhead division of the trolley line, when flames flashed noisily out of the front controller of the iron incasement in electric cars, to which the motorman affixes the speed lever. When this occurred, the motorman immediately turned and motioned to the conductor at the rear end of the car to disconnect the "overhead" or current running from the first controller to the rear one, and this the conductor forthwith did at a point next to the roof of the car and close to the rear end. This disconnecting likewise caused a flame or flash, accompanied also with a noise. The evidence is conflicting as to the extent of the flames or flashes which proceeded from the front controller, and the disconnecting of the current at the rear of the car, and the degree of the noise accompanying them. There was some evidence that the flames or flashes were extensive, and the noises accompanying them very loud, amounting to reports or explosions. On the other hand, there was evidence to the effect that the flame from the front controller flashed eight or ten inches high, accompanied by but a slight noise, and that the effect of disconnecting the overhead current on the rear platform occasioned but a slight flash and a slight sizzling, or sputtering noise, characteristic of arc lights or short electrical disconnections. However, when the flash from the front controller took place, plaintiff immediately jumped from his seat and rushed out towards the rear platform. What next took place is again a matter of dispute under the evidence. Plaintiff testified that as he reached the rear platform the flash from the overhead disconnection occurred, accompanied by a loud report; that it appeared to him that the whole of the rear end of the car was on fire; that the flash completely blinded him, which was the last he remembered, except that he felt a peculiar sensation as of flying through the air; that he knew nothing more until he found himself over against a curb on the street with his leg broken. Opposed to plaintiff's claim in this particular was evidence tending to show, as before stated, the slight character of the flash from the controller and in disconnecting the overhead current on the rear platform, and the slight noises accompanying both, together with evidence that plaintiff not only was not blown off the car by force of an explosion, as his testimony would indicate, but that he rushed out of the car and immediately jumped from it; that he so stated when persons went to his assistance, and further declared that it was foolish for him to have jumped at all. The evidence further showed that there were five other persons besides plaintiff, including his wife, all seated inside the car, none of whom were hurt, and all of whom remained on the car until it stopped. Evidence was also introduced on the part of defendant to show that the controllers upon the car had been examined some three days before the accident, and were then in perfectly good order and condition. We state this evidence, and refer to the conflict in it, not only for the purpose of giving the general facts, but also in view of the claim of appellant that the verdict of the jury was not sustained by the evidence. The claim of defendant before the jury, under the evidence, was twofold: First, that the flashes, with their accompanying noises, be the character of them what they may, happened without any negligence on the part of defendant; and, second, that they were so slight and unimportant that the plaintiff, by reason of them, was not placed in any situation of peril, real or apparent, which would justify an ordinarily reasonable man, or a man of average prudence, in pursuing the course which he did. By rendering a verdict for defendant the jury necessarily found, from the evidence, in favor of defendant on one or both of these propositions. As the evidence was conflicting on the material points in issue, it was for the jury to determine what credit should be given to it. They determined that the evidence in support of respondent's position was the more convincing, and, as that was sufficient to support their verdict, we cannot disturb it.

2. It is claimed that the court erred in refusing to permit appellant to inquire of certain witnesses, called by him in rebuttal, as to the extent of the flashes, and the extent of what was claimed by appellant to have been the accompanying explosions. This the court refused, on objection of respondent, to permit, as not being rebuttal evidence, and we think the ruling was correct. These matters were gone into fully by appellant in presentation of his main case. In fact, it is quite apparent that the theories of the appellant upon which he sought to recover were that either he was hurled off the car by force of an explosion on the rear platform, or that the flashes and explosions were of such extent and magnitude that, as a reasonable man, he was warranted in apprehending danger and taking the course he did to escape it. On these theories he went fully into the matter of the flashes and explosions in presenting his main case, and, if he had any additional testimony on those points, then was the time to have presented it. While it was within the discretion of the court to allow, for good cause shown, the admission of evidence in rebuttal which should have been introduced in presenting the main case, still there was no reason suggested why this evidence was not presented at that time, and so it was properly rejected on rebuttal.

3. Complaint is made that the court erred in many of the instructions which it gave to the jury, and in its refusal to give certain instructions requested by appellant. It will

be unnecessary to set forth the requested instructions which it is claimed should have been given. We are satisfied that the court committed no error in refusing them. They consist of two instructions with reference to the degree of care to be exercised by a common carrier of passengers, and one relative to the rule of law under which the conduct of a party when placed in a position of peril is to be measured. Without discussing the objections urged against these instructions—that they did not completely state the law, save the one which was a verbatim copy of section 2100 of the Civil Code—a careful consideration of all the instructions which were given by the court shows that the jury were clearly and fully instructed on both these subjects. As to the instructions which were given and are challenged, the court instructed the jury: "In this case the plaintiff, George W. H. Patterson, claims to have received personal injuries through the negligence of the railroad company defendant. The plaintiff assigns the defendant's negligence as the cause of his alleged injuries. The law requires that he prove such negligence. As the plaintiff, he has the affirmative of that issue. Unless the plaintiff makes this proof, and shows negligence on the part of defendant, by a preponderance of the whole evidence, he cannot recover herein, and your verdict must be for the defendant." And again: "I instruct you, as matter of law, that any presumption of defective condition, arising from any flashing, smoking, or report of any machinery or appliances of defendant in this case, need not be overcome by the railroad company by any preponderance of the evidence. If the railroad company introduces sufficient evidence simply to balance such a presumption, without overcoming it by a preponderance of evidence, the presumption is overcome." It is claimed that that portion of the first of these instructions which states that the plaintiff has the affirmative of the issue was erroneous, the argument of plaintiff being that, having proven he was a passenger on the car, that the explosions and flashings of the controllers took place, and that he was injured, he established a prima facie case, which cast the burden of proof upon defendant to show, in order to absolve itself from liability, that the injury was the result of unavoidable accident, or one which the utmost care and foresight on the part of the defendant could not have prevented—that to this extent the affirmative was on the defendant. This contention, however, does not make the proper distinction between the weight of evidence and the burden of proof, applied in its strict sense as used in the instruction. Plaintiff charged negligence, and made out a prima facie case by the aid of a presumption. The burden was then cast on defendant to show by the weight of evidence that it was not negligent, or to overcome the presumption. But because it was necessary, by reason of this presumption, for the defendant to meet or overcome it, did not shift the burden of proof, in its strict sense, from the plaintiff to defendant. When the evidence was all in, the burden of proof on the question of negligence remained with the party who originally took it—the plaintiff. Under the pleadings he had the affirmative of that issue; he alleged negligence, and the law cast on him the obligation of proving it by a preponderance of evidence. In a strict sense this burden of proof never shifted. But this whole proposition is, adversely to plaintiff's contention, and in support of the instruction, clearly and fully discussed in Scott v. Wood, 81 Cal. 398, 22 Pac. 871, and nothing that we could further say here would make the matter clearer than it is stated there. The rule laid down in Scott v. Wood, as to the affirmative of the issue being on the plaintiff, as stated in the instruction, has been subsequently approved as applicable to actions for damages, where, as in the case at bar, a presumption of negligence arises. Osgood v. Los Angeles Ry. Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171.

Exception is also taken to the latter part of the second instruction quoted above, where the jury were told that if the defendant introduced sufficient evidence to balance the presumption arising in favor of plaintiff from the proof of a prima facie case, without overcoming such presumption with a preponderance of evidence, the presumption was overcome. It is claimed by appellant that this presumption can only be overcome by a preponderance of the evidence. But this cannot be so. Before a plaintiff is entitled to recover in any action, he must have a preponderance of evidence in his favor. If the evidence offered on the part of a defendant leaves the weight of evidence in a case equally balanced, there cannot exist that preponderance of evidence in plaintiff's favor which the law requires shall exist in order to warrant a recovery. To say that the plaintiff can recover when the weight of the evidence is equally balanced, and there has been no preponderance on either side, is to say that the plaintiff can recover without a preponderance of evidence, which is, of course, legally impossible.

The rule as stated in the instruction under review is sustained by the reasoning in Scott v. Wood, supra, as we understand that case. And such cases as are called to our attention from elsewhere support this doctrine. In Kay v. Metropolitan R. R. Co., 163 N. Y. 447, 57 N. E. 751, plaintiff, in a collision between the street cars of defendant, was injured, and recovered a judgment. On the trial the court instructed the jury that the burden of proving affirmatively that it was free from negligence was on the defendant. That instruction, on appeal, the Supreme Court held to be erroneous, saying (and this decision also deals with the question of burden of proof we have previously discussed): "The plaintiff, upon the issue of negligence, had to meet the burden of proof at every stage of the case. When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon the party who alleges it to establish it by proof. The onus probandi is upon him throughout. In the case at bar, the plaintiff made out her cause of action prima facie by the aid of a legal presumption; but, when the proof was all in, the burden of proof had not shifted, but was still on the plaintiff. * * * If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary. The jury were bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and, in determining the weight to be given to the former as against the latter, they were bound to apply the rule that the burden of proof was upon the plaintiff. If, on the whole, the scale did not preponderate in favor of the presumption, and against the defendant's proof, the plaintiff had not made out her case, since she failed to meet and overcome the burden of proof." In Mex. Central R. R. Co. v. Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103, plaintiff was injured, while a passenger, in a derailment. The jury were instructed that, unless the railroad company overcame the presumption of negligence arising from the proof of derailment, they should find in favor of plaintiff. This instruction, on appeal, was held erroneous, the court saying: "Although the derailment of the train may have been sufficient to raise the presumption of negligence, yet it did not devolve upon the defendant the duty of showing, by evidence of a preponderating weight, that the accident was not the result of negligence. It was entitled to a verdict if the evidence upon the issue was balanced; that is, if it preponderated on neither side." These are the only instructions given by the court and challenged which we deem specially worth noticing. The other instructions criticised correctly state the law, and present no questions which require particular discussion.

4. One of the grounds of the motion for a new trial was on account of newly discovered evidence. This consisted of the testimony of two witnesses, who would testify solely upon the question of the extent of the flashes and the loudness of the reports accompanying them. This matter was all gone into upon the trial, so that the newly discovered evidence was simply cumulative. Hence it was not good cause for a new trial. Reed v. Clark, 47 Cal. 194, 204. This disposes of all the points made on this appeal which in our judgment require consideration, and, finding no error in the record warranting a reversal, the judgment and order are affirmed.

We concur. McFARLAND, J.; HENSHAW, J.

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147 Cal. 188

In re DOLE'S ESTATE. (S. F. 4,037.)

(Supreme Court of California. June 20, 1905.)

1. Wills—Contest—Presumption of Competency.

In an action to contest a will after probate, it is presumed that testator was mentally competent.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 101–110.]

2. Same—Evidence—Previous and Subsequent Mental Condition.

In an action to contest a will, evidence of the condition of testator's mind both before and after the date of the will is admissible, but only for the purpose of showing the condition of mind at the precise date when the will was executed.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 120.]

3. Same—Evidence—Sufficiency.

In an action to contest a will, evidence *held* insufficient to justify submission to the jury of the question whether deceased was mentally incompetent.

4. Same—Jurisdiction of Probate Court—Collateral Attack.

Under Code Civ. Proc. § 1330, relative to actions to contest a will after probate, and providing that if, upon hearing the proofs, the jury or court shall decide the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked, the objection that the court which admitted the will to probate did not have jurisdiction, because decedent was not a resident of the county in which the will was probated, cannot be raised in an action to contest a will, especially where no such issue is made by the pleadings.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 907.]

Commissioners' Decision. Department 2. Appeal from Superior Court, Alameda County; W. E. Greene, Judge.

Proceedings to contest the will of Elbridge Dole, deceased. From a judgment of nonsuit, contestants appeal. Affirmed.

Jellett & Meyerstein and R. H. E. Espey, for appellants. Gibson, Woolner, Crosby & Ryker, for respondents.

COOPER, C. This is an appeal from a judgment of nonsuit dismissing the contest of the will of deceased. The facts are substantially as follows: In July, 1900, deceased was of the age of about 83 years, and the owner of an estate of the value of some $18,000. He then resided, and had for many years resided, in Hayward, Alameda county, with Mary A. Dole, the widow of his deceased brother, who had taken care of him and furnished him a home. He had no wife nor child nor grandchild. He made his last will and testament, and therein bequeathed to his nieces, Lizzie Dole, Flora Dole, Helen

Noyes, and Caroline Webb (being four of the contestants), all residents of Bangor, Maine, the sum of $500 each. To Mrs. Eva R. Hichborn, his niece, and a daughter of Mary A. Dole, and to her two children, Blanche A. Hichborn and A. F. Hichborn, he gave $500 each. The residue of his estate he left to his sister-in-law Mary A. Dole and her son Walter W. Dole, share and share alike, and appointed said Walter W. Dole the executor of his will. The will was duly executed and witnessed by E. G. Ryker and E. S. Warren. In April, 1901, Mary A. Dole applied for and was granted letters of guardianship upon the person and estate of deceased by the probate court of Alameda county, and she duly qualified as such guardian. About this time Mary A. Dole and deceased left Hayward, and made their home with Mrs. Hichborn, in the city of San Francisco, where deceased continued to make his home, receiving the care and attention of his sister-in-law and niece, until May, 1902, when he died, at the age of 84 years and 6 months. In June, 1902, the executor named therein filed the will and petitioned for letters testamentary in the county of Alameda. The will was admitted to probate by the superior court of Alameda county on the 7th day of July, 1902, and Walter W. Dole appointed executor thereof. The court found in the order admitting the will to probate that deceased at the time of his death was a resident of the county of Alameda, and that at the time of the execution of the will he was of sound and disposing mind, and not acting under duress or undue influence. This contest praying for the revocation of the probate of the will was commenced July 3, 1903, within the year after its admission to probate. The contest came on for hearing in April, 1904, before the court with a jury, and at the close of the testimony on the part of the contestants the court, on motion of the attorney for the executor, granted a nonsuit.

Counsel for appellants claim that there are two propositions on which the case should be reversed: First, that the evidence was sufficient for the case to go to the jury upon the question of the mental capacity of the deceased to make the will, and hence that the court erred in holding otherwise; and, second, that the superior court of Alameda county had no jurisdiction, because deceased did not reside in that county at the time of his death. We will discuss the two propositions in the order presented.

The contestants allege about all the statutory grounds of contest under five separate headings, alleging that the will was not the will of deceased; that it was not signed by him; that it was not attested by two witnesses, as required by law; that it was procured by restraint, undue influence, and fraudulent representations; and that at the time it was executed deceased was "not of sound and disposing mind, and was a person of unsound mind, and wholly incompetent and unable to execute a will or any other legal document, and wholly incompetent to transact any business whatever, and was non compos mentis." All the alleged grounds of contest are now abandoned except the latter, which brings us to the question as to whether or not the evidence is sufficient to show that deceased at the time he executed the will was not of sound and disposing mind. It must be borne in mind that deceased is presumed to have been of sound and disposing mind; that the probate court has found and adjudged in its order admitting the will to probate that he was of sound and disposing mind, and that the burden was upon contestants to allege and prove that he was not of such sound and disposing mind. While evidence of the condition of the testator's mind, both before and after the date of the testamentary act, was admissible, yet such evidence was important only so far as it tended to show the condition of the mind of deceased at the very date of the execution of the will. In re Wilson, 117 Cal. 276, 49 Pac. 172, 711. The right to dispose of one's property by will is most solemnly assured by the law of the land, and is a most valuable incident to ownership. The beneficiaries of a will are as much entitled to protection as any other property owners; and hence the rule that a will cannot be set aside except upon allegation and proof that it was not in fact the will of the testator, or that he did not have a mind capable of disposing of his property. In re McDevitt, 95 Cal. 33, 30 Pac. 101.

The evidence shows that deceased at the time he made the will was old and feeble, and fast approaching the end, but this of itself is not sufficient to justify the court or jury in setting aside the will. Even in old age, if the testator knows his property and the manner in which it is invested, and his relatives who are the object of his bounty, he may make a valid will. It is not necessary that his memory be perfect. The aged person often fails to remember the details of business and the names of his friends, but this is often the case with persons in the prime of life. The memories and reasoning powers of people even in the prime of life differ as the features of each individual differ in a multitude of ten thousand. Of course, if the mind of the testator no longer grasps the facts in relation to his property, its situation, and the objects of his bounty, there is no mind capable of disposing. Underhill on the Law of Wills, vol. 1, §§ 114 to 117, inclusive. In the latter section the author says: "It is safe to say that old age alone, no matter how great, never did and cannot invalidate a will, if from all the evidence it appears that the testator had sufficient capacity." In Waddington v. Buzby, 45 N. J. Eq. 173, 16 Atl.

690, 14 Am. St. Rep. 706, the court held that deceased, although feeble and 83 years old, was capable of making a will. The court said: "She was feeble and forgetful to the extent of persons ordinarily at such an advanced age, and she was nearly blind, so that she could not read, or did so with difficulty. But she could at that time go about the house, knew the members of the family, talked about her business affairs, remembered the amount of her property and where it was invested, objected to the reduction of the percentage of interest, took part in the routine of the house and the payment of bills, and conversed with visitors whom she knew. She had been an intelligent woman, but not of very strong will, rather reticent than talkative, and became more silent and absent-minded as she grew old. She was injured by a fall, and failed in physical and mental strength from that time gradually until her death. The opinions of witnesses as to her mental capacity are of no weight, unless sustained by facts on which such opinions are founded. * * * It is shown to my satisfaction that the testatrix at the time she executed this writing was capable of recollecting the property she was about to dispose of, understanding the manner of distributing it therein set forth, the objects of her bounty, and the nature of the business in which she was engaged. If so, she had the requisite mental capacity." This court said in Estate of Motz, 136 Cal. 562, 69 Pac. 295: "The soundness of mind required for making a will has relation to the act of the testator in making final disposition of his property as he desires. Although feeble in health, suffering under disease, aged and infirm, the testator, if of sound mind with reference to the disposition of his property, may make a will. If he is able to understand and carry in mind the nature and situation of his property, and his relations to his relatives and those around him, with clear remembrance as to those in whom, and those things in which, he has been mostly interested, capable of understanding the act he is doing and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, he has the capacity to make a will."

We have carefully read all the evidence, and, in view of the rules above laid down, we are of opinion that the evidence was not sufficient to show the jury that deceased was of unsound mind at the time he made the will. It would serve no useful purpose to particularly narrate the evidence. Deceased, at and about the time he made the will, talked intelligently about his business affairs; remembered the property he owned, and its location and value. He went daily to the post office for the mail, and would sit down and rest and smoke, talking with his acquaintances. About this time he went to his neighbor Armstrong to have him compute the interest on some promissory notes. He talked to Armstrong about his money matters and about investing in government bonds; told him he had $4,000 in the bank which he desired to invest. Armstrong told him to see his nephew Walter Dole, and have the money put in a savings bank in San Francisco, which advice deceased appears to have taken. After he made the will, deceased went to Walnut Creek for the purpose of collecting $800 that was due him from one Wood; took one Abdol with him, and they collected the money. He told Armstrong that he had two houses at Walnut Creek, but could not collect any rent; that he was going to the firm of Crosby & Ryker, at Walnut Creek, and get them to attend to his business there. He always knew Armstrong, and conversed with him about business. He often visited the shop of one Bridge, a neighbor, and told Bridge that he used to work at making buggies and wagons, and that he used to get several hundred dollars for a buggy such as is now sold for $75. On one occasion he told Bridge about having loaned $20 to one Chisholm, and that he had not succeeded in collecting it. He also told Bridge about his relationship to Walter Dole. He went often to the jeweler's to get his watch regulated. He loaned $10 to John M. Bridge, but when Bridge wanted a larger loan he "found he couldn't make anything out of him." He paid his board to his sister-in-law, and consulted a lawyer about his business. His will shows that he remembered his nieces in Bangor, Me., and he gave the bulk of his property to those who had taken care of him in his old age. This was the most natural thing to do. It indicates a just and proper feeling toward those who had given him comfort and care in his old age. It is true that several witnesses testified that he was childish and forgetful, but this evidence nearly all had relation to times after he had made the will. Of course, during the later years of his life he became quite feeble, and would often go to sleep in his chair while smoking his pipe. No acts or conduct of deceased at or about the time he made the will would indicate that he did not know what he was doing, or what property he was disposing of. Neither of the attesting witnesses to the will was called as a witness, nor the party who wrote it. It is clear that, if the jury had found a verdict for contestants on this testimony, it would have been the duty of the court to set it aside. In such case it was its duty to grant a nonsuit. Downing v. Murray, 113 Cal. 455, 45 Pac. 869.

The contestants cannot be allowed in this collateral proceeding to claim that deceased was not a resident of Alameda county at the time of his death. In hearing the petition for probate of the will, the court found and determined that deceased was a resident of Alameda county at the time of his death. The order admitting the will to probate was not appealed from, and became final. Code Civ. Proc. § 1715. In the petition for the revocation of the probate of the will the contestants do not attempt to claim or allege that deceased was not a resident of the county of Alameda at the time of his death, or that the superior court of Alameda county did not have jurisdiction. On the contrary, they allege that the will was admitted to probate "by an order duly given and made." In their opening brief they allege that evidence was offered "in support of the single ground of contest that the testator was incompetent to make a will at the time the will under contest was executed." Not only this, but the statute does not give the right to contest a will after probate upon the ground that the court did not have jurisdiction. The statute provides: "If, upon hearing the proofs of the parties, the jury shall find, or if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled, and revoked." Code Civ. Proc. § 1330. The determination of the probate court as to the residence of deceased at the time of his death is final in all collateral proceedings. Irwin v. Scriber, 18 Cal. 500; In re Griffith, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; In re Eichhoff, 101 Cal. 605, 36 Pac. 11; Estate of Latour, 140 Cal. 421, 73 Pac. 1070, 74 Pac. 441. As this proceeding was instituted for the purpose of revoking the probate of a will, which had become final, except subject to attack in the manner provided by the statute, and as the statute does not provide that want of jurisdiction is one of the grounds upon which such probate may be revoked, it is clear that the question now attempted to be raised is collateral. The petition filed by contestants gave respondent no notice of any such ground of attack. It was not one of the issues made by the pleadings before the trial court.

Error is claimed to have been committed by the court in its ruling in striking out on respondents' motion an answer of the witness Bridge, and in sustaining respondents' objection to a question asked by contestants of the witness Sigle. We think the rulings were proper, and, if otherwise, they were not of sufficient importance to justify a reversal of the judgment. In fact, counsel for appellants do not insist upon them in their reply brief.

We advise that the judgment be affirmed.

We concur: HARRISON, C.; GRAY, C.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed: HENSHAW, J.; McFARLAND, J.; LORIGAN, J.

147 Cal. 162

WICHMAN v. CITY OF PLACERVILLE.

(S. F. 3,161.)*

(Supreme Court of California. June 19, 1905.)

MUNICIPAL CORPORATIONS — CHARTER—AMENDMENT—BONDS—AUTHORITY TO ISSUE—STATUTES—REPEAL.

Placerville, having been incorporated in 1859, was authorized by Act April 3, 1863 (St. 1863, p. 166, c. 134), to issue certain bonds for the relief of its fire department, which act became effective immediately on its passage. At the same session, Act April 6, 1863 (St. 1863, p. 211, c. 160), was passed, reincorporating the city, which took effect on the third Tuesday of April that year, and contained a provision that the act incorporating the city, passed March 7, 1859 (St. 1859, p. 77, c. 93), and all acts amendatory thereto, were repealed. *Held*, that the reincorporation act repealed the bond act, which was amendatory of the city's original charter, and conferred on the city as reincorporated no power to issue such bonds.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Elizabeth A. Wichman, as executrix, etc., against the city of Placerville. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Crittenden Thornton and J. F. Ripley, for appellant. George H. Thompson, for respondent.

HENSHAW, J. This action was at law to recover upon seven bonds issued by the defendant municipality under an act of the Legislature entitled "An act authorizing the common council of the city of Placerville to issue certain bonds for the relief of the fire department of said city," approved April 3, 1863. St. 1863, p. 166, c. 134. The defendant demurred to plaintiff's amended complaint upon several grounds. The demurrer was sustained, judgment passed for defendant, and plaintiff appeals.

The general demurrer for lack of facts is decisive of this controversy, and is therefore the only proposition which need be considered. It is undisputed that the city of Placerville was incorporated by charter in 1859, and continued as a municipal corporation from that date. The Legislature passed an act to reincorporate the city of Placerville by an act entitled "An act to reincorporate the city of Placerville and extend the limits thereof." St. 1863, p. 211, c. 160. The act was approved April 6, 1863, and took effect upon the third Tuesday in April of that year. The same session of the Legislature passed the bond act above referred to, which was approved April 3, 1863, and by its terms became effective immediately after its passage. The act reincorporating the city of Placerville was a complete charter, not an amendment to the old charter, and contained the express provision that "An act entitled 'An act to incorporate the City of Placerville,' passed March 7, one thousand eight hundred and fifty-nine, and all acts amendatory thereof, are hereby repealed." The situation thus presented is that the act authorizing the bonds was a power conferred upon the old municipality. By respondent it is contended that the act was in its nature amendatory of the charter of 1859, and that the effect of the act of reincorporation was to repeal the bond act as an amendatory act of the old charter, or, more broadly stated, it was a power conferred upon the old corporation, the exercise of which was not conferred upon, nor continued, to the new corporation; that the power itself therefore lapsed, and could not be exercised by the reincorporated city. Appellant's contention, upon the other hand, is that the reincorporation was but a continuation in a new form of the old city, and that all the rights, powers, and duties which belonged to the earlier municipality were continued in full force under the new charter. In support of her contention appellant cites certain cases, each of which has been given careful consideration. No one of these cases, however, bears out appellant's contention. One and all they have to do, not with the power of a reincorporated town to create a new obligation not included in terms or by necessary implication in the charter grant of power, they have to do simply with the question of the responsibility of a reincorporated town for the obligations legally created by its predecessor. In all of these cases it is recognized that the strictness of the common-law rule has been modified, and that such obligations become a legal burden upon the reincorporated city without express provision in the new charter to that effect, and that, such being the law, the power to meet and extinguish such obligations by taxation or other appropriate method is likewise continued. Such was the decision of this court in People v. The City & County of San Francisco, 21 Cal. 668, 696. Such was the case of Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896; Mt. Pleasant v. Beckwith, 100 U. S. 520, 25 L. Ed. 699; Shapleigh v. San Angelo, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620. The syllabus in the last case illustrates the doctrine and general features of them all. It is as follows: "When a municipal corporation with fixed boundaries is dissolved by law, and a new corporation is created by the Legislature for the same general purposes, but with new boundaries, embracing less territory, but containing substantially the same population, the great mass of the taxable property, and the corporate property of the old corporation which passes without consideration and for the same uses, the debts of the old corporation fall upon the new corporation as its legal successor; and powers of taxation to pay them, which it had at the time of their creation, and which entered into the contracts, also survive and pass into the new corporation." But such, it should be repeated, is not the question presented in this case. Here, the new city of Placerville is not being called upon to liquidate obligations incurred by its predecessor. It is called upon to meet obligations which the new city itself incurred, and the sole question is, whether it had the power to create the obligation in question, or whether that creation was ultra vires. That it had no such power by the terms of the new charter is undisputed, and, saving in those cases alone where powers are continued for the sole and necessary purpose of meeting pre-existing obligations, the new organic law of the city became the sole and absolute measure of its power.

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*Rehearing denied July 19, 1905.

The proposition that charters of municipal corporations are special grants of power from the sovereign authority, and are to be strictly construed, and that whatever power is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld, is a proposition too well settled to call for discussion. Douglas v. Mayor of Placerville, 18 Cal. 645. Equally well settled is it that want of power is always a defense to a municipal corporation, and that no estoppel, by conduct or by ratification, to raise the question of want of power, can be urged against such corporation. This last is a rule of necessity. If a corporation, by ratification, could validate an act, void as being ultra vires, no limit could be set to its powers. It could enter into any contract absolutely without authority at law, and, by the simple process of recognition and ratification of the void contract, give it validity. Such a rule could not, of course, be tolerated. Brandenstein v. Hoke, 101 Cal. 131, 35 Pac. 562; Sutro v. Pettit, 74 Cal. 332, 16 Pac. 7, 5 Am. St. Rep. 442; Smith v. Broderick, 107 Cal. 649, 40 Pac. 1033, 48 Am. St. Rep. 167; 1 Dillon, Municipal Corporations (4th Ed.) §§ 445, 446. This rule of construction that the charter is the measure of the powers of the municipality, and that in the case of the reincorporation of a city, or of a city succeeding another municipality, the new charter contains the mode of exercise and measure of its powers, is definitely declared in First Municipality of New Orleans, 1 Rob. (La.) 279. It was applied by this court in the recent case of Fritz v. City & County of San Francisco, 132 Cal. 373, 64 Pac. 566, where it was held that the terms of the new charter of the city and county which had gone into effect superseded the provisions of the earlier park and boulevard bonding act, and that bonds which had been actually voted under this latter act could not be lawfully issued under the terms of the new charter. Nor can the fact that the bonding act was passed at the same session of the Legislature with the reincorporation act be considered as aiding appellant's position. In Mendocino County v. Bank of Mendocino, 86 Cal. 257, 24 Pac. 1002, Ex parte Benjamin, 65 Cal.

310, 4 Pac. 23, and in Santa Clara v. S. P. R. R. Co., 66 Cal. 642, 6 Pac. 744, it was held that section 4045 of the Political Code, prescribing duties and powers of boards of supervisors, was superseded and repealed by the county government act, which was passed on the very next day.

The judgment appealed from is therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

147 Cal. 236

In re THOMAS' ESTATE. (L. A. 1,508.)

(Supreme Court of California. June 24, 1905.)

1. IRRIGATION CORPORATIONS—SHARES AS APPURTENANT TO LAND—EFFECT OF STATUTE.

Civ. Code, § 324, declares that any corporation organized to supply water may, in its bylaws, provide that water shall only be supplied to owners of capital stock, and that such stock shall be appurtenant to certain lands, when the same are described in the certificate issued therefor, and that in such case the shares of stock shall only be transferred with the land, and shall pass as an appurtenance thereto. *Held* that, if the shares of a corporation not organized in compliance with this statute had become appurtenant to land before the statute was enacted, it had no invalidating effect upon the rights so acquired.

2. SAME—SEVERANCE OF WATER RIGHTS.

Owners of land, as appurtenant to which they owned a right to use waters from a stream for irrigation, conveyed their water rights to a corporation, receiving shares in proportion to the number of hours each was entitled to use the water; the certificate of stock referring to no land or water, but merely reciting that the person named therein was entitled to the specified number of shares of the corporation, transferable on the books by indorsement and surrender of the certificate, though there was an understanding that each was entitled to water corresponding to the number of shares owned by him. The corporation sold no water—distributing all the water at its disposal to its stockholders—and consequently paid no cash dividends. An owner of a part of the land and of certain shares of stock sold the land, and transferred to the purchaser the shares of stock, without any additional compensation. This tract of land was improved by an orchard, which increased its value to about 10 times what it would have been without the orchard, and the orchard could not be maintained without the use of the water. *Held*, that the conveyance by the original owner of the tract to the corporation of the appurtenant water right did not segregate the water right from the land, but merely changed its form, and hence, under Civ. Code, § 1311, providing that every devise of land conveys all the estate of the devisor, etc., a devise of the land carried with it the shares of stock in the irrigation company, as appurtenant thereto.

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Judicial settlement of the estate of C. W. Thomas, deceased. From a decree of distribution, Elizabeth Thomas appeals. Affirmed.

Scarborough & Forgy, for appellant. F. O. Daniel and R. Y. Williams, for respondent.

BEATTY, C. J. This is an appeal by Elizabeth Thomas, widow of the deceased, and residuary legatee under his will, from that part of the decree of distribution of his estate which gives to Mrs. Charles Bryant and her children eight shares of the capital stock of the Trabuca Water Company, and directs the executors to transfer the same to them. The will contains the following clause: "I hereby give and devise to my beloved sister, Mrs. Charles Bryant, of the State of Iowa, and her children, share and share alike, those certain six acres of land situate in Orange County, State of California, purchased by me from Albert Fuller in the year A. D. 1897 or 1898." After other special devises, all the residue of the property, both real and personal, was left to the appellant, the surviving wife. The decree distributed to the respondents the six acres of land mentioned in the above clause of the will, describing it particularly, and adding thereto the following: "Together with the water rights incident and appurtenant thereto or thereto belonging or appertaining, including eight shares of the capital stock of the Trabuca Water Company which were used upon the said land and which are found herein to be incident and appurtenant to and belonging to it." And it further directs the executors to indorse and transfer the certificate for said stock, so that the same could be transferred upon the books of the company to respondent. The question is whether the eight shares of stock were appurtenant, as a right to so much water, to the six acres of land left to the sister and her children, and consequently were real property, or whether they were personal property in the same sense as other corporation stock. If they were appurtenant to the land, the decree was correct; otherwise not.

The facts relied upon in support of the claim that the capital stock in question is appurtenant to the six acres of land are as follows: In January, 1892, the six acres belonged to one J. P. Fuller, who, with some 15 other landowners in the vicinity, owned, as appurtenant to their several tracts of land, the right to the use of the waters of Trabuca creek for the purposes of irrigation. By agreement or acquiescence of all the owners, each was entitled to receive in his regular turn all the water of the creek for a "run" of a certain number of hours, according to the area of land irrigated by him, until all the owners had had one turn, when the course of delivery was repeated in the same order. The several parties so owning said water as appurtenant to the respective tracts of land, for the purpose of greater economy and convenience in the systematic management of the ditch and the payment of the expenses incident thereto, and for the just distribution of the waters of said creek according to the recognized rights of the several owners, incorporated the Trabuca Water Company. For convenience the stock of the corporation was divided into a number of shares equal to the aggregate number of hours' use of the water necessary to give one turn to each of the owners. Thereupon, in March, 1892, all the owners conveyed to the corporation, by deed of grant, the ditches then in use for the conveyance of the water, and all their water rights in the waters of Trabuca creek. This deed contains the clause: "Also the right to use the waters of Trabuca Creek for supplying said ditch. And any rights which may have accrued to said parties by their use of the waters of said creek for irrigation." In payment for this conveyance the corporation issued to each landowner a certificate of stock for a number of shares, equal to the number of hours to which he had been entitled to use the water on his land in a single "turn." Each share of stock was understood by the incorporators to represent one hour's run of water. It was understood by the incorporators at the time, and the custom of the corporation ever since seems to have been in accordance with such understanding, that no dividends were to be paid upon the stock, but that each owner of stock was entitled to all the water in his turn for a number of hours equal to the number of shares of stock held by him. This understanding and practice were within, and entirely consistent with, the purposes for which the corporation was formed, which were, as stated in its articles of incorporation, "to locate, develop, buy, sell and distribute, water for irrigating, manufacturing and domestic purposes, upon the lands described as follows: * * * Also, to acquire such real estate as may be necessary for reservoirs, pumping works, rights of way, water ditches, and for piping and furnishing water to the town of San Juan Capistrano." The corporation has never undertaken to do all the things that it might lawfully have done without transgressing the terms of its charter, but, on the other hand, it has neither done nor attempted to do anything ultra vires. It has acquired from those who joined in its formation, and who owned lands within the defined district, water rights and rights of way, for which it has paid by issuing its stock. With money raised by assessment it has established a pumping plant, and it has developed and pumped water in periods of scarcity. It has sold no water to outsiders, and consequently has made no cash dividends, but has distributed to its stockholders, in proportion to the shares held by them, respectively, all the water at its disposal. It has, in other words, made a dividend in kind. All this has been done not in pursuance of any by-law formally inscribed in the records of the corporation, but solely in accordance with a common understanding of the stockholders, which, so far as these parties and this controversy are concerned, is no more to be questioned than if it existed in the form of a by-law.

The certificates of stock issued by the corporation were all in the form of that which is in controversy here, which is as follows:

"No. 36, 8 shares, capital stock $36,000—360 shares $100 each. Capistrano, Cal., June 4, 1897. This certifies that C. W. Thomas is entitled to eight shares of the capital stock of the Trabuca Water Company, transferable on the books of the company by endorsement hereon and surrender of this certificate. Richard Eagan, Secretary. J. E. Bacon, President."

No by-laws were adopted or certificates of stock issued in conformity with section 324 of the Civil Code as amended in 1895, providing that shares of stock in a water company, when the section is complied with, shall be appurtenant to the land described in the certificate. But in this connection it is proper to note the fact that the corporation was formed, and its practice of distributing water to its stockholders established, more than three years before the passage of this amendment; and, while it is true that nothing can be claimed by respondent under this law, it remains equally true that if, before its enactment, the water right became appurtenant to the tract devised to her by other lawful means, the law has no invalidating effect upon the right so acquired.

The original certificate for the eight shares allotted to the six-acre tract in controversy was issued to J. P. Fuller at the time when he and others conveyed their water rights to the corporation—in March, 1892. In August, 1893, he conveyed the land and the eight shares of stock to Albert Fuller by a deed containing express mention of the stock, which was thereupon transferred on the books of the company. In April, 1897, Albert Fuller conveyed the land, without mention of the stock, to Thomas. But upon demand of the latter, and without any other consideration than the price of the land, the certificate of stock was transferred to him, and the transfer duly registered. There was no reason for this transfer, except the understanding, shared equally by grantor and grantee, that the water right evidenced by the certificate was part of the land, and passed by the conveyance of the land. While the land was owned by the Fullers, both before and after the incorporation of the company, the water represented by the eight shares of stock was used to irrigate it, and this use was continued by Thomas during the entire period of his ownership. The land, in its natural state, without water for irrigation, would produce no crops other than barley and hay, and for that purpose would not be worth more than $50 an acre. But the decedent set out an orchard of apples and walnuts on it, which were just coming into bearing at the date of the trial, and, according to the evidence, increased its value to four or five hundred dollars an acre with the water. Without the water the trees would die, and the land revert to its original condition.

It would be a waste of time to elaborate the proposition that the water right in controversy was appurtenant to the land devised to the respondent up to the time when J. P. Fuller delivered his deed to the corporation. The appellant seems to concede so much, but she contends that by that deed the water right was segregated from the land, and ceased to be appurtenant. To this proposition she cites the case of Gould v. Stafford, 91 Cal. 146, 27 Pac. 543. But that case is only authority on the point that the owner of land with a water right appurtenant can convey the right while retaining the land, and thus sever the connection. It does not follow, however, that, when he and other owners in common of the source of supply convey their water rights to a corporation for the mere purpose of convenience in the management and distribution of the water back to them according to their respective rights, there is any severance of the right from the land to which it was appurtenant. Such was the nature of the transaction here. There was a formal conveyance of the legal title of the several water rights to the corporation, but simultaneously the grantors received certificates of stock which constituted them the beneficiaries of everything so conveyed in the proportion of their original interests. As stockholders they became entitled to receive their proportionate share of all that the company was authorized to divide. It had nothing but water to divide, and of that they received the same share and in the same manner and order that they had received it before the conveyance. And the successive owners of the six-acre tract applied it after the conveyance to that tract as they had done before. All that happened was that a right which they had held and exercised under one title before the conveyance was held and exercised under a (formally) different title afterwards. There was in fact no moment of time when they lost the right to use the water, and there was no cessation of its use on the particular tract. Neither the corporation nor any other persons acquired any right to divert it to another use. And the question whether a water right is appurtenant to a particular tract does not depend in the least degree upon the source of title to the water right. It is made appurtenant to the land by use on land for its benefit, and here the undisputed right of the Fullers and the decedent to receive 8 hours' run of all the company's water out of every 360 hours was made and continued appurtenant to the six-acre tract by use on the land in the irrigation of trees that greatly increased its value, and would perish without it. In view of these facts, it is clear that the water right remained appurtenant to the land, that it would have passed by conveyance of the land, and, if so, that it passed by the devise to respondent (Civ. Code, § 1311), and did not fall into the residue distributable to the appellant.

The principal argument of the appellant, directed against this view, is based upon the language of section 324 of the Civil Code. That section, as originally enacted, and as it stood at the date of the incorporation of the Trabuca Company, provided that whenever the capital stock of a corporation was divided into shares, and certificates issued, the shares should be personal property, and transferable by indorsement. It is evident that this provision related merely to the mode of transfer of the stockholder's interest in the corporation; making the indorsement and delivery of his stock certificate effective, as between him and his vendee, as a transfer of his interest in all the property of the corporation, whether real or personal. In 1895 this section was so amended as to except from its operation the stock of water companies upon their compliance with certain conditions; that is to say, if they provided in their by-laws that water should only be sold, distributed, supplied, or delivered to owners of its capital stock, and that such stock should be appurtenant to certain lands described in the certificates, and if they recorded such by-laws in the counties where the lands were situated, and issued certificates accordingly, then such shares of stock so located could only be transferred with the lands, as appurtenant thereto. As above stated, the conditions prescribed by this amendment were never complied with by the Trabuca Water Company, and its shares continue to be personal property for the purpose of transfer by mere indorsement. But it does not follow from this that the shares in controversy could not be appurtenant to the land. Conceding that they were so far personal property that the decedent might have transferred the water right by indorsement of the certificate, and thereby have severed the water right from his land, it remains undeniably true that the right represented by the certificate—the right to receive eight hours' run of water in his turn—was appurtenant to the land, though deemed personal property with reference to the mode of transfer. In this view, the stock certificate was merely the evidence of a water right, which right, though capable of severance from the land to which it had become appurtenant, never was alienated or diverted by the decedent in his lifetime, but remained appurtenant to the six-acre tract at the date of his will and at the time of his death. Therefore it was entirely proper to direct a transfer of the certificate to the respondent. It is her muniment of title, and passes with the right of which it is the evidence, just as title deeds should go to the distributee of real property.

Nor is it any objection to the decree that the corporation may be interested in the disposition of its stock. It is not easy to see how a corporation is a necessary party to a controversy between third parties as to the ownership of particular shares of its stock, but, if the Trabuca Water Company has a possible interest in this controversy, it is not bound by the decree, and remains free to maintain its adverse rights whenever they are drawn in question.

There are many assignments of error upon rulings of the court admitting evidence of the facts here stated. We find no occasion to criticise these rulings. All the facts proved were material, and the evidence competent.

The decree of the superior court is affirmed.

We concur: VAN DYKE, J.; LORIGAN, J.

McFARLAND, J. I concur in the judgment of affirmance, and generally in the opinion of the Chief Justice, but I base my concurrence mainly on the particular facts of this case as stated in that opinion, and on the consideration that the question to be decided involves the construction, not of a deed, but of a will, where great latitude is given to the language used in order to carry out the evident intent of the testator. It has even been held that, while by a deed land will not pass as appurtenant to land, yet it may so pass by will, when extrinsic evidence shows the evident intent with which the testator used certain language. Otis v. Smith, 9 Pick. 293. Of course, ordinarily a grant of land does not carry, as appurtenant to the land, certificates of stock in a corporation, but there is nothing in the leading opinion which disturbs that general principle.

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146 Cal. 398

BANK OF VISALIA v. SMITH et al. (Sac. 1,110.)

(Supreme Court of California. March 20, 1905.)

1. MORTGAGES — PROPERTY INCLUDED—CONSTRUCTION.

A mortgage of certain land embraced also a water ditch conveying water thereto, "with all the water rights and privileges appurtenant to the ditch"; and it appeared that, prior to the construction of the W. Water Company's ditch, the land in question was irrigated by a ditch constructed by the mortgagor, and that on the construction of the W. Water Company's ditch the mortgagor's ditch was utilized by such company between the junction of the two ditches and the land in question. *Held* that, in the absence of any other evidence, there was no showing entitling the mortgagee to have the mortgagor's shares of stock in the W. Water Company included in the mortgage.

2. RES JUDICATA—FINDINGS OUTSIDE ISSUES.

Under Code Civ. Proc. § 1911, providing that that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually included therein or necessary thereto, a finding by the court of a fact upon which there is no issue, and which does not form the basis of the judgment rendered, is not admissible in another action between the same parties as evidence of that fact, either as an admission or by way of estoppel.

Commissioners' Decision. Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Bank of Visalia against George T. Smith and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Chas. G. Lamberson, for appellant. Bradley & Farnsworth, for respondents.

HARRISON, C. July 13, 1894, S. Z. Curtis, since deceased, executed to the plaintiff a mortgage upon certain land in Tulare county as security for the payment of a promissory note then executed by him to the plaintiff. The property covered by the mortgage is described therein as follows:

"The South half of the Southwest quarter of Section 24; also all of Section 23 and the West half of Section 24; all in Township 17 South, of Range 25 East, M. D. M.

"Also that certain water ditch which conveys water to said lands for farming purposes, known as the Curtis Ditch; with all the water rights and privileges appurtenant to said ditch, or by means of which said ditch is supplied with water.

"Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, and the rents, issues and profits thereof."

Curtis died intestate April 4, 1896, without having paid the note, and the defendant W. M. Curtis was appointed the administrator of his estate. Thereafter the plaintiff herein, in an action therefor, obtained judgment for the foreclosure of the mortgage, under which the mortgaged property was sold to R. E. Hyde, who subsequently conveyed it to the plaintiff. Curtis was at the time of executing the mortgage the owner of five shares of the capital stock of the defendant corporation, Wutchumna Water Company, which is still standing in his name on the books of the corporation; and the plaintiff seeks by this action a judgment declaring it to be the owner of these shares of stock, and directing the defendant W. M. Curtis to surrender the certificate therefor, and the defendant Smith, as the secretary of the corporation, to issue to it the certificate for the same, claiming that it acquired title thereto by virtue of the aforesaid mortgage and conveyance to it. The court found that the shares of stock were not included in the property mortgaged by Curtis to the plaintiff, and are not appurtenant to the land or other property mortgaged by him, and rendered judgment in favor of the defendants. From this judgment the plaintiff has appealed.

The shares of stock are not mentioned in the description of the property mortgaged, nor in any of the proceedings for the foreclosure of that mortgage, or in the conveyance made upon the sale thereof, nor in the conveyance to the plaintiff; but the plaintiff contends that they are appurtenant to the property mortgaged, and included in that portion thereof which specifies the Curtis ditch, under the clause "with all the water rights and privileges appurtenant to said ditch, or by means of which said ditch is supplied with water." This description does not, however, mention the shares of stock, nor do its terms give rise to any presumption that they are appurtenant to the Curtis ditch, or that they represent any water right or privilege, "by means of which said ditch is supplied with water." "A thing is deemed to be appurtenant to land when it is by right used with the land for its benefit." Civ. Code, § 662. Whether such appurtenance exists is a question of fact, to be determined upon extrinsic evidence, and the burden of establishing such fact is upon him who claims a right to the appurtenance. Shares of stock, as such, are not presumptively appurtenant to land; and if the plaintiff would claim that the shares of stock in question represent water rights, or privileges which are appurtenant to the Curtis ditch, or by means of which the ditch is supplied with water, it was incumbent upon it to introduce evidence of such fact. There is no presumption that the Curtis ditch is owned by the Wutchumna Water Company, or that the capital stock of that corporation, or any of its shares, bears any relation to that ditch, or to the means by which it is supplied with water. On the contrary, the fact that Curtis mortgaged the ditch to the plaintiff justifies an inference that it was his own property, under a title distinct from any claimed by the Wutchumna Water Company. The capital stock of this corporation represents the property owned by it, and in the absence of any evidence that it was the owner of the Curtis ditch, or of the water flowing therein, it must be held that the shares of its capital stock owned by Curtis was property distinct from that mortgaged by him to the plaintiff.

The superintendent testified before the superior court that, prior to the construction of the Wutchumna water ditch, Curtis and two others had constructed a ditch of which he owned a one-half interest, sometimes called the "Curtis, Lindsay, and Moffett Ditch," and sometimes the "Curtis Ditch," extending from the St. Johns river as far as to the Curtis Ranch, and that the ranch was irrigated from the water flowing through this ditch; that the Wutchumna water ditch was taken out of the Kaweah river, several miles above the head of this Curtis ditch, and that in constructing the Wutchumna ditch, when this ditch was reached, its channel was utilized for the Wutchumna ditch, so that for the distance of about 2¾ miles from this point of intersection the water from the two ditches was intermingled, and carried along the same channel until the Curtis Ranch was reached; and that the ranch was irrigated from the waters so carried along this ditch. There was no evidence, however, tending to show that any water right or privilege was appurtenant to the Curtis ditch or to the Wutchumna ditch, or was the means by which either of said ditches is supplied with water.

The plaintiff offered in evidence the mortgage from Curtis to it, and the judgment roll in the action for its foreclosure, together with the conveyance made to it by virtue of the sale under that judgment; but, as neither of these documents contains any mention of the shares of stock, the evidence was properly excluded.

In the finding of fact contained in the judgment roll of the foreclosure suit, the court found the foregoing matters testified to by the superintendent, and also found that from 1892 to the time of his death, in 1896, Curtis was the owner of the five shares of stock, and of the land described in the mortgage, and was entitled to such proportion of the water flowing in said ditch as that number of shares bore to the whole number of shares issued by the corporation, and that, with a slight exception, the water represented by and belonging to him by virtue of his ownership of said shares was used entirely upon the said land, and was conducted thereto from the ditch of the Wutchumna Company through a ditch known as the "Curtis Ditch," and that during a portion of each year the water used upon said land had been supplied exclusively through these ditches by virtue of the ownership of said shares of stock; and the appellant urges that it thus appears that the water was appurtenant to the land, and that its right to the shares of stock is thereby shown. There was, however, no issue before the court in the foreclosure suit upon which it was authorized to find these facts, and in its conclusions of law it held that the said shares of stock were not included in the mortgage from Curtis to the plaintiff, and were not appurtenant to the mortgaged land. In the judgment which was rendered upon these findings no direction is given respecting these shares of stock, nor is any reference made to them therein. The finding being, therefore, irrelevant to any issues before the court in the present action, it was properly excluded.

A finding made by a court of a fact upon which there is no issue in the case before it, and which does not enter into or form the basis of the judgment rendered in the action, is not admissible in another action between the same parties as evidence of that fact, either as an admission or by way of estoppel. House v. Lockwood, 137 N. Y. 259, 33 N. E. 595; Black on Judgments, § 619; Freeman on Judgments, § 251. It is the judgment, and not the preliminary determination of the court or jury, which creates the estoppel. Only that which is the matter directly adjudged, or which appears upon the face of the judgment to have been so adjudged, is conclusive between the parties. Code Civ. Proc, §§ 1908, 1911. Such finding outside of any issue in the case is only a declaration made by the judge who tried the former action of his opinion, formed upon the evidence that he had heard (Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 Pac. 1108), and has no greater dignity as evidence than hearsay.

There was, moreover, no evidence before the court authorizing it to hold that the shares of stock in the corporation were appurtenant to the Curtis Ranch. The record does not show the character of the corporation Wutchumna Water Company, nor of the purposes for which it was incorporated; nor is there any evidence of the terms upon which it acquired the right to make use of the Curtis ditch, or whether there is any relation between it and the Curtis Ranch. Neither was it shown that there is any limitation upon the character of its capital stock, or any restriction upon the power of its stockholders to dispose of the same. The shares of its capital stock are declared by statute to be personal property, and, in the absence of any restriction upon their alienability, either in its articles of incorporation or in its by-laws, they are trnsferable by the indorsement of the owner and delivery of the certificate. If it should be assumed that the corporation is the owner of the Wutchumna ditch, and also of the Curtis ditch, it does not follow that the shares of its capital stock held by Curtis were appurtenant to the Curtis Ranch. There is nothing inconsistent between his being the owner of the stock, and also having a right to receive water from the company by virtue of a contract independent of such ownership; and, for all that appears in the record, there may be other rights incident to the shares of stock than that of receiving water from the ditch. The stockholders of a corporation have no estate in the land or other property of the corporation, and the transfer by a stockholder of the stock owned by him does not transfer any of the property of the corporation, or affect any right or obligation of the corporation in reference to the property held by it. Whether Curtis purchased the five shares owned by him in the open market, or accepted them in compensation for the right to use the Curtis ditch, is not shown. For all that appears in the record, the corporation may have been formed for the purpose of constructing the Wutchumna ditch, and selling the waters therein for irrigating the lands along its course. Its stockholders may or may not be the owners of any of those lands. There was therefore no evidence before the court in support of the demand of the plaintiff.

Whether the plaintiff has the right to receive water from the Wutchumna Company for the purpose of irrigating its land, either by virtue of contract, or from previous use, or as an appurtenance to the land, or for any other reason, is a question which is not presented upon this appeal, and is not determined. See Estate of Thomas, 81 Pac. 539. All that is here decided is that, upon the evidence presented to the superior court, the plaintiff failed to show that it is the owner of the shares of the capital stock of the Wutchumna Water Company held by Curtis in his lifetime, or entitled to a transfer of them to itself upon the books of the corporation.

The judgment and order denying a new trial should be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

For the foregoing reasons, the judgment and order denying the new trial are affirmed: McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

147 Cal. 259

BURTON v. MULLENARY. (L. A. 1,384.)

(Supreme Court of California. June 27, 1905.)

1. FRAUDULENT CONVEYANCES — INTENT—EVIDENCE—SUFFICIENCY.

On an issue as to whether a conveyance of land by a husband to his wife was made with intent to defraud creditors, evidence *held* sufficient to sustain a finding that there was no such intent.

2. TRIAL—FINDINGS.

A trial court is under no obligation to make findings of facts not made an issue by the pleadings.

3. DEEDS—DESCRIPTION—SUFFICIENCY.

A deed describing the premises as a lot "90x450," situated on a specified street, was sufficient as to the description, it appearing that the grantor at the time owned only one lot on that street which was 90 feet by 450.

4. EVIDENCE—LETTERS.

On an issue as to whether a conveyance by the husband to his wife was void as in fraud of creditors, there was no prejudicial error in permitting the wife to testify that about the time of the conveyance she received a letter from the husband, which she had destroyed, saying that he had left her and did not intend to return.

Department 2. Appeal from Superior Court, Santa Barbara County; W. S. Day, Judge.

Action by Stella Burton against Edward Mullenary. From a judgment in favor of plaintiff, and from an order denying motion for a new trial, defendant appeals. Affirmed.

B. F. Thomas, for appellant. C. A. Storke, for respondent.

McFARLAND, J. This is an action to quiet plaintiff's title as against the defendant, Mullenary, to a city lot in the city of Santa Barbara. The lot is described in the complaint by metes and bounds, and the description shows it to be a lot 90 feet by 450 feet, situated on the northwesterly corner of Cola and De la Vina streets, in said city. Defendant sets up a defense and claim of ownership, which will be noticed hereafter. The findings and judgment were for plaintiff, and defendant appeals from an order denying his motion for a new trial.

On February 7, 1895, the lot in question was owned by one Ben Burton, who was the husband of respondent, and on that day he executed to respondent a deed conveying the lot to her in fee. (Appellant contends that this deed was void for uncertainty of description, and this point will be noticed hereafter.) Respondent took possession of the lot under that deed, and has been in continued possession of it—the lot having a house on it, and being inclosed by a fence—and claiming title to it against all persons, and paying all taxes on it; and her said continuous possession extended over a period of more than five years next preceding the commencement of this action. At or about the time of this deed to respondent by her husband, the latter deserted her and left this state. He has never returned to her, but has continued his desertion, and respondent has ever since lived separately from him. This action was commenced May 7, 1901, more than six years after the execution of said deed and after the beginning of said desertion. At the time of the execution of said deed, respondent's husband also conveyed to her a tract of land in the county of Santa Barbara, containing about 20,000 acres, being a part of the Rancho Jesus Maria, and which we will call for convenience the "rancho." This property was mortgaged to the German Savings & Loan Bank for $45,000.

Appellant sets up as a defense to the action that the said deed to respondent of the lot here in contest by her husband was made by the latter with intent to hinder and defraud his creditors, and was therefore fraudulent and void; that at the time Ben Burton conveyed the rancho to respondent he was indebted to appellant in the sum of $3,466 for services rendered said Burton by appellant and his wife, as employés on said rancho; that on December 30, 1898, appellant commenced an action against said Burton to recover said amount of money, with interest, and procured a writ of attachment to be issued and levied on this lot here in contest; that on November 18, 1900, judgment was rendered in said action for appellant for the said amount of money and interest from February 1, 1895, Burton having been served by publication; that on March 7, 1901, a writ of execution was issued on this judgment, under which the lot in question was on March 30, 1901, sold by the sheriff to appellant, who received and now holds the certificate of purchase under the sale, and no redemption has been made. Upon these alleged facts appellant prays judgment that respondent is not the owner or entitled to possession of the said lot, and that appellant is the owner thereof, subject to the right of redemption by those entitled to redeem.

The court found that Ben Burton was not insolvent at the time he executed the said deed to respondent, and that it was not made with intent to hinder, delay, or defraud his creditors, or particularly the appellant. It is also found that respondent continuously held possession of the premises adversely to the whole world from February 7, 1895, to the time of the finding, claiming title under said deed, and having paid all the taxes; and under this finding she had title by prescription. If either of these findings is right, the motion for a new trial was properly denied.

Appellant contends that the finding that the deed in question was not made with intent to defraud the creditors is not supported by the evidence; but this contention cannot be sustained. There is no warrant for disturbing the finding, and, moreover, it is difficult to see how the court could have found otherwise. Apart from the mortgage on the rancho and the claim which appellant set up more than 3½ years after Burton had gone away, the only debts shown to have been owing by Burton were trivial, being some small claims against the rancho business amounting to from $200 to $300, which the respondent paid when she came into possession of the rancho. Of course, the mortgage on the rancho cuts no figure in the question. There was no evidence or pretense whatever that this rancho of 20,000 acres was not worth more than the amount of the mortgage. As to appellant's claim for back services for himself and his wife at the rancho, there is nothing to show that Burton had the slightest knowledge or suspicion of such a claim, or intent to defeat the same. Appellant occupied, to some extent, the position of foreman or superintendent, and handled a considerable part of the money received from the produce of the rancho, and it is rather remarkable, under the circumstances, that in February, 1895, Burton should have owed him for between three and four years' back wages, for himself and for more than five years' back wages for his wife. Of course, respondent was not bound by appellant's default judgment against Ben Burton, or concluded from contesting the claim on which that judgment rested. That claim was contested at the trial of this present action, and the evidence as to the validity of that claim was, to say the least, conflicting. The court did not find on that subject, and was not called upon to do so, for it was not made an issue by the pleadings. The answer merely sets up the appellant's action against Burton, the attachment, judgment, execution sale, etc., without any averment of the merits of the alleged cause of action, and the court merely finds what the appellant alleged on that subject; and there is nothing to preclude the conclusion that the court considered the judgment as not founded on a meritorious cause of action. At all events, there is no warrant for holding that the court should have found that the deed from Burton to his wife was made with intent to defeat appellant's said asserted claims. Moreover, it appears that Burton had from $10,000 to $12,000 in cash. There is therefore no good reason for upsetting the finding of the trial court that he did not convey the lot in contest with intent to defraud his creditors.

The contention of appellant, above referred to, that the deed from Burton to respondent was void for uncertainty of description, is founded on the fact that in the deed the description "90x450" is used without the use of the word "feet," or any other word to denote the quantity the said figures were intended to express. The lot is described as lying and being in the city and county of Santa Barbara, in the state of California, and then comes this language: "A lot 90x450 on the North westerly corner of Cola and De la Vina Streets, together with all and singular the tenements;" etc., but it was shown by the evidence that Ben Burton at the time of the deed owned a lot on the said corner of Cola and De la Vina streets 90 feet by 450 feet, and that he did not own any other land in that neighborhood. This was sufficient to show the lot conveyed, and the deed was not void for uncertainty.

Appellant contends that the court erred in allowing the respondent, when on the witness stand, to testify to the contents of a letter which she had received from her husband at the time she received the deed, which letter she says she had destroyed. It is not necessary to determine whether or not this ruling of the court was technically erroneous, for what the witness said as to the contents of the letter was not of sufficient consequence to affect the merits of the case. All that she said on the subject was this: "He simply said that he had left me; he did not say that he was not going to return; simply that he had left me forever." There was no dispute about the fact of the desertion.

The foregoing makes it unnecessary to discuss appellant's title by prescription.

The order appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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147 Cal. 124

In re HARRINGTON'S ESTATE. (S. F. 4,038.)*

(Supreme Court of California. June 12, 1905.)

1. JUDGMENT — PROBATE PROCEEDINGS — HOMESTEAD — WIDOW'S ALLOWANCE — RES JUDICATA.

Code Civ. Proc. § 577, defines a judgment as a final determination of the rights of the parties in an action or proceeding. Section 1716 declares that all issues of fact joined in probate proceedings must be tried in conformity with the requirements of article 2, c. 2, of this title; that judgments therein on issues joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions; and section 963 authorizes an appeal from a judgment or order against or in favor of setting apart property or making an allowance to a widow. *Held*, that an order denying an alleged widow's petition for a homestead allowance based on her claim of widowhood, on which issue is joined, is not a mere order made on a motion in a pending proceeding, but a judgment, to which the doctrine of res judicata applies.

2. SAME—LAW OF THE CASE.

Where an application by an alleged widow for a homestead allowance in property of her deceased husband was based on a contested claim of widowhood, an adverse decision of such issue of fact constituted the law of the case.

3. SAME—ESTOPPEL—ADDITIONAL EVIDENCE.

Where, on a prior hearing of an alleged widow's petition for a homestead allowance, it was held that, inasmuch as the laws of another state, where she had contracted a subsequent marriage during the life of her husband, were not introduced in evidence, it would be presumed according to the law of California that the second marriage was voidable only, and that, the same not having been set aside, petitioner was not decedent's widow, such judgment operated against her as an estoppel on such issue, depriving her of the right to relitigate the same, and show that under the laws of such other state her second marriage was absolutely void.

4. SAME—SUBSEQUENT PROCEEDINGS — DISTRIBUTION.

A judgment adverse to an alleged widow's application for homestead, determining that she was not decedent's widow at the time of his death, *held* res judicata of such issue in subsequent proceedings for distribution of the estate.

Department 2. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

On petition of the executor of the estate of John P. Harrington, deceased, for distribution. From an order denying the petition of deceased's alleged widow to have one-half of the estate distributed to her, and from an order denying her motion for a new trial, she appeals. Affirmed.

M. C. Hassett (Samuel M. Shortridge, of counsel), for appellant. Heller & Powers, for executor. Beverly L. Hodghead and Martin Stevens, for respondents.

HENSHAW, J. John P. Harrington died testate, and his estate was probated in the city and county of San Francisco. No mention was made in his will of Amelia Harrington, appellant herein, and upon the hearing of the executor's petition for distribution of the estate she appeared and filed her answer to the petition, and prayed that one-half of the residue of the estate be distributed to her as the widow of the deceased. All the devisees mentioned in the will, saving one, appeared and filed opposition to the claim of the appellant as the surviving widow of the deceased. The court made its decree settling the account of the executor and distributed the estate according to the terms of the will, finding against the appellant's alleged right of succession. Amelia Harrington moved for a new trial, which was denied, and she appeals from the decree and from the order denying her motion.

Twice before during the progress of the administration of the estate had Amelia Harrington appeared, in the one instance seeking a family allowance from the estate of deceased as his widow (Estate of Harrington, 140 Cal. 294, 74 Pac. 136); in the other, petitioning the court to set aside to her a homestead from the estate of deceased as his widow (140 Cal. 244, 73 Pac. 1000, 98 Am. St. Rep. 51). In both of these proceedings the devisees under the will, who appear as respendents on this appeal, contested her application, the sole question at issue being her relationship to the deceased and her status as his widow, as appears from the following excerpts from the opinion of this court in the last cited case: "This case comes within a very narrow compass, the only point involved being whether the respondent is the widow of the deceased. The lower court held that she was not, and we think that determination was correct." Again: "Her right to have the court set apart to her as a homestead property of the estate of Harrington can be based only on the fact that she is his widow." The facts touching the relationship of this appellant to the deceased are set forth in the opinion from which quotation has just been made. She had been married to Harrington. After her marriage, and in the belief that Harrington was dead, she married in Michigan one Carley. Subsequently, and upon hearing rumors to the effect that Harrington was still alive, she and Carley voluntarily separated. No annulment of the marriage was had. Upon her former appeal it was contended that as her second marriage to Carley under the laws of the state of Michigan was absolutely void ab initio, her status as the wife of Harrington had never been changed or affected by that void marriage, and that, so remaining his wife, she became upon his death his widow. The laws of Michigan were not offered in evidence in support of this contention, and under well-settled principles of law this court held that in the absence of such proof it would be assumed that the law of Michigan is like that of this state (Estate of Richards, 133 Cal. 526, 65 Pac. 1034), and that such being the condition of the law her second marriage was not void, but voidable merely. Upon the present hearing she offered, as additional evidence in support of her claim of widowhood, the laws of Michigan, declaring such a marriage to be not voidable merely, but absolutely void, and the judgment of a court of competent jurisdiction of the state of Michigan formally annulling the second marriage. The respondents to her petition introduced in evidence the judgments or decrees of the court denying her right to homestead and family allowance, with the decisions of this court upon appeal therefrom, and contended that the question of her widowhood had been adjudicated against her, and that an estoppel by judgment was therefore raised against this second presentation of her claim. The question whether or not the former determination of the court in probate does operate to raise such an estoppel by judgment is the question in this case.

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*Rehearing denied July 12, 1905.

1. Appellant contends that the status of husband and wife was created between appellant and John P. Harrington in the state of Michigan, and that from this status neither could be relieved except by death or divorce; that no divorce having been granted, they remained husband and wife until Harrington died; that the validity or invalidity of the marriage of appellant to Carley must be determined by the laws of Michigan, and if void under those laws was void everywhere; that it was void under the laws of Michigan; and that the matter of succession, being a statutory right, fixed by law, cannot be made to depend upon any act or omission of the widow or other heir claiming an estate. All these grounds can amount to no more than a declaration that if in law appellant was in fact the widow of Harrington no estoppel by conduct, by deed, or by judgment can be raised against her to prevent her from asserting her claim. We are, however, cited to no authority supporting such a proposition, and in fact it may be safely said that no such authority can be found. So far as appellant is concerned, she may raise an estoppel against the assertion, in her own interest, of the claim of widowhood as readily as she may estop herself from asserting any other legal right. So that the sole question, as we have said, remains and is whether the judgment of the court in probate in the homestead proceeding raises an estoppel against her attempted litigation of the same claim of widowhood upon distribution.

Herein appellant first contends that the doctrine of res judicata does not apply to mere orders made on motions in pending proceedings, and this is strictly true. But was this a mere order made on motion in a pending proceeding or was it in its essence a final judgment? A motion is an application for an order or direction of the court not included in a judgment. Code Civ. Proc. § 1003. A judgment is the final determination of the rights of the parties in an action or proceeding. Code Civ. Proc. § 577. Section 1716 of the Code of Civil Procedure provides that: "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of article 2, chapter 2 of this title, and in all such proceedings the party affirming is plaintiff and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court, as in civil actions." While section 963 of the Code of Civil Procedure declares that: "An appeal may be taken from a judgment or order * * * against or in favor of setting apart property or making an allowance for a widow." In her petition for a homestead this appellant put before the court her demand to valuable property of the estate, based upon her claim of widowhood. Issue was joined upon this claim, the proceeding was an adversary contested proceeding, and its outcome "finally determined the rights of the parties in that proceeding." Called by what name one may elect, the determination of the court in that matter was essentially a judgment within the meaning of the definition above given. The Legislature itself regarded such a determination as a judgment when in section 963, supra, it provided that an appeal might be taken from such judgment against or in favor of setting apart property for the widow.

2. It is next contended that as the decision in the homestead proceeding, finding and declaring that she was not the widow, was upon a question of fact, such decision did not become the law of the case. The rule undoubtedly is that the decision of a court on appeal, as to a question of fact, does not become the law of the case, for the very obvious reason that upon a retrial of the issues in the same case the facts may be made differently to appear. But where an issue of fact vital to the controversy has been tried between parties litigant, and a judgment depending for its sufficiency upon the finding of fact has become final, that determination of fact is forever binding in every court between the parties to that litigation and their privies. Otherwise, as has been repeatedly declared by the courts, there could be no end to litigation. "If a new action could be commenced and a case retried because of the discovery of new facts after the case had been finally disposed of, there would be no end of litigation, and a case be kept in court forever." Quirk v. Rooney, 130 Cal. 505, 62 Pac. 825. And again: "If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The principles herein stated are elementary." Bingham v. Kearney, 136 Cal. 175, 68 Pac. 597. And says Freeman on Judgments (4th Ed. § 260): "It is sufficient that the status of the action was such that parties might have had their lawsuit disposed of according to their respective rights, if they had presented all their evidence, and the court had properly understood the facts and correctly applied the law. But if either party fails to present all his proofs, or improperly manages his case, or afterwards discovers additional evidence in his behalf, or if the court finds contrary to the evidence or misapplies the law—in all of these cases the judgment, until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled the controversy in accordance with the principles of abstract justice."

3. It is contended that to be such a judgment as to raise an estoppel the judgment must have been upon the merits, and that the judgment in the homestead proceedings was not upon the merits because of the temporary disability of this appellant at that time. This temporary disability, it is asserted, lay in the fact that at the time of that hearing the court in Michigan had not entered its decree annulling the marriage. But in truth she was under no disability. She failed merely in the production and introduction of evidence which was as available to her at that time as it was upon the last hearing, the evidence to which we refer being the laws of the state of Michigan. Had she supported her contention that her marriage to Carley was absolutely void ab initio by proof of the laws of Michigan, it would have been sufficient for her case, and she would of necessity have been adjudged the widow of Harrington, as was the petitioner in the Estate of Newman, 124 Cal. 692, 57 Pac. 686, 45 L. R. A. 780. In her brief appellant states that "it was proved by the laws of Michigan, set forth in the agreed statement of facts admitted in evidence, that under those laws the pretended marriage entered into between James Carley and Amelia Harrington in the year 1886 was absolutely void without any decree of divorce or legal process to so declare it." If that be so, then her misfortune was not that she was laboring under any disability at the time of the hearing in the homestead proceeding, but it lay simply in her failure to introduce and avail herself of evidence at hand in proof of her claim. But as is said in Bingham v. Kearney, supra: "If she failed to assert her claim properly or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it."

4. It thus having been made to appear that the decree of the court refusing to set aside a homestead is in its essence a judgment, and that the issue, and indeed the sole matter in controversy in the proceeding, was the status of this appellant as the widow of Harrington, deceased; and it further having been made to appear that this issue was directly involved, fully litigated, and specifically decided against the contention of the appellant; and, finally, it appearing that appellant in the homestead proceedings was not under any disability, and that her petition was not denied for a mere failure of proof in the nature of nonsuit—there is left for consideration but one further contention of the appellant, which is that, notwithstanding the existence of all these facts, still the judgment in the homestead proceedings is not res judicata in proceedings upon distribution. Appellant here relies upon the decision of this court in Estate of Nolan, 145 Cal. 559, 79 Pac. 428, and upon certain adjudications of sister states, and the consequence to her of an adverse adjudication prompts a review of these cases.

In Estate of Nolan, Mary Nolan had filed a petition for letters of administration upon the estate, alleging that she was the widow of the deceased. Letters of administration were issued to her, and she acted as such administratrix. No appeal was taken from this decree. Subsequently she obtained an order granting her a family allowance as widow, and no appeal was taken from such order. Thereafter, on petition for partial distribution of the estate and after a hearing by all parties and after a contest for the first time raised upon the question of her status as widow, the court found that she was not and never had been the widow of the deceased, and distributed the estate to the heirs at law. The pretended widow acquiesced in this decision and never appealed from it. Subsequently, in the settlement of her account, objections were raised to the payment of some $625 as family allowance under the order which long before had become final. This court decided merely that, owing to the finality of the order of family allowance, her rights under it were fixed, and that the subsequent finding and decree of the court upon proceedings for distribution to the effect that she was not his widow could not be taken advantage of to defeat her rights under a judgment which had become conclusive in her favor. It is, however, here to be noted that in the granting of letters of administration and in the making of the family allowance the question of her widowhood was never controverted. It had not become an issue in either proceeding. In neither of those two adjudications had there been a hearing or determination upon the merits, and doubtless for this reason Mary Nolan did not plead either decree in bar of the proceedings on distribution. This case, however, must be construed with that of Howell v. Budd, 91 Cal. 342, 27 Pac. 747, where this court, in bank, had under consideration the effect of an adjudication under an application for letters of administration, where the right of the petitioner was contested solely upon the issue as to whether or not she was the child of the deceased, and reviewing at length the rule and doctrine of res judicata, particularly as applied to determination of heirship in probate proceedings, we declared that the judgment of the court upon such hearing, if not reversed upon appeal, is a determination for all time and in all courts, so far as the parties to the proceeding are concerned, upon the question of kinship. With particularity it was pointed out that so to be an adjudication upon heirship or right of succession the matter must turn upon that contested issue, and this fact must be made to appear; but when the right does so turn, and is so made to appear by the grant of administration, says Greenleaf, Ev. § 550: "The sentence or decree upon that question is conclusive everywhere in a suit between the same parties for distribution." See, also, Garwood v. Garwood, 29 Cal. 514.

Of the adjudications from sister states which appellant cites as being directly in point, the first is Bradley v. Johnson, 49 Ga. 412. The facts in that case were that letters of administration upon the estate of one Bradley had been issued to Emma Bradley, claiming to be his widow. An appeal was taken to the superior court and a trial by jury had, the jury rendering the following verdict: "We, the jury, find that John Johnson, applicant, is entitled to administration on the estate of Thaddeus W. Bradley, deceased." Judgment was entered on this verdict. Subsequently the alleged widow petitioned for an accounting and distribution of Bradley's estate. A trial by jury was had, and the administrator interposed, by way of estoppel to the claim of the alleged widow, the judgment in the former proceeding. The appellate court declared, in substance, that it did not appear that there had been a trial of the question of her widowhood upon its merits, and that it was decided at all could be gathered only by inference, saying: "The judgment does not decide anything more, and does not purport to decide anything more than the fact that Johnson was entitled to the administration on Bradley's estate. That judgment is not an adjudication directly upon the point that the complainant is not the widow of Bradley, and does not purport to decide that question." Contrast this with the language of this court in Ex parte Harrington, supra: "This case comes within a very narrow compass, the only point involved being whether the respondent is the widow of the deceased. The lower court held that she was not, and we think that determination was correct."

In Oldham v. McIver, 49 Tex. 556, a mulatto woman claimed to be the widow of William Oldham, a white man, the laws of the state, civil and penal, prohibiting such marriages. The alleged widow, upon application, had caused to be set apart to her a homestead and the exempted property. The administrator sought to set aside these judgments under proceedings in certiorari. While this matter was thus pending, an action was tried touching the right of possession of the homestead property between the widow and certain outside claimants, renters of the homestead property, who were in possession thereof. This case went to judgment, the decision being that the renters should retain the homestead and other exempt property during the year 1869, holding it as tenants of Phillis (the alleged widow) and her children, and at the end of the year turn it over to them and pay to them its rental value for the year. "This rental value," says the Supreme Court of Georgia, "was the only matter submitted to or found in the trial of the case." The proceeding in certiorari from the homestead award coming on to be heard, this judgment was pleaded as a final adjudication of her status. The Supreme Court of Georgia fully recognized the binding force which pertained to a decree awarding a homestead, where the question of the widowhood of the claimant was directly involved, and adjudicated, using this language: "Under the law as it existed the county court was authorized to set apart to the widow and children of the deceased, if he had such, the homestead and exempted property. This gave that court the right to ascertain the fact that she was his lawful wife, and that certain of her children were his heirs, and to make the order setting apart the property. That was an adjudication of that fact by a competent court having jurisdiction in the matter as pertaining to the estate of William Oldham, then being administered in said court. That order conclusively established that fact in any other suit or proceeding in which it was or might be involved or be put in issue until set aside by appeal or certiorari directly." The court then proceeds to show, first, that in the action between Phillis and the renters in possession of the homestead Phillis obtained judgment, not by a trial upon the question of the merits of her widowhood, but simply by pleading that her widowhood had been adjudicated by the order of the county court, and "upon that alone," says the court, "and not upon the trial or determination of that fact." Therefore there was not only no adjudication upon the merits, but the very matter of her widowhood was still sub judice in the certiorari proceedings—a direct attack upon the homestead judgment—which proceedings in certiorari resulted in the defeat of Phillis' claim. It will be observed that this Texas case, so far from being a recognition of appellant's contention, distinctly declares the law as to the effect of a judgment in homestead proceedings to be such as we here hold it to be.

The last case is that of Bordwell v. Saginaw Circuit Judge, 119 Mich. 421, 78 N. W. 468. The alleged widow applied to the probate court asking for an allowance for her support. The heirs at law contested her claim of widowhood. The probate judge determined she was the widow and made her an allowance. The heirs appealed to the circuit court. The relator moved the circuit court to dismiss the appeal upon the ground that the order was not appealable. Her motion was denied. The proceeding before the Supreme Court of Michigan was to review the action of the circuit court, or, in other words, it was to determine the single question whether or not, under the laws of Michigan, an appeal lay from the order granting a family allowance to an alleged widow, when the question of her status was disputed. The Supreme Court of Michigan held that its laws permitted no such appeal. This was the beginning and the end of their determination, but probably because of the fact that so grave a question as the status of widowhood should not be finally determined for all time and in all proceedings, without the right of appeal which is so generally accorded in other states, the Supreme Court of Michigan, as obiter purely, and without discussion or citation of authority, declared that the determination of the probate judge "that relator is the widow of Mr. Bordwell is conclusive only so far as it relates to the allowances made to her pending the litigation, and is not res judicata as to her right as widow to the distributive share of the estate to which the widow is entitled." Under the different laws of this state, where an adjudication of a homestead is a judgment from which an appeal may be taken, this dictum of the Supreme Court of Michigan, for reasons already given, cannot be regarded as persuasive.

The decree and order appealed from are therefore affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

147 Cal. 265

PEOPLE v. WOODS et al. (Cr. 1,196.)*

(Supreme Court of California. June 28, 1905.)

1. Murder—Killing of Officer—Evidence—Competency.

On a prosecution for the killing of a policeman who was pursuing defendant and others in the nighttime, evidence that the party were in possession of burglars' tools, and that they had armed themselves that night before starting out to commit a burglary, though the intention to commit the burglary had been abandoned before the shooting occurred, was relevant and material as bearing on the motives and probable conduct of defendant at the time of the killing.

2. Same—Self-Defense.

Where, on a prosecution for the killing of a policeman, it did not appear which first drew his pistol and commenced firing, but it appeared that defendant was one of a party of burglars returning from an unsuccessful attempt at burglary, in preparation for which they had armed themselves and secured burglars' tools, and that deceased was attracted by an outcry, followed by the discharge of a pistol by one of the party, the jury were warranted in concluding that the officer was only doing his duty, and that he was deliberately murdered to prevent detection.

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*Rehearing denied July 28, 1905.

3. Criminal Law—Appeal—Harmless Error.

Evidence as to incidents of the trip to the place where it had been intended to commit the burglary, such as evidence that after the attempt was abandoned it was proposed to break into a certain coalyard, if irrelevant, was harmless.

4. Same—Admissibility of Evidence—Res Gestæ.

On a prosecution for the killing of a policeman, evidence as to an attempt on the part of certain persons, who were in defendant's party, to rob a person on the street, as to his outcry, and the flight of those who attempted to commit the robbery, was properly admitted, such outcry and flight being shown to be the occasion of the interference of deceased, which led to the killing.

5. Homicide—Sufficiency of Evidence.

On a prosecution for murder, evidence considered, and *held* to have justified a finding that a part of the common design on the part of defendant and other members of his party was to resist arrest by the use of pistols, with which they had armed themselves.

6. Same.

On a prosecution for murder, evidence considered, and *held* to warrant a verdict of murder in the first degree.

7. Same—Deliberate Intent to Kill—Sufficiency of Evidence.

Where, on a prosecution for murder, it appeared that defendant made preparations to kill in connection with a projected burglary, and that when an officer approached him, under circumstances indicating the probability that he would arrest defendant or search him, defendant killed the officer, there was sufficient evidence of a deliberate purpose to kill.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 480.]

8. Criminal Law—New Trial—Improper Conduct of Counsel.

Where defendant was named in the indictment with an alias, and the district attorney, in commencing his statement of the case to the talesmen preliminary to their examination, stated that defendant was so named, whereupon, on objection, the district attorney apologized to the court, there was no ground for granting a new trial.

9. Murder—Instructions.

On a prosecution for murder, it was not error for the court to read to the jury Pen. Code, § 189, defining murder in the first degree, and including, among other things, all murders committed in the perpetration or attempt to perpetrate robbery, burglary, etc., it not being an implication that defendant was engaged in the commission of any of the enumerated crimes.

10. Same—Instructions.

Where, on a prosecution for murder, the court charged fully on the different degrees of murder, and gave the jury a form of verdict for murder in the first degree, failure of the court to give the form for murder in the second degree was not error.

11. Criminal Law—Appeal—Review—Necessity for Exception at Trial.

Where no exception was taken to the court's refusal to furnish the jury in a murder case with written forms of verdicts of murder in the second degree and manslaughter, the matter could not be considered on appeal.

Commissioners' Decision. In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Frank Woods was convicted of murder in the first degree, and he appeals from the judgment and from an order denying his motion for a new trial. Affirmed.

Albert P. Wheelan, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Dep. Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

BEATTY, C. J. The appellant, jointly with five others, was indicted for the murder of Eugene C. Robinson, a police officer of San Francisco. Upon a separate trial he was convicted of murder in the first degree and sentenced to death. His appeal is from the judgment and from an order denying his motion for a new trial.

The principal direct evidence against the appellant was the testimony of William Henderson, one of the six defendants charged with the murder, who stated that he, Goucher, Kauffman, Kennedy, Courtney, and the appellant had formed a plan to rob the safe at Cypress Lawn Cemetery; that they had provided themselves with burglars' tools, dynamite, etc., for the purpose of breaking into the safe, and on the night of the 20th of January, 1902, had gone to Cypress Lawn, where, finding the place occupied and guarded, they had abandoned the enterprise, and started back to the city about midnight. All but one of the party were armed with pistols, that of appellant being of 44 caliber, the others smaller. Henderson, the witness, was carrying the tools and dynamite. In returning to the city they rode on electric cars to a point near the junction of Mission and Valencia streets, where the last car was put in the barn, and from there they started to walk down into the city. They divided themselves into two parties. Woods, Henderson, and Kauffman going in front, and Kennedy, Goucher, and Courtney following at some distance behind. While proceeding in this way, those in front were called back by those behind to consider a proposition to break into the office of a coalyard and rob it. This enterprise was vetoed by Woods, Kauffman, and Henderson, and their tramp to the city was resumed in the same order as before. When the three who were in advance got to Seventeenth street, on Valencia, they heard a loud yell of alarm coming from the direction of Eighteenth and Valencia, and directly Goucher and Kennedy came running up. Kennedy turned and fired a shot from his pistol in the direction from which they had come, jumped over a fence, and disappeared. Goucher joined those in front, remarking that he was not going to run. When the four had proceeded to a point between Sixteenth and Seventeenth streets on Valencia, the deceased, in plain clothes, ran up behind them and asked "Who has got that gun?" Henderson, the witness, started to get away, and had gone about 25 feet when two shots rang out, and were shortly followed by a whole fusillade. Henderson continued his retreat, and only saw, or thought he saw, as he was leaving, that the appellant and Goucher were shooting the man who ran up—Officer Robinson. He also heard the command, "Throw up your hands," and thought it was the voice of appellant. He continued running along Valencia to Sixteenth street, down Sixteenth street to Julian avenue, and along Julian avenue to Fifteenth street. In his flight he was followed closely by Goucher and appellant, and he heard the latter say to Goucher as they ran, "He got me twice." At the corner of Julian avenue and Sixteenth street some one came up and commanded them to stop, but they continued to retreat, and some shooting occurred as they were passing along Julian avenue from Sixteenth to Fifteenth streets. One shot struck the witness as he was retreating, and he fired three shots in return. At Fifteenth street he was overtaken and arrested by Officer Taylor.

The testimony of this witness was supplemented by ample proof that Officer Robinson was shot and killed at the spot on Valencia street, between Sixteenth and Seventeenth, where the fusillade occurred, and it was corroborated in almost every detail by the testimony of other witnesses and by circumstantial evidence of a very persuasive character. Officer Taylor was at the corner of Mission and Fifteenth streets when he heard the shooting on Valencia. He ran to Sixteenth and up Sixteenth to the corner of Julian avenue in time to encounter Goucher and appellant, whom he ordered to halt, stating that he was an officer. They continued to run along Julian avenue as related by Henderson, and some one fired at the officer. He drew his pistol and fired at them. One of his shots would account for the wound received by Henderson at this point. The appellant, when subsequently arrested, was found to be wounded in two places, but his wounds were probably inflicted by Officer Robinson, for Officer Taylor noticed that he was limping when he turned into Julian avenue, and he saw his companion (Goucher) take him by the arm, saying at the same time, "Come on, you son of a bitch," and Henderson heard him say just before that "he"—meaning Officer Robinson—"got me twice." Officer Taylor at the trial positively identified appellant as the larger of the two men he encountered at the corner of Julian avenue and Sixteenth street, and the one who had the heavier sounding pistol. Two overcoats resembling those worn by appellant and Goucher previous to the shooting were found the next morning in a vacant lot near by, and one of them had bullet holes corresponding to the wounds found on appellant's body when he was arrested some weeks after the murder at Portland, Or. The fatal wounds received by Officer Robinson were caused by 44-caliber bullets, and two witnesses testified that a few days before the murder a man resembling appellant, and wearing an overcoat like that found with the bullet holes in it, had been inquiring at their shops for short 44 cartridges.

A number of other circumstances corroborative of Henderson's statement were proved. Appellant was identified as a visitor at the place where three of his codefendants lived. The conductors and gripmen on three or four different electric cars remembered the party of six men who went out to Cypress Lawn on the 20th of January and returned shortly after midnight to the car barn near the junction of Mission and Valencia streets and started to walk from that point along Valencia street to the city. They did not positively identify appellant as one of the party, but, aside from the testimony of Officer Taylor as to his identity with the man he encountered at the corner of Julian avenue and Sixteenth street, the circumstances proved, especially the correspondence of the wounds on his body with the bullet holes in the overcoat found near the spot where he eluded Officer Taylor, were sufficient to justify the jury in concluding that appellant was the man who was hit twice by Officer Robinson in the encounter on Valencia street. In short, there was evidence sufficient to warrant the jury in finding that the six defendants named in the indictment went to Cypress Lawn for the purpose of committing a burglary; that, before they went, five of the six armed themselves with loaded pistols; that on their return to the city so armed, and with burglars' tools and dynamite in their possession, Goucher, Kennedy, and Courtney, who were following at some distance behind the others, attempted to hold up a Japanese near the corner of Eighteenth and Valencia streets; that his loud outcry attracted the attention of a number of people and caused the trio to run; that Kennedy fired a shot as he ran to intimidate any possible pursuer; that this attracted the attention of Officer Robinson, who ran up to the group composed of appellant, Goucher, Henderson, and Kauffman, and said or did something which made them apprehensive that he would arrest or search them, and that he would discover the burglars' tools and dynamite which Henderson was carrying; that this was one of the contingencies in view of which the defendants had armed themselves; and that in order to avoid detection they, or some of them, had immediately opened fire on the officer, and that he had returned the fire of the one who first fired upon him—the man with the 44-caliber pistol, the bullets of which caused his death. Clearly there was no failure of evidence to show that Officer Robinson was murdered, that the murder was the act of the appellant, and that it was willful, deliberate, and premeditated in a legal sense. Counsel for appellant makes a general and sweeping charge of unfairness, and violation of the well-known rules of criminal procedure in the conduct of the trial in the superior court, which we think is entirely unsupported by the record on which he appeals. It is true that very numerous objections interposed by him to the admission of evidence were overruled, but his objections were founded upon an erroneous view of the case, and the rulings of the court were correct. He assumes that the prosecution relied exclusively upon the theory that the killing was done in pursuance of the conspiracy to commit the burglary at Cypress Lawn, and that the appellant must therefore be convicted of murder, although he did not participate in the killing, if it was done by any one of the six persons engaged in the conspiracy. On this assumption he objected to all evidence of the conspiracy, and at the end of the trial moved to strike it all out upon the ground that the conspiracy ended with the abandonment of the attempt upon the cemetery safe and before the killing occurred. But the case for the prosecution did not rest upon the doctrine of the liability of one conspirator for the acts of the others. The proof showed that the appellant himself fired the fatal shot, and the evidence as to the preceding circumstances—the arming, the possession of burglars' tools, etc.—was material and relevant to the motives and probable line of conduct of the appellant at the time of the killing. It is a part of the argument of counsel upon another point, at least that seems to be his argument, that, in the absence of any evidence except that of an accomplice (Henderson) as to what took place at the very time and place of the killing, the defendant may have used his pistol in self-defense against one who did not announce himself an officer and was not in uniform. It is true that, whether we regard the testimony of Henderson or not, we are left to conjecture which of the two, appellant or deceased, first drew his pistol and commenced firing. Apart from all other evidence except that going to show that the parties met and fought, and that one was wounded and the other killed, a jury might not be warranted in finding that the survivor was not acting in self-defense. But when they are informed that the slayer was one of a party of burglars returning from an unsuccessful attempt, in preparation for which they had armed themselves with loaded pistols, and provided dynamite and burglars' tools, then in their possession, and that the person killed was a police officer attracted to the spot by a loud outcry, followed by the discharge of a pistol by one of the party, they would be warranted in concluding that the officer did nothing more than his duty under the circumstances, because he had no motive to do more, and that the parties who had armed themselves for just such a contingency, and who had the strong motive to prevent the discovery of the burglars' tools in their possession, that they, or some of them, would put their pistols to the use for which they were provided, and that they deliberately murdered the officer to escape detection. In this view, all the evidence as to the conspiracy, the arms, and the burglars' tools was material and relevant, and all the incidents of the trip to the cemetery and return, so far as they may have been irrelevant, were entirely harmless. People v. Pool, 27 Cal. 572. This is especially true of the proposal to break into the coalyard. The only evidence as to that was Henderson's, and he testified that the appellant refused to have anything to do with it. The evidence of Costello as to the attempt by Kennedy, Goucher, and Courtney to rob the Japanese, his outcry, and the flight of the trio, was of the res gestæ; it was the occasion of the shot by Kennedy, and of the interference of the officer which led to his death.

The court was not only justified in overruling the objections to the testimony regarding the conspiracy upon the ground above set forth, but upon the further ground that upon the evidence, circumstantial and direct, the jury would have been justified in concluding that a part of the common design was to resist arrest by the use of the pistols with which the defendants armed themselves. People v. Pool, supra. Pistols are not used for breaking into a safe; their purpose is to kill those who interfere to prevent a burglary or arrest the perpetrators.

There is some inconsistency in the contention of counsel that the conspiracy was at an end and that Henderson was an accomplice. If the conspiracy was at an end, Henderson, according to his own testimony, was entirely innocent of the murder. He had no part in it either in design or act, and if the jury believed him his testimony alone fastened the crime upon the appellant.

It is claimed that the evidence does not warrant a verdict of murder in the first degree. We think it was clearly sufficient. It shows that the appellant made preparations to kill in connection with the projected burglary, and that, when an officer approached him under circumstances indicating the probability that he would arrest him or search him, he killed the officer. This is sufficient evidence of a deliberate purpose to kill, and, if such purpose existed, the killing was murder in the first degree.

Appellant complains that he was prejudiced by misconduct of the prosecuting attorney during the impanelment of the jury. The alleged misconduct consisted in a statement made in the hearing of the panel from which the jury was selected. In the indictment the appellant was named Frank Woods, alias Saint Louis Frank. After his arraignment and plea he moved the court to strike out the alias from the indictment. The court denied this motion, but instructed the clerk not to read the words "alias Saint Louis Frank" to the jury. When the assistant district attorney commenced his statement of the case to the talesmen preliminary to their examination touching their qualifications to act, he used this language: "The defendant at the bar, Frank Woods, alias Saint Louis

Frank, William Henderson"— At this point he was interrupted by counsel for the appellant, who excepted to the reading of the alias from the indictment and assigned it as misconduct. The assistant district attorney and the district attorney himself, who was present, begged the pardon of the court, and there the matter ended. We are not cited to any authority, and we know of none, for holding that the defendant in a criminal case is entitled to have any portion of a valid indictment suppressed during the trial except the charge of a prior conviction. But conceding that a prosecuting officer might be guilty of misconduct in purposely and wantonly parading the fact that a defendant is named with an alias in the indictment, with intent to prejudice him before the jury, there is nothing in this case to indicate that the prosecuting attorney was actuated by any such motive, or that his using the words complained of was other than an inadvertence. Indeed, it does not appear that Mr. Alford, who made the statement, had any knowledge of the instruction which the court gave to the clerk to avoid reading the alias. We do not think the discretion of the court was abused in denying a new trial on this ground.

It is claimed that the court erred in reading to the jury, as part of his charge, section 189 of the Penal Code, which defines murder in the first degree, and includes, among other things, all murders committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem. The contention of counsel is that this was misleading and confusing, because it seemed to imply that under the evidence the jury would be warranted in finding that Officer Robinson was killed by appellant or some of his codefendants while they were attempting to commit a burglary. The charge of the court carries no such implication, and, unless it can be said that it is error to give the full legal definition of murder in the first degree on the trial of an indictment for murder, the appellant has no cause of complaint as to this part of the charge, which, upon the whole, was a clear exposition of the difference between murder of the first and murder of the second degree.

Lastly, it is contended that the court committed a most flagrant and prejudicial error "in taking away from the jury the right to find the defendant guilty of murder in the second degree." Upon this point counsel cites a number of cases in each of which the trial court had erroneously instructed the jury to bring in a verdict of murder in the first degree in case they found certain facts. Nothing of the kind occurred in this case. The court correctly defined the two degrees of murder, and informed the jury that a verdict of murder in the first degree would require the imposition of a sentence of death, unless they should by their verdict fix the penalty at life imprisonment in the state's prison. In this connection the court stated to them what the form of the verdict should be according as they desired the infliction of the one penalty or the other. The omission to give the form of verdict of murder in the second degree cannot be regarded as an intimation that such a verdict was out of the question. The jury could not have failed to understand from the elaborate discussion of the difference between the two degrees of murder contained in the charge of the court that they were to determine by their verdict of which degree the defendant was guilty, if guilty at all.

The defendant's counsel, as the jury were about to retire, requested the court to furnish them with written forms of verdicts of murder in the second degree and manslaughter. This request was refused, but there was no exception to the refusal, and we need not consider whether such refusal was erroneous.

The judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.

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1 Cal. App. 99

OLSEN v. W. H. BIRCH & CO. et al.

(Court of Appeal, First District, California. June 1, 1905.)

EXECUTION—STAY—BONDS — LIABILITY OF SURETIES.

A judgment against defendants for a certain sum of money, besides interest and costs, on foreclosure of liens on a steamship, providing that the steamship, her engines, boilers, tackle, apparel, and furniture, were liable for the payment thereof, is not within Code Civ. Proc. § 942, providing for a stay of execution as to judgments directing the payment of money; nor section 943, as to judgments directing the assignment of documents or personal property on the sale of personal property on the foreclosure; nor section 944, as to judgments directing the execution of a conveyance; nor section 945, as to judgments directing the sale or delivery of possession of real estate; and under section 949, providing that, in cases not within sections 942–945, the perfecting of an appeal by giving the undertaking mentioned in section 941 stays proceedings, the execution of an undertaking in twice the amount of the judgment, as provided in section 942, was without consideration, and unenforceable against the sureties.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4727–4735.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by C. S. Olsen against W. H. Birch & Co., Herman Zadig, and James Smith. From a judgment in favor of plaintiff, Zadig and Smith appeal. Reversed.

E. L. Campbell, J. S. Spilman, and A. A. Sanderson, for appellants. H. W. Hutton, for respondent.

COOPER, J. Plaintiff recovered a judgment of foreclosure and sale against defendants W. H. Birch & Co. and the Yukon & Northwestern Dredging & Transportation Company, as owners of the steamship City of Dawson, for the foreclosure of certain liens against the said vessel, under the provisions of chapter 6, §§ 813 et seq., of the Code of Civil Procedure, relating to actions against steamers, vessels, and boats. The defendants appealed from the judgment and decree so made, and gave an undertaking, with appellants as sureties, in double the amount of the judgment, for the purpose of staying execution thereon. The judgment was affirmed on appeal (133 Cal. 479, 65 Pac. 1032, 85 Am. St. Rep. 215), and upon filing the remittitur in the court below, on motion of counsel for plaintiff, judgment was ordered and entered without notice against the appellants, as sureties on said undertaking, for the amount of the judgment, with interest and costs. From this judgment this appeal is taken.

The sole question is as to whether there was any consideration for said undertaking. If there was no consideration, the sureties are not liable, and the judgment must be reversed.

In the judgment of foreclosure, which was the subject of the former appeal, it was decreed that plaintiff have judgment against the Yukon & Northwestern Dredging & Transportation Company for the sum of $380, besides interest and costs, which judgment provided "that the steamship City of Dawson, her engines and boilers, tackle, apparel, and furniture, are liable for the payment of the said sums; and it is further ordered that the sheriff of the city and county of San Francisco, state of California, be, and he is hereby, ordered and directed to sell the said steamer, her said engines and boilers, tackle, apparel, and furniture, in the manner provided by law, and out of the proceeds arising from such sale he retain his fees, disbursements, and commissions," and pay to plaintiff the amount so found to be due him, with costs. The contention of plaintiff is that this judgment is one which "directs the payment of money," within the meaning of section 942, Code Civ. Proc., and that there should have been given, and the undertaking was given, in twice the amount of the judgment, and stayed the execution of the judgment pending the appeal. If the judgment obtained in the foreclosure proceedings was a judgment directing the payment of money, within the meaning of the section quoted, then the appeal bond is supported by a valid consideration, but we do not think it was such judgment. It was found that the steamship City of Dawson, her engines, boilers, tackle, etc., were liable for the payment of the amount due plaintiff. No personal judgment is directed to be entered. In Owen v. Pomona Land, etc., Co., 124 Cal. 331, 57 Pac. 71, the decree directed that plaintiff recover judgment against defendant for the amount of the several sums of money named, and that the land and stock be sold, and the proceeds applied to the payment of the amount found due. The court held that it was not a judgment directing the payment of money, within the meaning of section 942, and in the opinion it said: "This language, considered by itself, certainly does sustain the contention of respondent. But it cannot be taken by itself, disconnected from other parts of the decree; and, when the whole decree is read together, it is found to be in substance an ordinary decree of foreclosure, in which certain property is ordered sold, and its proceeds applied upon an ascertained debt." The case of Central L. & M. Co. v. Center, 107 Cal. 193, 40 Pac. 334, is to the same effect. In speaking of a judgment for the direct payment of money under section 942, the court said in Kreling v. Kreling, 116 Cal. 460, 48 Pac. 383: "That section is applicable to a judgment which directs payment by the defendant of a specific amount of money, and which can be directly enforced by a writ of execution, but has no application to a judgment which may be satisfied in either of two or more modes, or which cannot be enforced against the defendant until after the plaintiff has exhausted another remedy, and when he is liable for only a deficiency in the proceeds of certain property which is primarily chargeable therefor." Section 949, Code Civ. Proc., provides: "In cases not provided for in sections 942, 943, 944 and 945 the perfecting of an appeal by giving the undertaking, or making the deposit mentioned in section 941, stays proceedings in the court below upon the judgment and order appealed from." The section excepts certain cases of which this is not one. The $300 undertaking, provided for in section 941, as to damages and costs, was given. Section 943 provides that judgments directing the assignment or delivery of documents or personal property, and judgments directing a sale of personal property upon the foreclosure of a mortgage thereon, may be stayed by the things required to be assigned or delivered being placed in the custody of such officer or receiver as the court may appoint, or by executing an undertaking in an amount to be fixed by the court or a judge thereof, and in the manner prescribed as to the particular judgment. Section 944 provides that a judgment directing the execution of a conveyance may be stayed by the execution of the conveyance and depositing it with the clerk. Section 945 provides that, if the judgment direct the sale or delivery of the possession of real property, it may be stayed by executing an undertaking to the effect prescribed in the section, and in the amount fixed by the court.

We are unable to escape the conclusion that, as this case is not one provided for in either of the sections referred to in section 949, the perfecting of the appeal by giving the $300 undertaking stayed proceedings in the court below pending the appeal. The undertaking executed by appellants was unnecessary, and did not stay the execution, and worked no detriment or injury to plaintiff. Appellants received nothing for executing and giving the undertaking. Plaintiff did not agree to forbear, or do any other act to his injury. In Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070, a judgment had been obtained for the foreclosure of a chattel mortgage. On appeal, in addition to the $300 bond, a stay bond in double the amount of the judgment was given. It was held that the bond was without consideration and void as to the sureties. The court said: "The undertaking was not given in pursuance of any agreement between the parties, but simply to secure a statutory privilege. It did not have that effect, and was therefore wholly without consideration and void, and could not be valid as a common law undertaking." In Owen v. Pomona Land, etc., Co., 124 Cal. 333, 57 Pac. 71, the judgment of the court below for certain sums of money was declared to be a lien upon certain land and water stock. An undertaking in proper form was given for $300, but no separate undertaking to stay proceedings. The court said: "On the whole, it appears that this is a case not covered by any provision of the statute for the filing of an additional stay bond, and proceedings on the judgment were therefore stayed by the ordinary undertaking on appeal." It has been universally held that a stay bond, where none is required, in cases similar to this, is without consideration and void. Estate of Kennedy, 129 Cal. 385, 62 Pac. 64; Central Land & M. Co. v. Center, 107 Cal. 193, 40 Pac. 334; Reay v. Butler, 118 Cal. 113, 50 Pac. 375; McCallion, etc., v. Society, 98 Cal. 443, 33 Pac. 329.

Plaintiff claims that the bill of exceptions as to the appellant Smith cannot be considered, because it was not served and filed within the time allowed by law. But if it be conceded that the bill of exceptions was not served in time, the judgment roll, exclusive of the bill of exceptions, shows the error relied on.

The judgment against appellants is reversed.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 104

In re THAYER'S ESTATE.

LAYMANCE v. UTTER.

(Court of Appeal, First District, California. June 1, 1905.)

1. APPEAL — EXECUTORS — ORDER SETTLING ACCOUNTS—JUDGMENT ROLL — WHAT CONSTITUTES.

The judgment roll on an appeal from an order settling the accounts of an executor consists of the petition and account and reports accompanying the same, objections and exceptions thereto, findings of the court, and the order settling account.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 2248, 2249.]

2. SAME—BILL OF EXCEPTIONS—REVIEW.

Where, on appeal from an order settling the accounts of an executor, the transcript included a decree of partial distribution, notice of appeal therefrom, and a remittitur, they could not be considered, not having been included in the bill of exceptions as required by rule 29 (64 Pac. xii).

3. EXECUTORS — FINAL ACCOUNT — SETTLEMENT—JURISDICTION.

Code Civ. Proc. § 1665, provides that distribution of the estate of a decedent to the heirs or legatees may take place upon settlement of the final account, or at any subsequent time; and by sections 1658, 1661, a partial distribution may be had before settlement of the final account. Section 946 declares that a perfected appeal stays all proceedings on the judgment appealed from, or on matters embraced therein, but that the court below may proceed upon any other matter not affected by the judgment appealed from. *Held*, that where, pending an appeal from a decree of partial distribution, the final account of the executor was settled, and on appeal from the decree of settlement the account rendered was not in the transcript, so that it did not appear that it contained any account of payments made in connection with the order of partial distribution, and it was not shown that the settlement of the final account determined any matter affected by the order of partial distribution, no error in settling the final account at such time was shown.

Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Proceedings on the settlement of the estate of N. D. Thayer, deceased, and from a judgment settling the final account of Denton Utter, as executor, M. J. Laymance appeals. Affirmed.

See 76 Pac. 41.

A. A. Sanderson, for appellant. James H. Boyer and A. Boyer, for respondent.

HALL, J. This is an appeal by M. J. Laymance, who is described in his notice of appeal as "a party in interest in said estate, and assignee of Mary L. Flick, one of the legatees and devisees under the last will and testament of said N. D. Thayer, deceased," from an order settling the final account of the executor. The transcript contains no bill of exceptions or statement authenticated in any way by the judge of the trial court, but contains certain documents certified to by the clerk, as follows: (1) A decree of partial distribution to M. J. Laymance, dated and filed February 27, 1903. (2) A notice of appeal by the executor and certain legatees from said decree, dated and filed March 6, 1903. (3) The order settling the final account of the executor, dated and filed April 15, 1904 (which is the order from which this appeal is prosecuted). (4) Remittitur (setting out judgment of Supreme Court reversing decree of partial distribution), dated April 11, 1904, and indorsed "Filed April 16, 1904." (5) Notice of appeal, filed June 14, 1904, and the certificate of clerk that an undertaking on appeal in due form was filed.

Appellant, in his brief, states that "the sole question involved in and by this appeal concerns the power and jurisdiction of the said superior court to make and enter an order in said estate, settling and allowing the final account of the executor prior to the filing of the said remittitur in the superior court." We are of the opinion that such question is not properly presented by the record before us. It has been held that the judgment roll on an appeal from an order settling the accounts of an executor consists of the petition and account, and reports accompanying same, objections and exceptions thereto (if any), findings of the court (if any), and order settling account. Estate of Isaacs, 30 Cal. 106; Estate of Page, 57 Cal. 238; Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639. The only one of these documents contained in this transcript is the order settling the account, and, while there are also set forth a decree of partial distribution, a notice of appeal therefrom, and the remittitur, they are not contained in a bill of exceptions as required by Rule 29 (64 Pac. xii). See, also, Nash v. Harris, 57 Cal. 242; Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299. We therefore on this appeal can properly take notice only of the order settling the account, which on its face does not disclose the fact relied on as showing that the court had no jurisdiction to settle the account.

But if it be conceded that on the record before us we may examine the various documents contained in the transcript, we are of the opinion that the court had jurisdiction to settle the account. The matter of settling the final accounts of an executor or administrator does not necessarily involve the matter of distribution of the estate at all. Distribution of the estate to the heirs or legatees may take place upon the settlement of the final account or at any subsequent time. Section 1665, Code Civ. Proc. One or the other of these is the usual course, though the law allows, under certain conditions, a partial distribution before the settlement of the final account. Sections 1658, 1661, Code Civ. Proc. A perfected appeal "stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein; * * * but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from." Section 946, Code Civ. Proc. Upon an order simply settling a final account no matter concerning the distribution of an estate would be necessarily determined. The account rendered in this case is not in the transcript, and we must therefore assume that it contained no account of any payment made under or in connection with the order of partial distribution, but only accounts of receipts and payments of debts of decedent and expenses of administration, which are matters proper to be considered in a final account. These matters are not affected by or embraced in a decree of partial distribution. It certainly is not shown that the court, by its order settling the final account of the executor, determined any matter that it did not have jurisdiction to determine at that time. It in no way appears that any payment under the decree of partial distribution, or any expense incurred in connection therewith, was presented by the final account. Though a decree of distribution and a decree settling a final account are sometimes embraced in one decree of court, the decree settling a final account need not necessarily in any way affect the manner of the distribution of the estate.

The decree settling final account is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 107

SOCIETA DI MUTUO SOCORSO v. MANTEL et al.

(Court of Appeal, First District, California. June 2, 1905.)

1. EXECUTION — SUPPLEMENTARY PROCEEDINGS—ORDER—RES JUDICATA.

An order in supplementary proceedings, directing payment of a debt owing by A to the judgment debtor, constituted a judgment on which an execution might have been issued, and from which an appeal might have been taken, so that, no appeal having been taken within the time provided, it was res judicata as between A and the judgment creditor, and estopped A from disputing its liability to such creditor in any other action.

2. SAME—MATERIAL ISSUES—FINDINGS.

Where, in a suit to determine plaintiff's liability to pay certain money, plaintiff alleged that a judgment was rendered against it in supplementary proceedings, directing payment to the judgment creditor of its debtor, but that prior to the entry of the judgment the debtor had assigned the claim to S., who was not a party to such proceedings, and who claimed the fund, the judgment creditor pleaded that the judgment rendered against plaintiff in the supplementary proceedings, directing payment, had not been appealed from within the time provided, and was res judicata, such plea raised a material issue, and it was error for the court to render judgment for plaintiff without making findings thereon.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Societa di Mutuo Socorso against Max Mantel and others. From the judgment, defendant Mantel appeals. Reversed.

George E. Lawrence for appellant. James A. Devoto and Devoto & Richardson, for respondent Societa di Mutuo Socorso. A. D. Splivalo, for respondents Splivalo and Figone.

HARRISON, P. J. In the complaint herein the plaintiff alleges that in 1896 the appellants Mantel et al. recovered a judgment in the superior court of San Francisco against their codefendant Figone for $2,230, upon which an execution was issued, by virtue of which the sheriff of San Francisco levied upon any moneys in their hands that might be owing from them to said Figone, and that the said execution was thereafter returned wholly unsatisfied; that in January, 1900, Figone recovered a judgment against the plaintiff in said superior court for the sum of $63; that the defendant Splivalo claims that the moneys so adjudged to be due from it to Figone were assigned to him prior to the entry of said judgment, and prior to the levy of the execution in favor of the appellants, and that since said assignment he has been the owner thereof, and claims that he is entitled to receive the amount of said judgment from the plaintiff; that it still has said money, and is ready and willing to pay it to the one entitled thereto, but that by reason of the said conflicting claims, it does not know to whom it should pay the same. It therefore asked that all of the defendants appear and set forth their respective rights to the said money, and that the court determine which party is entitled to the same. The appellants answered the complaint, setting forth certain facts showing the judgment in their favor against Figone, and that, after the garnishment upon the plaintiff by virtue of said judgment, they had instituted proceedings supplementary to the execution issued thereon, and that in such proceedings the superior court had determined that the plaintiff was indebted to Figone in the sum of $63, and had made an order that the plaintiff immediately pay said sum of money to these appellants in partial satisfaction of their judgment against Figone; that said order had not been appealed from or set aside, but was in full force and effect, and had become final; that by reason thereof the plaintiff is estopped from denying its indebtedness to them in said sum of $63, and from alleging that there is any controversy as to whom it should pay the same. They also allege that the defendant Splivalo has no right to or interest in said money; that he had knowledge and notice of said supplementary proceedings, and refused to attend or be present at the examination therein of the plaintiff; and that by reason thereof he is estopped from making any claim thereto, and from denying that they are entitled to receive the same. The defendant Splivalo, in his answer to the complaint, alleged that he was the holder and owner of the judgment in favor of Figone, against the plaintiff, by virtue of an assignment from Figone prior to its entry of the claim upon which it was rendered. At the trial of the cause the court found that the appellants had obtained the said judgment against Figone, and that under an execution issued thereon a garnishment had been served upon the plaintiff covering all moneys due or owing from it to Figone; that prior to the date of said judgment Figone had assigned to the defendant Splivalo his claim against the plaintiff upon which an action was then pending, and that in January, 1900, judgment had been rendered thereon by the superior court in favor of Figone for the sum of $63. Upon these findings of fact the court rendered judgment that the plaintiff pay to Splivalo the amount of the judgment against it, and that it recover its costs from the appellants. The appellants moved for a new trial upon several grounds, and the said motion, taken upon a bill of exceptions, was denied. From this order the defendants Mantel have appealed, the principal grounds urged upon the appeal being that the decision was against law, in that the court failed to make findings upon certain material issues of fact presented by their answer, especially that it made no finding of fact upon the issues presented by their allegations setting up the proceedings supplementary to execution upon their judgment against Figone.

At the trial these appellants offered in evidence the record of their supplementary proceedings, and an order of the court made therein directing the plaintiff to pay to them the said sum of $63, to be applied towards the satisfaction of their judgment against Figone, and that said payment should be and operate as a satisfaction of the judgment recovered by Figone against it, which Splivalo claimed had been assigned to him. This evidence is not shown to have been qualified by any other evidence, and the appellants were entitled to a finding thereon if the facts thereby established were material to the issues before the court, and if the effect of such finding would be to invalidate the judgment rendered upon the other findings. See Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504.

The order of the superior court made in the supplementary proceedings, directing the payment by the plaintiff to these appellants of $63, was "the final determination of the rights of the parties in the proceedings, and, in effect, constituted a judgment on which an execution might have been issued and from which an appeal might have been taken." Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254. No appeal having been taken therefrom, and the time for such appeal having expired, the order had become final. It was therefore res judicata as between the plaintiff herein and the appellants, and estopped the plaintiff from disputing its liability to these appellants in any other action. See McCullough v. Clark, 41 Cal. 298. The averments in the answer of the appellants upon this point raised a material issue between them and the plaintiff, and, if found by the court to be established by evidence, would constitute a defense to any right of the plaintiff to withhold the money from them or to pay it to any other party; and they were entitled to a finding upon the truth of these averments. If such finding had been made in accordance with their claim, it would have countervailed the other findings made by the court, and necessitated a judgment against the plaintiff and in their favor for the said sum of $63. The judgment rendered by the court, without making any finding thereon, was therefore a decision against law, for which appellants were entitled to a new trial.

The order appealed from is reversed, and the superior court is directed to grant a new trial.

We concur: COOPER, J.; HALL, J.

1 Cal. App. 116

MICHAELSON v. FISH.

(Court of Appeal, Third District, California. June 3, 1905.)

1. LIENS—STATUTES.

Civ. Code, §§ 3051, 3052, providing that a person who makes, alters, or repairs any article of personal property, or who, by labor or skill, improves such article, may have a special lien thereon, and may retain possession until his charges are paid, creates a lien in favor of a bailee for hire, to whom property is "delivered" in the way of his trade or occupation, and who by his labor and skill imparts additional value thereto, and does not create a lien in favor of a person who performs services with reference to personal property in his possession as a mere servant.

2. SAME—SERVANTS.

Where defendant was employed as a distiller to manufacture brandy and wine at an agreed wage, and, though he had charge of the distillery and grape pickers, he worked generally about the premises, and the brandy in question was not the sole product of his services, but was the result of the combined labor of defendant and certain others, he was not entitled to a common-law lien thereon for his wages and for the value of certain fruit furnished by him to his employer to be used in the manufacture of the brandy.

Appeal from Superior Court, Shasta County; Edward Sweeney, Judge.

Action by Fred Michaelson against Frank W. Fish. From a judgment for defendant, plaintiff appeals. Reversed.

Watson & Bush, for appellant. Reid & Bartlett, for respondent.

McLAUGHLIN, J. This action was brought by plaintiff to recover possession of 11 casks of brandy, with damages for withholding possession of the same. The defendant, answering the complaint, denied that plaintiff owned or was entitled to the possession of the brandy, or had at any time demanded possession of the same. As a special defense, and as ground for affirmative relief, he alleged: That he was employed by one Annie Kline Rickert, as a distiller, to make and manufacture brandy, at an agreed wage of $75 per month; that he was to receive $125 for certain fruit furnished by him to said employer; that his employer was using plaintiff's distillery in making said brandy, under permission from plaintiff; that he worked under said employment eight months, and that no part of his said wages, or of the money due for said fruit, had been paid; that he was in possession of said brandy until it was wrongfully taken from him under a writ of replevin; that he was entitled to retain possession of the same until he was paid for his labor in making it. The prayer was that he be adjudged entitled to the possession of the brandy, and, in case it could not be returned, to its value. The findings recite that the plaintiff is the owner of the brandy, and that he had demanded and been refused possession of two casks thereof. The other facts were found substantially as set forth in the answer, except as to the amount due for labor and services, which was fixed at $225. It is further found: "That before giving up possession of said brandy he [defendant] was entitled to be paid for his labor in making the same, to the extent of $225, which said amount was a lien upon said brandy for the labor of defendant in making the same." The conclusions of law contained a recital of like tenor, and, further, that defendant was entitled to possession of the brandy. Judgment was entered accordingly, and from this judgment, and an order denying his motion for a new trial, plaintiff appeals.

The appeal from the judgment was taken more than six months after the judgment was made and entered, and it must therefore be dismissed. Code Civ. Proc. § 939, subd. 1; Henry v. Merguire, 111 Cal. 1, 43 Pac. 387.

The motion for a new trial was based upon an agreed statement of the case. It contains no assignments of error, save four specifications of particulars, in which the evidence is insufficient to sustain the decision of the court. These specifications are assailed as being too general and uncertain. We do not think the court or opposing counsel could have had any doubt as to what evidence should be put into the statement, for the specifications plainly point to the particular defect in the proof. No objection appears to have been made that the specifications were insufficient, though the court evidently passed upon the motion with the agreed statement before it. The testimony appears to be substantially embodied therein. Under the liberal rule recently declared by the Supreme Court, the specifications are entirely sufficient. Jones v. Goldtree Brothers Company, 142 Cal. 383, 77 Pac. 939; American Type, etc., Co. v. Packer, 130 Cal. 462, 62 Pac. 744.

The principal question presented by such specifications is this: Does the ordinary relation of master and servant alone entitle the servant to a lien on a manufactured article which is in part the product of his labor? According to the testimony of defendant, he was employed to work in this distillery as a distiller and general manager. He had charge of the distill and of the grape pickers, and worked at anything and everything about the premises. Aside from the grape pickers, at least three men, Benton, Jewell, and Rickert, assisted in making the brandy. After being manufactured, the brandy was stored in his cellar, with his consent, and by direction of Mrs. Rickert. All this was during his employment as above mentioned. That he had no special possession of the brandy before or during the manufacture thereof, for any purpose or in any sense, is clear. His possession during the term of his employment was the possession of his employer, under every rule governing the relation of master and servant. Ledley v. Hays, 1 Cal. 161; Goodwin v. Garr, 8 Cal. 615; People v. Perini, 94 Cal. 575, 29 Pac. 1027.

Our statutory provisions are but re-enactments or extensions of the common law relating to liens of this character. Under both, a person who makes, alters, or repairs any article of personal property, or who by labor or skill improves such article, will have a special lien thereon, and may retain possession until his charges are paid. Jones on Liens, § 731 et seq.; Civ. Code, §§ 3051, 3052. But this lien exists only "in favor of a bailee for hire, who takes property, in the way of his trade and occupation, and by his labor and skill imparts additional value to it." Jones on Liens, § 731. In other words, if personal property is delivered to a person, either for the purpose of having another article made from it, as gold for a ring, leather for a harness, or lumber for a desk, or for the purpose of having it altered, repaired, or improved, the person having special possession for any of the purposes mentioned, and who performs the service required of him, will have a special lien on the article for his charges as long as he retains possession of the same. But this is far from saying that any employé will have a lien on any article manufactured during the course of his employment. Such a doctrine would not only result in a babel of voices, each claiming a lien on the product of factory, mill, and forge, but would paralyze every industry, where many perform their part, in manufacturing the infinite variety of articles now upon our markets. It is indispensable to this character of lien that the person asserting it should have an independent and exclusive possession of the property. Grinnell v. Cook (N. Y.) 38 Am. Dec. 663; Hollingsworth v. Dow, 19 Pick. 228. Nay, more, he must have such possession personally, or by an agent, before and during the service required, and for the particular purpose of rendering some service in making, repairing, altering, improving, or mayhap protecting, the article upon which he claims a lien. McDearmid v. Foster (Or.) 12 Pac. 816, 817; Wenz v. McBride (Colo. Sup.) 36 Pac. 1105; Jones on Liens, § 731 et seq.

Applying these principles to the case at bar, we are forced to the conclusion that not one element essential to this character of lien existed. Viewing the evidence in the light most favorable to respondent's contention; going even farther, and conceding that he was employed as a distiller and did nothing else—still his lien must fall. Whether his position was humble or exalted, his duties special or general, he was still a servant. His rights and duties were both governed by the law pertaining to the relation of master and servant. He could not be a bailee in any sense, must less for hire; for his possession, in any event, would be the possession of his employer. He could not, and did not, have that independent and exclusive possession of the brandy indispensable to the lien claimed. Neither before nor during the manufacture did he have possession of the brandy, or the fruit from which it was made, any more than Jewell or Benton, or the grape pickers, his co-workers, had. None of these co-workers had possession, and neither did he. The possession was in the employer, whose servants they all were, during the entire process of making the brandy.

It may be claimed that he had obtained possession of the brandy after it was made. Waiving the evidence, which shows conclusively that the liquor was in the actual or constructive possession of the employer all the time, such possession could not avail him here, for we have seen that such a possession is not an element in this class of liens. If an employé in a manufacturing establishment could obtain a lien by simply securing possession of a keg of pickles, a box of crackers, or a bolt of cloth, according to the nature of his work, resulting chaos would compel a repeal of the law under which such lien obtained. And then respondent's service was not special, as being confined to the distill or the manufacture of this brandy. Sour wine was made, and he himself says he picked fruit, looked after the men, kept the books, did some grubbing and carpenter work, papered the house, hauled stuff to Redding, and did "most everything while he was there," all during the term of this employment.

Neither was the brandy the sole product of his service. He informs us that at least three men, besides the grape pickers, assisted in making the brandy. Others employed with him by the same master, under separate and distinct contracts of employment, contributed their labor, and even the plaintiff furnished his fruit. Under these circumstances there could be no lien. It might as well be claimed that the product of the loom is subject to the lien of any of the many persons whose fingers deftly contributed to its texture, color, or finish. As was well said by our Supreme Court: "We know of no principle of law which authorizes an employé to take or retain property of his employer until his wages have been paid." Ex parte Corran (Cal.) 41 Pac. 464. That no lien exists in favor of a person situated as respondent was has been the uniform holding wherever the question has arisen. McIntyre v. Carver (Pa.) 37 Am. Dec. 519; Fitzgerald v. Elliot (Pa.) 29 Atl. 346, 42 Am. St. Rep. 812; Mechem on Agency, § 676; Lawrence v. Phy (Or.) 41 Pac. 673.

The court having found that appellant was the owner of the brandy, it followed that he was entitled to possession, unless respondent had some legal right to withhold such possession. The materiality of the findings or decision that respondent had a lien and was entitled to possession until his wages were paid is therefore apparent. The evidence is insufficient to justify or sustain the last-mentioned findings.

The appeal from the judgment is dismissed, and the order denying the motion for a new trial is reversed, and a new trial granted.

We concur: CHIPMAN, P. J.; BUCKLES, J.

1 Cal. App. 35

In re SYLVAR'S ESTATE.

(Court of Appeal, First District, California. May 26, 1905.)

1. ADMINISTRATORS — CONDUCT — ACCOUNT —DELAY.

Where, on the hearing of an application to settle an administrator's third account, it appeared that the administrator had paid a dividend to creditors, as ordered by the court, and had obeyed all of the court's orders in the estate, that every item of the account was correct, and that there was still undisposed of at the hearing property of the appraised value of $2,750, the fact that the estate had been pending several years, during which there had been litigation which was appealed to the Supreme Court, did not establish that the administrator had willfully or negligently caused the delay.

2. SAME — INTEREST — LIABILITY OF ADMINISTRATOR—OBJECTION.

Under Code Civ. Proc. § 1635, declaring that on the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the decedent's estate may appear and file his exceptions in writing to the administrator's account and contest the same, an objection that the administrator should be charged with interest for the use of the funds of the estate, not stated in the written grounds of contest of an administrator's third account, was unsustainable.

3. SAME—PLEADING.

An objection to an administrator's third account that he had not accounted for all the estate of the decedent which had come into his possession was insufficient to raise a contention that the administrator should be charged with interest.

4. SAME—PAYMENT OF DEBTS—ORDERS.

Under Code Civ. Proc. § 1647, providing that on settlement of the accounts of an administrator or executor the court shall make an order for the payment of the debts as the circumstances of the estate require, where on the settlement of an administrator's third account a balance of cash was shown to be in the hands of the administrator, it was error for the court to refuse to grant an order for the payment of debts, and to make an order merely directing the administrator to close the estate and have the proceeds thereof distributed among the creditors at the earliest possible date.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Judicial settlement of the accounts of the administrator of the estate of Jackson Sylvar, deceased. From an order settling the administrator's third account, and from an order refusing to revoke the letters of administration, certain creditors appeal. Affirmed.

Charles B. Younger, Jr., for appellant. Lindsay & Cassin, for respondent.

COOPER, J. Two appeals from orders of the superior court are brought up in this record; the one from an order settling the third account of the administrator, and the other from an order refusing to revoke the letters of administration.

The account purported to give a detailed and itemized statement of all sums received and of all amounts paid out during the period covered by it. This account was contested by appellants, creditors of the estate, who filed their objections in writing to "each and every item of disbursements therein contained, except the items of taxes, upon each of the following grounds, to wit: (1) That in rendering said account said administrator did not produce or file vouchers therefor. (2) That said administrator did not pay the same. (3) That such item is not an expense of administration of said estate. (4) That the charge thereof is excessive, and more than the reasonable value thereof. (5) That such item is not a proper or legal charge. (6) That such item is not a necessary expense of administration. (7) That said administrator has not accounted for all the estate of said deceased which has come to his possession."

The bill of exceptions shows that upon the hearing "each and every item set forth in said account was proven by competent testimony to be true, with the exception of those items the consideration of which has been continued until the hearing of the final account in said matter." Appellants do not now attempt to attack any item in the account, nor do they claim that the finding as to any item is unsupported by the evidence. The main contention is that the administrator has neglected for an unreasonable time to have the money on hand distributed or paid to the creditors, and that he deposited the money on hand with one Hoffman, who mingled it with his own and used it to some extent in his own business.

In regard to the delay, while it is true the estate has been pending several years, there is nothing in the record to show that the administrator has willfully or negligently caused the delay. There are many cases in which the settlement of estates is unavoidably delayed without the fault of the administrator. In this case it appears that there was litigation which went to the Supreme Court. In all cases where the administrator is called upon to pay the penalty of his neglect by being charged with interest or by removal from his trust, it is incumbent upon the party alleging such neglect to prove it. All presumptions are in favor of the regularity of the management of the estate by the administrator. Here the administrator appears to have paid a dividend to the creditors as ordered by the court, and to have obeyed all orders of the court in the estate. The account filed is the third account, and each and every item was found to be correct. There was still on hand undisposed of at the time of the hearing in the court below property of the appraised value of $2,750.

In regard to the money having been deposited with, and to some extent used by, Hoffman, it does not appear that the administrator consented to, or was in any way privy to, such use. The administrator never used any of the money himself, nor received anything for its use. We are not prepared to say that an administrator may not deposit the funds of the estate with a private banker or with an individual. In many cases it would be the safer course to do so. But, aside from this, a conclusive answer to appellants' claim that the administrator should be charged with interest is the fact that no such claim is stated in the written grounds of contest. The Code provides (Code Civ. Proc. § 1635): "On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same." The object of the section is that an issue shall be made in the trial court as to the items contested, or with which it is sought to charge the administrator. It was intended that the administrator should know the items contested or the matters in regard to which he is claimed to have been delinquent, so that he may come into court with his evidence, prepared to meet or explain any exception taken to his account. The issues are thus made by the verified account and the written exceptions filed to it. The method is simple, and designed to save the time of the court being taken up by uncontested matters. In the Estate of More, 121 Cal. 639, 54 Pac. 148, the same view was taken, and it was there said the person desiring to contest the account of an executor or administrator "must file his exceptions in writing to the account, setting out specifically the grounds of his objections, and at the hearing he should be held limited to the exceptions so presented."

Appellants contend that the claim that the administrator should be charged with interest is supported by the statement "that said administrator has not accounted for all the estate of said deceased which has come to his possession." Under the most liberal rules of pleading we could not hold that a penalty for delay in settling an estate, or interest allowed as a penalty for depositing the money with Hoffman, is "estate which has come to his possession." The administrator has received no interest, profit, or income from the estate. It has been said that in the absence of exceptions the court may inquire into any matter in the settlement of an account which may seem objectionable, and may pass judgment thereon; but such rule does not apply to any matter by which it is sought to impose a penalty upon the administrator, nor to cases where the parties have appeared and made their objections in writing, as they did in this case.

The law provides (Code Civ. Proc. § 1647) that "upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of the estate require." The section evidently makes it the duty of the court, when there is money on hand, to make an order for the payment of the debts. If there are not sufficient funds on hand with which to pay the debts, the court must specify in the decree the sum to be paid to each creditor. Here the account shows a balance of cash on hand of $6,757.47. The court refused to make an order for the payment of the debts of the estate, but made an order directing the administrator "to close the said estate, and have the proceeds thereof distributed among the creditors at the earliest possible date." Petitioners were creditors in a large amount, and asked for an order to the administrator for the payment of the debts of the estate. They were entitled to such order, or to an order directing a dividend to the extent that the funds on hand would justify.

The order refusing to revoke the letters of administration was correct, for the reasons herein stated in discussing the appeal from the order allowing the account. A further separate discussion of the latter order would serve no useful purpose.

The order, in as far as it settles the account, is affirmed. The order, as to a distribution of the unsold estate, and denying a dividend to the creditors, is reversed, and the court directed to amend and modify its order so as to direct a dividend to the creditors in accordance with the views herein expressed. The order refusing to revoke the letters of administration is affirmed. Appellants are entitled to their costs on this appeal.

We concur: HALL, J.; HARRISON, P. J.

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7 Cal. Unrep. 212

WHITE v. WISE et al.

(Court of Appeal, Third District, California. May 29, 1905.)

APPEAL — REMAND — PROCEEDINGS BELOW — JUDGMENT.

Where a judgment for plaintiff was reversed on appeal, with directions to render judgment for defendant as prayed in the answer, which was that the prayer of the complaint be denied, and that plaintiff take nothing by the action, and that defendant have judgment against plaintiff for costs, a judgment rendered that the prayer of plaintiff be denied, that plaintiff take nothing by the action, and that defendant have judgment against plaintiff for costs, and is entitled to "appropriate process" to enforce the judgment, and every part thereof, was not objectionable, as granting more relief than demanded, in so far as it awarded process to enforce the judgment.

Appeal from Superior Court, Mendocino County; M. S. Sayre, Judge.

Action by Frankie White against John H. Wise and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

W. T. Baggett, W. H. Linforth, and J. T. White, for appellant. W. H. Langford, for respondents.

McLAUGHLIN, J. Upon a former appeal in this case, the judgment in favor of the respondent there, the appellant here, was reversed by the Supreme Court, "with directions to the lower court to enter judgment on the findings for the appellant as prayed for in this answer." White v. Wise, 134 Cal. 613, 66 Pac. 959. The appellant mentioned there was Wise, the respondent here, and the prayer of his answer was as follows: "That the prayer of said complaint may be denied, and that said plaintiff take nothing by this action, and that this defendant have judgment against plaintiff for his costs herein incurred." Upon the receipt of the remittitur the lower court, on motion, rendered judgment as follows: "Now, therefore, in pursuance of the premises, and in accordance with judgment, *decision and direction* of the said superior court, * * * it is ordered, adjudged, and decreed that the prayer of plaintiff herein be, and the same is hereby, denied; that the said plaintiff shall take nothing by this action; and that the defendant John H. Wise shall have and is hereby given judgment against said plaintiff Frankie White for his costs herein incurred, amounting to the sum of $153.80. *And said defendant is entitled to and shall have any appropriate process of this court to enforce said judgment hereby given, and each and every part thereof.*" It is conceded that, but for the concluding clause in said judgment, there could be no pretext for this appeal. Notwithstanding appellant's strenuous objections to the language italicized, we cannot refrain from saying that this is an instance where "much ado about nothing" has operated to vex an adverse litigant, and needlessly consume the time of the court. The successful defendant would, under the law, be entitled to appropriate process to "enforce said judgment, and every part thereof," regardless of this clause, which could give him no more.

This appeal is without merit, and hence the judgment is affirmed, with $50 damages, and the superior court is directed to include this sum of money in the judgment, in addition to other costs.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 92

IDOL v. SAN FRANCISCO CONST. CO.

(Court of Appeal, Third District, California. May 31, 1905.)

1. Contracts — Performance — Evidence —Sufficiency.

In an action on a contract whereby defendant employed plaintiff to transport men to defendant's camps, *held*, that the evidence was sufficient to establish that plaintiff had transported a certain number of men for whom he had not been paid.

2. Evidence—Original Entries.

On an issue as to the number of men plaintiff had hauled from a certain place to defendant's camp, plaintiff produced a book, and testified that he had entered in it the names of the men sent out by him up to a certain date, and that after that he copied the names in the book from the waybills when the men were hauled, and that the book was correctly kept. *Held*, that the book was admissible as a book of original entries up to the time when the names were copied from the waybills.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1453–1462.]

3. Evidence—Admission—Harmless Error.

On an issue as to the number of passengers plaintiff had carried for defendant, any error in admitting a certain book kept by plaintiff in evidence was immaterial, where his evidence as to the number of passengers carried and not paid for was uncontradicted.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4161–4166.]

Appeal from Superior Court, Mendocino County; J. M. Mannon, Judge.

Action by P. H. Idol against the San Francisco Construction Company. From an order denying defendant's motion for a new trial, it appeals. Affirmed.

W. H. Chapman, for appellant. Thos. Carothers, for respondent.

BUCKLES, J. The appeal comes up from the order of the lower court denying the appellant's motion for a new trial. An agreement was entered into between the respective parties whereby the respondent agreed to pay the plaintiff the sum of $1 each for carrying men from Ukiah to its camps along the line of the extension of the California & Northwestern Railway Company from Ukiah to Willits. There is a conflict in the evidence as to whether the number of laborers were to be paid for who were placed on the wagons and stages, waybilled to the camps of the defendant, or whether it was the number of men who should be delivered at the camps and received by defendant. The court held that plaintiff's contention was correct, and by this court, under the well-settled rule that where there is a substantial conflict in the evidence, the judgment will not be disturbed.

The other assignments of error are as to the introduction of an account book. The plaintiff had testified that "there was due him on the agreement the sum of $442, and that much is unpaid at the rate of $1 a head." Another witness stated that "442 had been hauled that had not been paid for." In rebuttal of this, the defendant showed that the number had not been received. Considering that the agreement was that all who were taken in the vehicles, waybilled for defendant's camps, served as the basis for charging $1, then the evidence produced by plaintiff is sufficient to establish the fact that he transported 442 men for which he was not paid. But the question arose as to the whole number of men hauled from Ukiah, and to ascertain this a book of plaintiff was produced, and plaintiff testified that it was the book in which he entered the names, in his hand, of the men he sent out on his stage, and from the statement of the man as to name, etc., each day, up to September 17th, and after that he copied the names in the book from the waybills, and at the time—the very day—the men were hauled, and that the book was correctly kept; that is, that up to September 17th he was absolutely certain that the book contained a correct statement of the name of every man hauled, and that after that time it contained a correct account of every man on the waybills for defendant's camps; and witness Carothers, who was in plaintiff's employ, and made out the waybills, testified that he put the names of all these men on the waybills. The book was the book of original entry up to September 17th—the entries made therein by the plaintiff at the time of the transaction—and was properly introduced in evidence for the purpose of showing the number of men sent out to that date. But after September 17th the waybills constituted the original entry, and they are not the book to which their contents were transcribed. But whether it was error to introduce the book, instead of the waybills is immaterial, because plaintiff's evidence as to the number of passengers not paid for was uncontradicted.

Judgment is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 111

STODDARD v. NEWHALL et al.

(Court of Appeal, First District, California. June 2, 1905.)

EVIDENCE—DECLARATIONS AGAINST INTEREST—ADMISSIBILITY AGAINST REPRESENTATIVE.

Under Code Civ. Proc. § 1853, declaring the declarations of a decedent against his pecuniary interest admissible in evidence against his successor in interest, the declaration of a decedent that property for which suit was brought by his administratrix belonged to his mother, and that he was in possession thereof for convenience sake, was admissible against the administratrix.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 876–879.]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Margaret Stoddard, as administratrix of the estate of F. A. Stoddard, deceased, against Mary Newhall and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

James R. Lowe and L. B. Archer, for appellants. W. A. Bowden, for respondent.

COOPER, J. This action was brought by plaintiff, as administratrix, for the recovery of a large number of articles of personal property of the estate of plaintiff's intestate, which the defendants are alleged to have taken possession of and conveyed away, and for damages in double the value of the property so taken. Judgment was rendered in favor of plaintiff for the recovery of a portion of the property described in the complaint, or the value thereof, found to be $287.50, and for the further sum of $287.50 (being double damages), and for costs. This appeal is from the judgment and order denying defendants' motion for a new trial.

Among the articles which the complaint charges the defendants with having taken was a lot of tools. Deceased is alleged to have been the owner of said tools. Plaintiff introduced evidence tending to show that deceased was in possession of said tools up to the time of his death. The witness Franks testified in cross-examination that deceased, while in possession of the tools, told him that the tools belonged to deceased. The defendant Mary E. Newhall is the mother of deceased. She testified that the tools belonged to her, and that deceased was employed by her as foreman in her orchard; that he kept most of the tools "at the drier and engines at his house" because it was more convenient for him for them to be there. It is thus apparent that one of the important issues at the trial was as to the title to these tools. Defendants attempted to prove by the witnesses Geer and Stoddard declarations made by deceased to them to the effect that the tools belonged to his mother, and that he was keeping them in his basement because it was more convenient. Several questions were asked for the purpose of eliciting testimony as to what deceased stated to the witnesses as to the ownership of the tools. The court sustained the plaintiff's objections to each of such questions, and the rulings are now complained of as erroneous. The declarations were declarations by deceased against his interest, and the evidence was admissible. The courts hold such declarations admissible because of the extreme improbability of their falsehood. The regard which men pay to their own interests is deemed a sufficient security that any statement or declaration against interest should be received. The admission of such evidence is subject to the objection that it is easily fabricated, and the party who is alleged to have made such statement is beyond the reach of the process of the court, and hence cannot contradict it; but this objection goes to the weight of the evidence, and not to its admissibility. The testimony as to such declarations should be carefully scrutinized in view of all the surrounding circumstances, and the motives or interest of the witness. If, in the light of all the circumstances, and the credibility of the witnesses, the judge or jury believe that such declaration was made, they are to consider it as any other fact in the case. Section 1853, Code Civ. Proc., provides: "The declaration, act or omission of a decedent having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest." The plaintiff, in her capacity as administratrix, is the successor in interest of her deceased husband. It was said by Cockburn, C. J., in Regina v. Overseers of Birmingham, 1 Best & Smith, Q. B. p. 768: "Now, it has been held over and over again, in the analogous case of declarations against pecuniary interest, that the declaration of the deceased person may be received not only to prove so much contained in it as is adverse to his pecuniary interest, but to prove collateral facts stated in it—at all events, so far as it relates to facts which are not foreign to the declaration, and may be taken to have formed a substantial part of it." In Peace v. Jenkins, 32 N. C. 356, the Supreme Court of North Carolina held that declarations of a deceased in regard to his indebtedness were competent in an action to recover personal property where the consideration of the bill of sale was attacked. The court said: "John T. Peace was dead, and his declarations were relevant to the very matter in dispute, to wit, his indebtedness to Josiah Peace, and upon a question of fraud and against his interest. Its aptness to prove that fact of indebtedness was to be considered of by the jury in deciding on its weight, from the time and circumstances under which it was made." See, further, 1 Greenleaf on Evidence, § 147, and notes; Chamberlayne's Best on Evidence, §§ 500 to 503, and American Notes; Am. & Eng. Ency. of Law (2d Ed.) vol. 9, p. 8, and notes.

It is not necessary to decide the question as to whether or not the complaint and findings support the judgment for double damages. As the case must be retried, we will presume that the court will see that the findings are supported by the pleadings and the evidence.

The judgment and order are reversed.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 39

Ex parte CHILDS.

(Court of Appeal, Second District, California. May 27, 1905.)

1. INDICTMENT—ATTACK ON HABEAS CORPUS—SUFFICIENCY.

A complaint charging a crime cannot, on habeas corpus, be attacked for mere uncertainty in its allegations as to the crime charged.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 25.]

2. ORDINANCE—PLEADING.

A county ordinance is within Pen. Code, § 963, providing that, in pleading a private statute, it is sufficient to refer to the statute by its title and the day of its passage, and that the court must thereupon take judicial notice thereof.

3. INTOXICATING LIQUORS — LICENSE—COUNTY ORDINANCE—BREACH.

Under Pen. Code, § 963, providing that in pleading a private statute it is sufficient to refer to the statute by its title and day of its passage, a complaint for violation of a county ordinance forbidding the handling of intoxicating liquors without a license is sufficient, where the title of the ordinance and the day of its passage is set out in the complaint.

Petition by William Childs for writ of habeas corpus. Dismissed.

M. C. Munday and Munday & Redd, for petitioner. E. J. Fleming, Dep. Dist. Atty., for respondent.

GRAY, P. J. This application for a writ of habeas corpus is based on the ground that the complaint on which Childs was convicted and sentenced to a term in jail on a plea of guilty fails to state a public offense. The complaint in question charges "that on the 7th day of April, 1905, near Burbank (outside the limits of incorporated cities and towns), and in the county of Los Angeles, state of California, a misdemeanor was committed by William Childs, who at the time and place last aforesaid did willfully and unlawfully engage in, conduct, and carry on a retail establishment, by then and there selling, serving, and giving away spirituous, vinous, malt, and mixed liquors in quantities less than one-fifth of a gallon, and by the drink and glass, and to be drunk upon the premises where sold, without first having secured a license so to do, contrary to the ordinance of the county of Los Angeles entitled 'Ordinance imposing licenses and fixing rates thereof in the county of Los Angeles, state of California,' as passed, adopted, and approved by the board of supervisors of said Los Angeles county on the 20th day of January, 1903, and particularly sections 1, 3, and 16 of said ordinance, and against the peace and dignity of the people of the state of California." It is urged by petitioner that the ordinance, or the part of it defining the offense with which it is sought to charge the defendant, should have been set out, and that, the complaint failing of this, it does not contain a charge of a public offense. The validity of the ordinance is not in any way questioned. The point made goes only to the sufficiency of the complaint as a pleading; the claim, in substance, being that the complaint is uncertain and not sufficiently specific in its allegations as to this ordinance. No claim is made that the acts charged to have been done by the defendant do not constitute the crime denounced by the ordinance. We do not think that the insufficiency of a pleading in the respect claimed herein can be declared on habeas corpus, even if it were so insufficient. But it is not insufficient in the respect claimed. It is not necessary in pleading a county ordinance to set out its substance, or any part of its substance. Much less is it necessary to copy any part of it into a criminal pleading. Section 963 of the Penal Code reads as follows: "In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof." The ordinance under which the complaint is drawn is a municipal ordinance and a private statute, within the meaning of the above section. Its title and the day of its passage is set out in the complaint, and the court will therefore take judicial notice of it, just as it takes judicial notice of a statute of the state defining a crime. Ex parte Davis, 115 Cal. 447, 47 Pac. 258; City of Tulare v. Hevren, 126 Cal. 229, 58 Pac. 530. Looking at the acts charged in the complaint, it can be seen that they are the acts denounced in the ordinance as a crime, and made punishable thereby.

There is no ground for the issuance of the writ. Let the petition be dismissed.

We concur: SMITH, J.; ALLEN, J.

(1 Cal. App. 75)

In re HAYDEN'S ESTATE.

(Court of Appeal, Third District, California. May 29, 1905.)

1. Guardian and Ward — Incompetents—Maintenance — Sale of Real Estate—Statutes.

Code Civ. Proc. §§ 1777–1781, providing that, when the income of an estate under guardianship is insufficient to maintain the ward, his guardian may sell his real or personal estate, and specifying the proceedings therefor, authorized the guardian of an incompetent, whose income was insufficient to maintain her, to sell a portion of her real property for that purpose.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, § 120.]

2. Same—Contracts—Performance.

Where an incompetent agreed to convey certain land to defendant in consideration of personal services extending through an indefinite future period, defendant was not entitled to prevent the sale of the land by the incompetent's guardian to furnish a fund for her maintenance until defendant was entitled to maintain a suit for specific performance; it being impossible for him to make a binding offer and tender of performance of such personal services.

3. Same—Evidence.

Evidence *held* insufficient to clearly establish a contract by an incompetent either to convey or devise certain land to defendant in consideration of care, maintenance, and society during the balance of incumbent's lifetime.

4. Same—Witnesses — Cross-Examination.

Where a witness, on direct examination, had testified concerning a conversation had with an incompetent, it was proper on cross-examination to ask him concerning "all" of such conversation.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 933.]

Appeal from Superior Court, San Joaquin County.

Application by A. L. Westing, as guardian of the person and estate of Sarah C. Hayden, an incompetent, for an order for the sale of real property, to which F. H. Collins filed objections. From an order directing the sale, objector appeals. Affirmed.

See 79 Pac. 588.

A. H. Carpenter, for appellant. Nicol & Orr and E. P. Foltz, for respondent.

McLAUGHLIN, J. On March 20, 1903, A. L. Westing, a grandson of Sarah C. Hayden, was appointed guardian of her person and estate. On April 11, 1903, said guardian applied to the court for an order of sale of certain real property, alleging in his petition that such sale was for the best interest of the estate, and was necessary, because the personal property and income from the real property were insufficient to pay the expenses of guardianship, the outstanding debts, and costs of maintaining his ward. The appellant, F. H. Collins, filed objections and answer to said petition, denying all the above-recited averments. It is then alleged that on September 1, 1901, the said incompetent entered into a contract whereby she agreed that if he would come to Stockton and live with her, act as her business agent and manager, furnish her board, care, comfort, companionship, and protection during her life, and after her death bury her and erect a monument over the graves of herself and husband, she would give and bequeath unto him, among other property, the parcel of land here sought to be sold. He then alleges a part performance of said contract, and avers that said guardian, hoping to benefit himself as a probable heir of said incompetent, prevented the further performance of this contract, and is endeavoring to repudiate the same and cause said property to be unnecessarily sold in violation of its terms. Under these pleadings, the issues presented were tried, the order granted, and contestant appeals therefrom upon a bill of exceptions containing many assignments of error in rulings on the admission of evidence, and specifying that the evidence is insufficient to sustain the order in the particulars set forth in the above recital of issuable facts.

The Necessity for the Sale.

It can hardly be contended that the property of an incompetent cannot be used for her maintenance and the payment of her debts, as well by the guardian as by herself, if incompetent. Nor can it be successfully maintained that the guardian cannot be authorized to sell any part of the real property for such purpose. Code Civ. Proc. §§ 1777–1781; Smith v. Biscailuz, 83 Cal. 350, 21 Pac. 15, 23 Pac. 314; Fitch v. Miller, 20 Cal. 352. The evidence is entirely sufficient to sustain the conclusion that such sale was necessary and for the best interest of the estate. The evidence of appellant alone would sustain that conclusion; for if he boarded Mrs. Hayden for a considerable time, and the property without that burden yielded a surplus of only $39, it appears that the income is entirely inadequate to entirely maintain the ward now. In any event, the evidence is conflicting, and the conclusion of the court below must be sustained.

But it is claimed that this specific parcel of land could not be sold until other property, not within the contract mentioned, had been disposed of. Equity recognizes, and will enforce, such contracts as the one here pleaded; but it demands that the evidence to prove their existence and terms be clear, positive, and convincing, and the contract must be definite, certain, and just, and in consonance with sound public policy. Owens v. McNally, 113 Cal. 451, 45 Pac. 710, 33 L. R. A. 369. The services rendered must be such that they cannot be fully compensated in money. McCabe v. Healy, 138 Cal. 86, 70 Pac. 1008; Owens v. McNally, 113 Cal. 450, 45 Pac. 712, 33 L. R. A. 369. And when the contract is for conveyance of land, in consideration for personal services extending through a future indefinite period, and the relief sought is the prevention of a sale of the land until specific remedy is ripe, it being manifestly impossible to make a binding offer and tender of performance of such personal services, the relief asked will be denied, for the obvious reason that rights will not be conserved which may never accrue. O'Brien v. Perry, 130 Cal. 526, 62 Pac. 927; Stanton v. Singleton, 126 Cal. 665, 59 Pac. 146, 47 L. R. A. 334; Grimmer v. Carlton, 93 Cal. 193, 28 Pac. 1043, 27 Am. St. Rep. 171; King v. Gildersleeve, 79 Cal. 509, 21 Pac. 961. Then, too, "courts will be more strict in examining into the nature and circumstances of such agreements than any others, and would require very satisfactory proofs of the fairness and justness of the transaction." The nature and character of the services to be rendered must be certain, and in fact certainty must exist as to all terms of the contract. Owens v. McNally, 113 Cal. 452, 45 Pac. 712, 33 L. R. A. 369; McCabe v. Healy, supra.

Tested by these rules, the evidence here presented is far from being satisfactory. The appellant himself seems to be doubtful as to whether he was to take the land by deed during life, or by testamentary disposition, and seems equally doubtful touching the precise nature of the services to be rendered by him and the position he was to occupy in the household. At times his evidence conveys the idea that she was to convey the land to him presently, and again it was to come to him at her death. A carpenter by trade, he worked continuously, and on one occasion at least he was paid for working on her property. Up to December, 1902, the executor of her husband's estate had charge and control of the property, and it does not appear that appellant ever did more than to collect rent occasionally and turn the money over to his aunt. His wife, who heard both parties discuss the agreement, is equally unsettled as to their status in the household, the character of services to be rendered, and the quantity of property to be given or bequeathed. Her version of the matter in her own language is: "We were simply to pay her board, and she was to board with us. She was to furnish the house in which we live, and, as she stated to me her own self, several times, we were to make a home for her, and we were to have a home free of rent. That item of rent was distinctly mentioned. It was just like a son coming to live with his mother, as far as I can state. It was not a son coming to live with his mother, but that is the way she said it." From January 30, 1903, Mrs. Hayden paid the servant, bought her own provisions, and the servant cooked them for her; and she paid the grocery bills for herself and the girl. The testimony of Mr. Webster is in accord with the evidence of Mrs. Collins in salient points. And his evidence, relating to the escrow deed from Mrs. Hayden to Collins, absolutely negatives the existence of any contract to pass this property to Collins by deed or testamentary disposition; for, if she was thus bound to make a disposition of particular property, it is more than probable that it would have been included in a deed deliverable after her death, and this parcel was not so included. Mr. Collins apparently pursued his occupation as a carpenter without interruption. He had the use of her house, rent free, and obtained his wood from her ranch. In fact, it might be said that he enjoyed quid pro quo for every service rendered.

His evidence in direct examination fitted his legal rights with such nicety as to give to his conduct and all the surrounding circumstances peculiar significance. Why did he charge for work on her property? Why his ignorance of her affairs? And why did she, without apparent objection on his part, have her meals prepared by her servant, under the same roof where separate meals for himself and family were prepared? These circumstances, significant and potent, must be weighed with his testimony. Moreover, he testifies that his services, except his personal affection, can be compensated in money, and as his personal affection may still be bestowed, and is not in law a subject of compensation, he can be placed in statu quo. McCabe v. Healy, supra. Then, too, he did not perform the contract he attempts to prove; for from January 30, 1903, and until the guardian removed the incompetent from her home, appellant did not pay her board or other expenses, and he does not explain such failure. The evidence is voluminous, and no necessity exists for further recitals therefrom. Sufficient appears to point the reason for holding, as we do, that the evidence is not of that clear, positive, and convincing nature, or the contract of such character, that the relief here sought could be given.

We have examined the errors complained of in subdivisions 8 to 16 of appellant's brief, and find no prejudicial error. It was not error to sustain the objection to the question mentioned in subdivision 8. The question was broad enough to include any agreement, and the objection was that it was incompetent, if calculated to show any interest of Collins in any property belonging to Mrs. Hayden. The property admittedly was all real property, and any parol agreement showing a present interest in such property was objectionable. There was testimony in the case at that time tending to show that a deed had been made to Collins, and if the conversation concerning this agreement did not relate to the contents of such alleged deed, and did relate to an agreement to make testamentary disposition of property, counsel should have so explained, and then confined his question to the agreement sought to be established. He did not do so, or attempt to follow the subject further; and, as the state of the case justified the objection and ruling, there was no error. It was proper cross-examination to draw from Mr. Webster "all" the conversation he had with Mrs. Hayden. He had, on direct examination, testified concerning conversations with her, and appellant could hardly expect that portions which might be unfavorable could be excluded. The other rulings are so manifestly correct that it would only lengthen this opinion to discuss them.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 90

BITHER v. CHRISTENSEN et al.

(Court of Appeal, Third District, California. May 31, 1905.)

1. INTEREST — COMPUTATION — EXECUTION OF INSTRUMENT—INTENTION OF PARTIES.

Where a note and mortgage were executed and delivered in escrow, but with the intention and understanding that when the transaction was consummated the times of payment of the installments of interest on the note should be computed from the date of its execution and delivery to the depositary, such intention would be effectuated, and interest and the times of its payment would be computed from that date, and not from the date of the consummation of the transaction by the delivery of the note and mortgage by the depositary to the respective parties.

2. APPEAL—PRESUMPTIONS.

On appeal from the judgment roll alone, it must be assumed that the evidence supported the findings.

Appeal from Superior Court, Mendocino County; J. M. Mannon, Judge.

Action by Lawrence H. Bither against Andrew Christensen and another. From a judgment for plaintiff, defendants appeal. Affirmed.

W. Rigby and T. L. Carothers, for appellant. Seawell & Pemberton, for respondent.

CHIPMAN, P. J. Foreclosure of mortgage. Plaintiff had judgment, from which defendants appeal on the judgment roll alone. The only question presented is the claim of defendants that the action was prematurely brought.

From the findings of the court it appears that on August 8, 1898, plaintiff, defendant Christensen, and one Copsey entered into an agreement by which Christensen agreed to purchase certain lands situated in Mendocino county, owned by plaintiff and Copsey as tenants in common, being the premises described in the complaint; that in payment to Copsey for his interest therein said defendant should convey to him certain real property in San Francisco, and in payment to plaintiff for his interest therein he should pay plaintiff the sum of $2,000 five years after date, with interest thereon from said date at the rate of 6 per cent. per annum, payable semiannually, the payment of the same to be secured by mortgage on the premises described in the complaint; that the note evidencing said payment and the mortgage securing the same were to be at once delivered to one Pemberton, "to be held by him and withheld from record and from absolute delivery until such time as the said Christensen and the said Copsey should have time to investigate the title to the properties to be respectively conveyed, and to be respectively satisfied regarding such titles," and upon being so satisfied Pemberton was to make delivery of said note and mortgage to plaintiff, pursuant to which agreement the note and mortgage were executed and left with Pemberton; that thereafter on or before September 3, 1898, Christensen declared himself satisfied with the title, and, although informed that the title to a portion of the land was not perfect, "he insisted on the sale being fully consummated, and agreed to accept the deed to said lands as conveying sufficient title thereto," and directed Pemberton to complete the delivery of the said note and mortgage; and thereupon, "all the parties to the said transaction consenting thereto," Pemberton delivered the note and mortgage to plaintiff. It is further found that Christensen, with full knowledge of all the facts affecting the title of the portion of the land as to which title was not perfect, conveyed the San Francisco property to Copsey, and insisted on having the lands as to which the title was imperfect included in said mortgage. It is further found "that the time of payment of each installment of [as] provided for in said promissory note was, according to the intention and agreement of the parties, to be computed according to the terms of the writing itself —that is, of the terms of said promissory note; that the installments of interest fall due thereunder on the 8th day of February and 8th day of August in each year, respectively, after the date on the face of the note." It is further found that the mortgage provided, in case of default in the payment of any installment of interest, "the whole principal and interest shall be due at the option of the holder of the said obligation"; that plaintiff exercised his option on February 12, 1901, on which day he commenced this action; that defendant Christensen did not, before the commencement of this action, tender to plaintiff any installment of interest due under the terms of said note and mortgage, other than the installments due August 8, 1900, and prior thereto, which by the complaint are admitted to have been paid.

Appellants contend that the interest became due March 3d and September 3d, instead of February 8th and August 8th, as found by the court. Appellants rely on Collins v. Driscoll, 69 Cal. 550, 11 Pac. 244, and other cases to like effect, where it was held that the statute of limitations begins to run against a promissory note from the date of its actual delivery, and not from the date it bears. And it was there said: "Whatever may be its date, a note takes effect only on delivery." But it was also said: "A note may be antedated or postdated, and 'where the purposes of justice require it, the real date may be inquired into, and effect given to the instrument' "—citing Story on Prom. Notes, § 48; Paige v. Carter, 64 Cal. 489, 2 Pac. 260. The court found that the time of payment of each installment of the interest on said note "was, according to the intention and agreement of both parties, to be computed according to the terms of the writing itself," and that "the installments fall due thereunder on the 8th day of August of each year, respectively, after the date on the face of the note." It was perfectly competent for the parties to so agree, and we must assume that the evidence supported this finding.

The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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1 Cal. App. 54

BOYER v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al.

(Court of Appeal, Third District, California. May 29, 1905.)

1. Ejectment — Evidence — Admission—Error.

Where, in ejectment to recover land under a title acquired through a foreclosure suit, counsel offered the judgment roll in such foreclosure suit in evidence, and, in making the offer, enumerated a number of papers, including the affidavit and order for publication of the summons against one of the defendants, and, no objection being made, the court said, "Received in evidence, and considered as read and marked—that is, the judgment roll"—it did not appear therefrom that the affidavit and order for publication were thereby improperly admitted in evidence.

2. Same — Trial — Power of Court—Exclusion of Evidence.

Under Code Civ. Proc. § 125, subds. 1, 2, 3, 5, specifying the powers of a court in the trial of a case, the court's duty is not confined to passing on such portions of the testimony as may be excepted to, but extends to the preservation of the rights of the parties and a proper disposition of the controversy; and hence the fact that certain inadmissible papers were attached to a judgment roll offered in evidence were not objected to did not deprive the court of power, of its own motion, to refuse to admit such papers as a part of the roll.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 130.]

3. Same—Alias Summons — Presumptions.

Where summons was served by publication after the original summons was returned, it would be presumed, in the absence of anything appearing to the contrary on the face of the record, that an alias summons was issued.

4. Same — Mortgages — Foreclosure—Judgment—Conclusiveness.

Where it was stipulated that the pleadings, findings, and decree in a foreclosure suit were sufficient in form and substance, such decree, importing absolute verity, was binding on a party served by publication, and the sale thereunder passed the interest of such party to the purchaser.

5. Same—Payment of Taxes.

Where in ejectment it was admitted that all taxes on the land for 1895 and 1896 were paid by B. at a time when he was in possession under a contract with the purchaser at a mortgage foreclosure sale, through which the title finally passed to him, the fact that the property was assessed to H. at a time when he was in possession did not make such payment operate to the benefit of H.

Appeal from Superior Court, Sonoma County.

Action by A. Boyer against the Pacific Mutual Life Insurance Company of California and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

A. Boyer and J. P. Sweeney, for appellant. Fox & Geary and J. M. Thompson, for respondents.

McLAUGHLIN, J. This is an action in ejectment. Judgment having passed for defendants, the plaintiff appealed from the judgment, and in his bill of exceptions specifies that the evidence is insufficient to sustain the findings of the court relating to the title and right of possession to the land in dispute. The facts essential to a decision are as follows: On September 19, 1890, one H. J. Fouts owned the land in controversy, and on said day executed and delivered to the defendant insurance company his note for $3,000, secured by a mortgage upon said land. The title of Fouts passed by mesne conveyances to one Hellwegan, subject to the mortgage, and plaintiff claims title under a deed from Hellwegan dated June 30, 1900. On July 13, 1894, an action to foreclose said mortgage was commenced; Hellwegan and his wife being made parties defendant. Summons was returned October 24, 1894; the return showing personal service on all the defendants except Hellwegan. On the same day an affidavit for publication of summons was filed, and the order for publication issued. Every step in the service of summons by publication is admitted to be correct, except that it is claimed that such order for publication is void, because the affidavit is insufficient. There is a sharp conflict in the briefs as to the admission of said affidavit and order in evidence upon the trial of the case. Appellant claims that they were, and respondent that they were not, admitted.

During the trial of the case at bar, counsel for defendants offered in evidence the judgment roll in the foreclosure suit, and, in making such offer, enumerated a number of papers—among them, the affidavit and order for publication. No objection was made, and the court then said: "Very well. Received in evidence, and considered as read and marked—that is, the judgment roll in the case of Pacific Mutual Life Insurance Company v. Fouts." In view of what had just transpired, this pointed language was evidently intended to exclude the affidavit and order thus improperly enumerated, and admit only the judgment roll. If, however, there be any uncertainty as to this, that uncertainty must be resolved against appellant, who must show error affirmatively. Romine v. Cralle, 80 Cal. 628, 22 Pac. 296; Batchelder v. Baker, 79 Cal. 267, 21 Pac. 754; O'Callaghan v. Bode, 84 Cal. 493, 24 Pac. 269; Spelling on New Trial, §§ 428–685.

At the time the judgment in foreclosure was rendered (1894), neither the affidavit nor order for publication formed part of a judgment roll. People v. Temple, 103 Cal. 447, 37 Pac. 414; In re Newman, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146. Hence these two papers were inadmissible, under the well-settled rule that a judgment cannot be thus collaterally assailed. Sharp v. Daugney, 33 Cal. 505; People v. Harrison, 84 Cal. 609, 24 Pac. 311; Whitwell v. Barbier, 7 Cal. 54; Bennett v. Wilson, 133 Cal. 385, 65 Pac. 880, 85 Am. St. Rep. 207. This is admitted by counsel for appellant, but he contends that the papers being attached to the judgment roll, and enumerated when the offer was made, the court had no power of its own motion to strike out or refuse to admit evidence to which there had been no objection. This contention has no merit but its novelty. Section 128, Code Civ. Proc. subds. 1, 2, 3, 5. "The duty of the court is not confined to passing upon such portions of testimony as may be excepted to, but extends to the preservation of the rights of litigants, and a proper disposition of the matters in controversy." Parker v. Smith, 4 Cal. 106; People v. Wallace, 89 Cal. 166, 26 Pac. 650.

As the affidavit and order were eliminated from the case by the trial court, the question of their sufficiency is eliminated here, and it could serve no useful purpose to lengthen this opinion by discussing such sufficiency, or other questions connected with and dependent upon the existence of the main question here.

It is urged that the summons was served by publication after the original summons was returned. If it be conceded that such was the case, it could make no difference, for, nothing to the contrary appearing in the face of this record, it will be presumed that an alias summons was issued. People v. Davis, 143 Cal. 678, 77 Pac. 651; Sacramento Bank v. Montgomery et al. (decided May 17, 1905) 81 Pac. 138.

It is here expressly stipulated that the pleadings, findings, and decree in the foreclosure suit are sufficient in form and substance, and therefore such decree—importing, as it does, absolute verity—was binding on Hellwegan, and the sale under said judgment passed his title to the Pacific Mutual Life Insurance Company.

This disposes of all the specifications of error and insufficiency of evidence save one. It is claimed that the evidence is not sufficient to sustain the finding that the defendant Bruner paid all the taxes on the land for 1895–96. That Bruner did in fact pay the taxes is not disputed. Nor is it disputed that at the time of such payment Bruner was in possession of the land under a contract with the Pacific Mutual Life Insurance Company, through which the title finally passed to him. But it is contended that, because the property was assessed to Hellwegan at a time when he (Hellwegan) was in possession, the payment made by Bruner must be held made for the benefit of Hellwegan. The mere statement of the proposition is its refutation.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

1 Cal. App. 71

PEOPLE v. DURAND.

(Court of Appeal, Third District, California. May 29, 1905.)

Criminal Law—Appeal from Judgment—Questions Reviewable.

Under Pen. Code, § 1170, providing that an appeal from a judgment may be on the ground of error in charging the jury; section 1259, declaring that on such an appeal the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment; and section 1181, enumerating the grounds on which a new trial may be awarded after conviction—the sufficiency of the evidence to justify the giving of an instruction cannot be inquired into on an appeal from a judgment if there is any evidence to support the instruction.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Al Durand was convicted of assault with a deadly weapon, and appeals. Affirmed.

E. W. Holland, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of assault with a deadly weapon. He appeals from the judgment on bill of exceptions duly settled and allowed. There was no motion to instruct the jury to acquit when the prosecution rested, nor for a new trial, and there is in the record no exception taken to any ruling or decision of the court. The court instructed the jury as follows: "That, in order to convict the defendant of the crime charged in the complaint, it must appear from the evidence, beyond a reasonable doubt, that the alleged assault was made with a deadly weapon, and that it is incumbent on the prosecution to prove beyond a reasonable doubt and to a moral certainty that the weapon mentioned in the information was in fact a deadly weapon." The point made by defendant is that, although the instruction is a correct statement of the law, the evidence is insufficient to establish as a fact that the weapon with which defendant was assaulted was a deadly weapon, and hence the verdict was in violation of the instruction given.

The Attorney General contends that the sufficiency of the evidence may not be inquired into on this record. It was held in People v. Keyser, 53 Cal. 183, that the defendant may, upon an appeal from the judgment without having made a motion for a new trial, rely upon any of the grounds of exception mentioned in section 1170 of the Penal Code, and, of course, we may add, when the record contains a bill of exceptions, he may likewise rely upon any of such grounds. These grounds are stated in three paragraphs of the section, the first two of which can have no possible reference to the point made by defendant. The third paragraph also contains matter equally inapplicable to this case, and the only ground of exception at all applicable is an error of the court "in charging or instructing the jury upon the law on the trial of the issue." Section 1181 of the same Code enumerates in several different paragraphs the cases in which the court may, when the defendant has been convicted, grant him a new trial. It will be seen from a comparison of these two sections, as was said in Walker v. Superior Court, 135 Cal. 369, 67 Pac. 336, "that there are certain matters which may be pressed to the attention of the court upon motion for a new trial alone, and certain other matters which may be brought by a proper bill of exceptions to the attention of the appellate court, either upon denial of the motion for a new trial or upon direct appeal from the judgment, without the intervention of a motion for a new trial." The court then points out, by way of illustration, some of the matters which may be considered on an appeal from the judgment where there is no motion for a new trial. This exposition shows quite clearly that cases arise where "the instruction, though correct in point of law, is inapplicable to any evidence in the case, or to any theory which may be taken of the evidence in the case." An instruction upon the principle of flight as evidence tending to show guilt is given by way of illustration. Should defendant claim that there was no evidence whatsoever in the case tending to show that he had ever fled or attempted to escape from custody, he would have the right to so claim in a bill of exceptions on his appeal from the judgment, and it would be the duty of the district attorney to point out the evidence disputing such claim. So, also, as to defendant's exceptions to the rulings of the court in admitting or rejecting testimony. "His right to except to these is reserved by subdivision 3 of section 1170. His right to press his exceptions upon appeal from the judgment is preserved to him by section 1259 and the decision in People v. Keyser," supra. But does the right extend to the case here? There was some evidence tending to show that the weapon used by the defendant, and with which he made the assault, was a deadly weapon. The claim is that it was insufficient to prove the deadly character of the weapon, not that there was no evidence tending to show its character. If, upon an appeal from the judgment alone, the defendant may claim that the evidence is insufficient to establish the character of the weapon used in an assault, in order to show that the weapon used was not such as the instruction declared was essential to conviction of defendant, we do not see but that any other essential fact upon which there is a correct instruction, and as to which fact there is some evidence in the record, may also be reviewed in like manner, and the requirement of motion for a new trial would be practically abrogated. An instruction as to the doctrine of reasonable doubt would allow the defendant to have the evidence examined on his appeal from the judgment in order to show that there was grave doubt of his guilt. So, also, as to the intent with which the act was committed. Indeed, the rule would permit almost every fact tending to show guilt to be thus re-examined without a motion for a new trial, and on the appeal from the judgment alone. The provision of section 1259 is that on such an appeal "the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment." If the claim had been that there was no evidence whatsoever tending to show that any weapon was used in the assault, or that there was no evidence whatsoever tending to show that the weapon used was a deadly weapon, the case possibly might be said to be similar to the case suggested in the illustration relating to the flight of a defendant. But such is not the claim, for, as we have seen, it is conceded that there was some evidence on the point.

In People v. Ward, 79 Pac. 448, the court did not find it necessary to decide the question now involved, but it was there said that a defendant cannot have reviewed an order which denies him a new trial on the ground that the verdict is unsupported by the evidence, unless he shows by his bill of exceptions that he moved on that ground. The reason there given for requiring the bill to show that a motion had been made on the ground urged applies even more strongly to a case where it is sought to review the evidence on an appeal from the judgment.

The court cannot look to the testimony brought up by bill of exceptions on an appeal from the judgment alone, unless authorized to do so on a motion for a new trial, except in cases arising under section 1170 as interpreted in People v. Keyser, supra, or in cases to which section 1259 is applicable. The insufficiency of the evidence to sustain the verdict is expressly made the ground for a new trial under section 1181. It is not a matter mentioned in section 1170, nor is it included in the rights reserved to defendant by section 1259. There is a wide difference between the case where there is some evidence to a fact, although claimed to be insufficient, and where there is an entire absence of evidence to a fact concerning which there is an instruction. In the former case, if the instruction is correct as matter of law, the court cannot, on appeal from the judgment alone, look into the record to examine into insufficiency of the evidence, but defendant must move for a new trial to have the evidence reviewed. In the latter case he may, on his appeal from the judgment alone, claim an entire absence of evidence, in which case "the district attorney must," as was said in Walker v. Superior Court, "point out the evidence militating against the statement, and cause it to be inserted by way of amendment to the bill."

The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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1 Cal. App. 1

PEOPLE v. CURTIS.

(Court of Appeal, First District, California. May 22, 1905.)

1. Indecent Assault — Information—Victim—Sex.

Pen. Code, § 288, provides that any person who shall willfully and lewdly commit any lewd or lascivious act, other than those constituting other crimes, on or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing passions or sexual desires of such child, shall be guilty of a felony. *Held*, that an information for violating such section was not defective for failure to allege the sex of the child on whose person the act was committed.

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

C. L. Curtis was convicted of a statutory offense, and he appeals. Affirmed.

Geo. F. Carroll, De Witt C. Turner, W. J. Marcum, and Frank J. Murphy, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, J. Defendant prosecutes this appeal from the judgment of conviction, and the order denying his motion for a new trial. The prosecution was under section 288 of the Penal Code, which reads as follows: "Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two of this Code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the State Prison not less than one year." The sole point relied upon here is that the information fails to charge a public offense, because it does not show that the defendant and the child upon and with whom the crime was committed are of opposite sexes; that it does not show that defendant is a male, nor that the child is a female. It is not necessary that the information contain any statement as to the sex of the parties, or either of them. Any person who commits the acts named in the section upon or with the body of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or child, is guilty of a crime, under the section. If the acts prohibited were committed by defendant upon or with the body of a child of the same sex as defendant, he would nevertheless be guilty. The Legislature has not seen fit to make any reference to sex in the section, and it is not for this court to do so. It is sufficient that the information charges the offense substantially in the language of the statute.

The judgment and order are affirmed.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 5

FARRELL v. BOARD OF POLICE COM'RS OF CITY & COUNTY OF SAN FRANCISCO et al.

(Court of Appeal, First District, California. May 24, 1905.)

1. Municipal Corporations—Police Force—Removal of Officer—Mandamus—Limitations.

Code Civ. Proc. § 343, declares that an action for relief not otherwise provided for must be commenced within four years after the cause of action shall have accrued; and section 338, subd. 1, provides that an action upon a liability created by statute, other than a penalty or forfeiture, must be commenced within three years. *Held*, that mandamus to require plaintiff's admission to the office of a policeman, he alleging that he had been wrongfully removed, was barred by limitations where there had been a delay of nine years.

2. Same—Failure to Prefer Charges.

Const. art. 20, § 16, in substance provides that, when the duration of an office is not provided for by the Constitution, it may be declared by law, and, if not so declared, it shall be held during the pleasure of the authority making the appointment. *Held* that, where an officer's term is not fixed by the Constitution or declared by law, he holds only during the pleasure of the appointing power, and may be removed without charges, notice, or trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, §§ 69, 99.]

Appeal from Superior Court, City and County of San Francisco; C. B. Hebbard, Judge.

Action by J. W. Farrell against the board of police commissioners of the city and county of San Francisco and others for a writ of mandate requiring respondents to admit plaintiff to the office of policeman on the police force of the city and county of San Francisco. From a judgment overruling a demurrer to the petition, defendants appeal. Reversed.

The City and County Attorney, for appellants. Curtis Hillyer, for respondent.

HALL, J. This is an action by plaintiff against the defendants for a writ of mandate, directed to and requiring the board of police commissioners of the city and county of San Francisco to admit plaintiff to the office of policeman on the regularly constituted police department of the city and county of San Francisco. In plaintiff's petition he alleges that the board of police commissioners removed him from his office of policeman in the month of March, 1892, arbitrarily, and without any charges being preferred against him, and without any trial or hearing upon any charges, and that said commissioners have ever since said time deprived him of the use and enjoyment of his said office, and that he is still by them deprived of the enjoyment of said office. The petition for the writ was filed in the month of May, 1901. To this petition the defendants demurred, upon the general ground that it did not state facts sufficient to constitute a cause of action or to entitle plaintiff to a writ of mandate, and also upon the ground that "plaintiff's cause of action and right to a writ of mandate is barred by subdivision 1 of section 338 of the Code of Civil Procedure, and by section 343 of the Code of Civil Procedure." The lower court overruled the demurrer, defendants answered, a trial was had, and judgment went against the defendants as prayed for in plaintiff's petition.

So far as the plea of the statute of limitations is concerned, a precisely similar case was presented to the Supreme Court, since the taking of the appeal in this case, in the case of Jones v. Board of Police Commissioners of the City and County of San Francisco, 141 Cal. 96, 74 Pac. 696. The only difference between the Jones Case and the case before this court is that in the Jones Case the delay in bringing the action was about seven years, while in this case it exceeds nine years. In that case it was held that the plea of the bar of the statute of limitations was well taken, and the judgment of the lower court in favor of the plaintiff in that action was reversed, with directions to the court below to sustain the demurrer and dismiss the proceeding. The principle of the Jones Case controls this. See, also, Barnes v. Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153; Barber v. Mulford, 117 Cal. 356, 49 Pac. 206.

As to the general demurrer that the petition did not state a cause of action, the same question was presented in the case of People v. Hill, 7 Cal. 97; the only difference being that in the latter case the question arose under section 7 of article 11 of the old Constitution, while in the present case it arises under section 16 of article 20 of the present Constitution. Each in substance provides that, when the duration of an office is not provided for by the Constitution, it may be declared by law, and, if not so declared, it shall be held during the pleasure of the authority making the appointment. In the Hill Case it was said: "The only way in which this power of removal can be limited is by first fixing the duration or term of office, and then providing the mode, if deemed necessary, in which the officer may be removed during the term. A law which simply provides that a party shall not be removed, except in a given case, where the duration is not declared, would, in our opinion, be unconstitutional." It was accordingly held in the case of People v. Hill that the board of police commissioners could remove a police officer without any charges being preferred, and without any trial, for the reason that his term of office was not fixed, and he held office only during the pleasure of the appointing power. The same question was presented in the case of Smith v. Brown, 59 Cal. 672. That case arose under the present Constitution and the charter of Sacramento. The trial court rendered judgment upon demurrer for the defendant, and the court affirmed this judgment on the authority of People v. Hill. In Patton v. Board of Health of the City and County of San Francisco, 127 Cal. 388, 59 Pac. 702, 78 Am. St. Rep. 66, the court held that, where an officer's term is not fixed by law or by the Constitution, such officer holds only during the pleasure of the appointing power, and may be removed without charges, notice, or trial; citing People v. Hill and Smith v. Brown. Counsel for the respondent seems to concede that if People v. Hill is sound, the judgment in this case must be reversed; but he urges with much earnestness that the doctrine laid down in People v. Hill is not sound, and that the case should be overruled. We think the rule in People v. Hill is correct, and see no reason for departing from it.

The judgment is reversed, with directions to the lower court to sustain the demurrer and dismiss the petition.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 17

PEOPLE v. OLSEN.

(Court of Appeal, Third District, California. May 24, 1905.)

1. CRIMINAL LAW—COURT—MISCONDUCT.

A juror, in a prosecution for murder, on his voir dire, stated that he would have to be pretty well convinced, especially by circumstantial evidence, because he had seen one case go wrong on circumstantial evidence, whereupon the court remarked: "That is one case out of ten thousand—one out of ten thousand. That is about the rate." And thereafter, on defendant's attorney calling the court's attention to the remark, the judge replied: "I say so yet." *Held*, that such statement could only have impressed the juror with the fact that circumstantial evidence was to be considered, and that convictions could be had on such evidence, and hence, though objectionable, was not prejudicial error.

2. SAME.

In a prosecution for murder, circumstantial evidence *held* sufficient to sustain a conviction.

3. SAME—EXPERT OPINION.

Where, in a prosecution for murder, a physician who had performed the autopsy describthe wounds in detail, and from such description it plainly appeared that some blunt instrument must have been used in making them, defendant was not prejudiced by the admission of the witness' expert opinion that they were so caused.

4. SAME—INSTRUCTIONS.

Where, in a prosecution for murder, based on circumstantial evidence, the court had fully instructed as to the nature, force, and general rules applicable to such proof, a further instruction that if, under such rules, the testimony was sufficient to convince the jury, as reasonable men, beyond a reasonable doubt, that the defendant did commit the act charged," although the act may be surrounded in a degree by a doubt," then it was their duty to convict, was not erroneous, though the words quoted were meaningless and should have been stricken.

5. SAME.

Where the court charged at defendant's request that, when independent facts and circumstances are relied on to identify accused as the person who committed the crime charged, each material independent fact or circumstance necessary to complete such chain or series of independent facts tending to establish his guilt should be established to the same degree of certainty as the main fact which the independent circumstances tend to establish, etc., defendant was not entitled to object to an instruction that each and every fact and circumstance relied on by the prosecution to establish defendant's guilt must be proved beyond a reasonable doubt, and if the jury were not entirely satisfied, beyond all reasonable doubt, that such facts and circumstances had been proved, it was its duty to find a verdict of not guilty.

Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Oscar Olsen was convicted of murder, and he appeals. Affirmed.

J. O. Prewett and J. S. Daly, for appellant. U. S. Webb, Atty. Gen., for the People.

BUCKLES, J. Defendant was informed against by the district attorney of the county of Sacramento for the crime of murder, alleged to have been committed in the city of Sacramento on the 6th day of February, 1904, by killing one Henry Salt. He was tried, and found guilty of murder in the first degree, with punishment fixed for life in the State Prison. Appeal is from the judgment and order overruling his motion for a new trial.

During the examination of the jurors on their voir dire, and after six persons had been accepted and sworn to try the case, and while the examination of Juror Campbell was progressing, Campbell remarked, in answer to a question, that he would have to be pretty well convinced, especially in circumstantial evidence, because he had seen one case go wrong in Sacramento on circumstantial evidence, and the judge remarked: "That is one case out of ten thousand—one out of ten thousand. That is about the rate." And further on in the examination of Campbell, when defendant's attorney called the court's attention to this remark, the judge replied: "I say so yet." This is assigned as error. It is claimed by the defendant that the remarks of the court were, in effect, charging the jury as to the weight and reliability of circumstantial evidence, and that, out of 10,000 convictions in Sacramento county on circumstantial evidence, 1 was innocent, and 9,999 were guilty. This was assigned as error on the part of the trial judge. The statement of the judge was highly improper, and might well have been left unsaid. The first case cited by defendant in support of his contention is that of People v. Fong Ching, 78 Cal. 173, 20 Pac. 396. In that case the defendant was on trial for having offered Policeman Martin a bribe to induce Martin to testify falsely in a murder trial. The defendant testified in his own behalf, and said he had given Martin several sums of money, amounting to about $400, but that it was for his friendship, and to induce him to testify merely to the truth, and not to testify falsely against one Lee Chuck in a murder case. The judge said to the jury in one of his instructions: "If you believe the defendant's version, your verdict should be 'Not guilty.' It is not a crime in this state to encourage a witness with pecuniary gifts to be truthful, but neither is it among the recognized customs of this country to subsidize the personal integrity of our citizens in order to prevent them from lapsing into falsehood and perjury." The court said: "This language could have but one meaning and purpose. In addition to incorporating an unproved fact into the case, it was an argument against the truthfulness of the defendant's testimony, and its direct tendency was to induce the jury not to believe it." This was an attempt on the part of the judge to instruct the jury as to the weight to be given the defendant's testimony, and was clearly error. In People v. Travers, 88 Cal., at page 236, 26 Pac., at page 89, cited by defendant, the court told the jury in its charge: "During the argument of this case your attention has been called to a number of cases in which it was claimed that juries had improperly convicted the defendants. While it is true that innocent persons have been convicted in the past, there is no proof in this case of any such fact, and you are not justified in considering such matters in determining the guilt or innocence of this defendant. * * * If all criminals must go free because there is a possibility of jurors making mistakes, society might as well disband." The court said: "This instruction is clearly erroneous. In the first place, it is objectionable—although perhaps not fatally so—on account of its apparent hostility to the defendant. The jury would be very apt to get the impression from it that the court considered the defendant one of the 'criminals' alluded to, and feared the jury would fail to convict him on account of 'sympathy or prejudice.' In the second place, it is objectionable as an argument in favor of the prosecution on the weight of evidence, and thus was an invasion of the province of the jury." In the case at bar the words complained of were not found in an instruction to the jury, but a remark of the court during the impaneling of the jury, and could not have had any other effect than to impress upon the minds of the jurors the fact that circumstantial evidence was to be considered, and that conviction could be had on such evidence, and therefore not subject to the criticisms made in the cases cited. Therefore the error, if any, was not of a nature to injure the defendant. People v. Urquidas, 96 Cal. 239, 31 Pac. 52.

It is claimed by the defendant that the evidence in the case is totally inadequate to convict him. The testimony is circumstantial, but the circumstances all point to the defendant's guilt, and are as follows: The defendant and deceased were seen together on I street, drunk, arm in arm, puddling in the mud. They went to an open box car standing on I street, and the defendant helped deceased into the car and went away, leaving the door open. This was 12:45 p. m. A boy 11 years old had seen the defendant and two or three men together near China Slough, near Third and I streets, at 11:55 a. m., and the defendant was sitting on the stomach of deceased; and, whenever deceased made an effort to get up, defendant would hit him in the jaw. The boy saw the two or three men leave, and the deceased still on the ground. This witness was not positive in his identification of defendant or deceased. At about 1:15 defendant was seen at a saloon at No. 229 I street, and there was blood on his hand. The car door was open at 1:20 or 1:30 p. m. from 10 to 14 inches. Between 3 and 4 o'clock the defendant went with one Matteson to deliver a load of coal, and, while with Matteson, asked where he could sell a dead man, and on their return, said to Matteson: "When we are coming back I will show you where the stiff is. He is in a car." Defendant also told this witness that if he sold this dead man he had another one in sight, and that he would divide with witness. On their return from delivering the coal, defendant took Matteson to the box car on I street. The car was closed, and defendant opened the door. The body of deceased was lying in the west end, no hat on, and still warm. Defendant jumped into the car, raised the head of deceased, and said, "Isn't he a big, nice, juicy son of a bitch?" The flap of the pants was lying open. Defendant and witness then went to the coroner's office and tried to sell a dead body. The defendant said to Fenton, who was in the coroner's office: "I have got one for you. How much is there in it? I have got to have some money." The witness Fenton, who was also an undertaker, went with defendant to the car for the body; and, on approaching the car, defendant jumped out of the wagon, opened the car door, went to the body, grabbed hold of it and pulled it to the door of the car, and helped to place it in the wagon. The sternum was caved in, the lower jaw broken, and the body was beaten in a way to indicate that some blunt instrument had been used in inflicting the wounds, for the skin was not broken. The heels of the shoes worn by defendant showed blood stains, and blood stains were on his overalls. He declared he had no acquaintance with deceased. When the coroner asked him when he discovered the body, he answered, "About twelve o'clock." When the coroner said to him, "Now it is after four o'clock. Why didn't you report this before?" he answered, "Well, I don't know." Blood spots and stains were found in the car. The deceased must have met his death in the car. Defendant tendered no explanation of these circumstances. We think these circumstances were sufficient to indicate the guilt of the defendant, and, as the jury found him guilty, they must have believed him guilty beyond a reasonable doubt.

The shoes and overalls of the defendant, and the hat found in the car after the body was removed, were all introduced in evidence over defendant's objection. We think there was sufficient identification of the shoes and overalls as belonging to the defendant and the ones he wore between 11:55 a. m. and 3:30 o'clock p. m. of the day of the killing, and each article appeared to have human blood stains on it. The hat was not identified as the one deceased wore when he was seen with defendant going into the car, but there was nothing about the hat which would make it a link in the chain of evidence showing guilt, and it could do the defendant no harm.

Dr. Stevenson, the medical expert who made the autopsy on the body of the deceased, testified that he found abrasion on face, slight abrasion of left ear, abrasion and contusion over left cheek, right ear badly contused and slightly lacerated, fracture of right lower jaw, contusion an inch in diameter over inner third of right collar bone, contused wounds on other parts of collar bone, and one below the navel, a contused wound on the left groin, contused wound on the outer side of the left hip, and other scattering contused wounds on the body, and a general bruised condition about the chest. "All the ribs on the right side were fractured, except the upper two. The third, fourth, fifth, sixth, seventh, eighth, and tenth ribs on the left side were fractured. There was a contusion of the apex of the heart, which was caused by this violent force, forcing the chest wall down on the heart. There was a multiple rupture of the liver, done by the same cause. There was a considerable quantity of blood in both pleural cavities and in the abdominal cavity. Both lungs were bruised, and this condition was caused by the chest wall being forced in on them. The top of the chest was literally crushed in. Those wounds were necessarily fatal." The witness was then asked, "What, in your opinion, was the character of the instrument by which those wounds were caused?" Defendant objected on the ground that "this is not a subject of expert testimony." The objection was overruled, defendant excepted, and the witness answered: "It was made from some blunt instrument; I should say, rather, narrow, without any cutting edges. I mean sharp, cutting edges. There was no break in the skin. It was a bruised condition. So it must have unquestionably been produced by some blunt instrument of some kind." Defendant moved to strike out the witness' answer on the same ground, which the court denied, and he excepted. The witness then continued: "The ribs were broken clear off and forced in, tearing the pleura as they went by. The liver was ruptured in about five places." On cross-examination the witness testified: "Death would have come very soon after having received such injuries. I do not think he could have lived three-quarters of an hour, and it would have been impossible for deceased to have walked after receiving those injuries." In support of defendant's contention that the question as to the character of the instrument by which the wounds were caused is not expert testimony and is harmful to the defendant, he cites the Durrant Case, 116 Cal. 215–218, 48 Pac. 84, 85. In that case a hypothetical question was put to the expert physician, something like this: "If you wanted to keep the head—the face and neck—in an upright position, not turned to one side or the other, of a dead body still warm with life, what would you do to keep it in that position?" The objection to the question was that it was not a hypothetical question involving any elements in the case. The ruling and reasoning for same is unnecessary to quote here. The witness answered: "I would place it first in the position in which I wanted it, and, if it did not remain there, I would prop it up by supports in the desired position." Having disposed of the question raised in that case by Mr. Deuprey's objection, the court passed to the consideration of the proposition that the hypothetical question and answer were not the subject of expert testimony—a question, says the court, that was not presented to the trial judge. The court further said: "A juryman would be absolutely deficient in common sense and common knowledge who did not know that the way to keep an inanimate object in a given position would be to support it by props and stays in that position. * * * There was here no question of professional, scientific, or technical skill or knowledge. But the question and answer were absolutely without injury." And so it is here. The witness had described the wounds, and surely, from his detailed statement of their description and condition as he found them, it would show to the very dullest mind that they were inflicted with something other than a sharp instrument, but that in making them some blunt instrument must have been used, and the jury would be forced to such conclusion without the statement of the physician that the instrument was a blunt one. The shoes introduced in evidence were shown to be the shoes worn by defendant, and the jury had a right to infer from the description of the wounds themselves that they were made with the heels of those very shoes. A witness called as an expert should not be permitted to give his opinion and conclusions upon any matter not clearly of the nature of expert evidence. And when such testimony is admitted, and is of such a nature as to present to the jury a conclusion other than that which the jury might properly and reasonably reach from the other testimony in the case, then such testimony is harmful, and it will be error to admit it. For the reasons here stated, there was no error in admitting this evidence.

Certain instructions were given by the court, of which the defendant complains. The case was one of circumstantial evidence, and the court had fully instructed the jury as to the nature, force, and general rules of application of circumstantial evidence, and then said further: "If, under the foregoing rules, the testimony in this case is sufficient to convince you, as reasonable men, beyond a reasonable doubt, that the defendant did commit the act charged, *although the act may be surrounded in a degree by a doubt*, then I charge you that it is your duty to convict." This very instruction was given in People v. Anthony, 56 Cal. 397, and approved. But we think the trial judge might very well have omitted the words italicized, as they seem to be meaningless when all the rules and definitions of circumstantial evidence are given, and in view of the fact that the jury was repeatedly admonished that they must be satisfied from the evidence and beyond a reasonable doubt of the defendant's guilt, or they must acquit him.

The defendant claims the court erred in giving the following instruction: "The jury are instructed that each and every fact and circumstance relied upon by the prosecution to establish the guilt of the defendant, must be proved by the evidence beyond a reasonable doubt, and if the jury are not entirely satisfied, beyond all reasonable doubt, that such fact and circumstance has been proven, it is your duty to find a verdict of not guilty." The instruction seems as favorable to the defendant as he could ask, and, taken with all the other instructions in the case, and especially with the defendant's instruction No. 6 as modified by the court, he has no reason to complain. The instruction No. 6 is as follows, to wit: "You are instructed that, when independent facts and circumstances are relied upon to identify the accused as the person who committed the crime charged, each material, independent fact or circumstance necessary to complete such chain or series of independent facts tending to establish his guilt should be established to the same degree of certainty as the main fact which these independent circumstances, taken together, tend to establish. That is to say, each essential, independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty, beyond a reasonable doubt, and to your entire satisfaction, or you must acquit the defendant."

The refusal of the court to give defendant's instruction No. 15 and part of No. 2 are claimed as error, but all the matter contained in these two instructions is found in other instructions which were given, and the defendant had the full benefit of all they contained, and no error was made.

For the reasons herein stated, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

(1 Cal. App. 30)

In re CHESNEY'S ESTATE.

(Court of Appeal, First District, California. May 25, 1905.)

1. EXECUTORS — LEGACIES — PAYMENT—SUFFICIENCY OF ASSETS—DETERMINATION—COLLATERAL INHERITANCE TAX.

In determining the amount of money in the hands of executors available for the payment of a legacy, the court properly excluded the amount of the collateral inheritance tax to which the legacy was subject, such tax being neither an expense of administration, nor a charge on decedent's general estate, but a tax on the right of succession, which was to be deducted from the amount payable to the legatee in satisfaction of the legacy.

2. SAME—PAYMENT — INDEBTEDNESS OF ESTATE.

Code Civ. Proc. § 1663, authorizes the court to grant the petition of any legatee for the payment of his legacy if it appears that the estate "is but little indebted" and that the payment can be made "without loss to the creditors of the estate," and to dispense with the bond from the petitioner if the time for presenting claims has expired, and all claims that have been allowed have been paid, and the court is satisfied that no injury can result to the estate. *Held*, that where at the expiration of the time for the filing of debts against an estate the only indebtedness consisted of a disallowed claim filed by the petitioner on which suit had been brought, and the executors had in their hands property belonging to the estate many times greater in value than the amount of such rejected claim, it was not error for the court to grant petitioner's application for immediate payment of a legacy bequeathed to her without requiring a refunding bond.

3. SAME—COST OF TOMBSTONES.

Where executors had power to resort to decedent's real estate, if necessary, to obtain funds to erect tombstones provided for by the will, the court, in determining whether the amount of personal property in the hands of the executors was sufficient for the immediate payment of petitioner's legacy, was not required to take into consideration the amount that might be required for the erection of such tombstones.

Appeal from Superior Court, City and County of San Francisco; F. H. Kerrigan, Judge.

Petition by Mrs. S. Dallman against J. J. Frank and others, executors of the estate of Lisette Chesney, deceased, for the payment of a legacy. From a decree granting such petition, the executors appeal. Affirmed.

L. L. Solomons, for appellants. E. A. Bridgford and Hudson Grant, for respondent.

HARRISON, P. J. By the last will and testament of the above-named decedent she bequeathed to the respondent the sum of $500. After the expiration of more than one year from the issuance of letters testamentary, the respondent presented to the superior court her petition for a distribution to her of the said legacy. In her petition she alleged that the court had made a decree establishing due notice to the creditors of said estate, and that the time for the presentation of claims had expired, and that all claims that had been presented to and allowed by the executors had been fully paid; that a claim against the said estate for $915 had been presented by her and rejected by the executors, and that an action thereon was still pending and undetermined; that the estate was indebted to no one but herself, and to her only upon her said claim. She also alleged that it appeared from the inventory of the estate filed by the executors that its value exceeded $15,000, and that they had filed an account showing that after reserving a sum sufficient to pay her said claim, in case she should recover thereon, there would remain in their hands a balance of upwards of $3,000 for distribution to the persons entitled thereto, and that the legacy to her could be paid without any loss to the creditors of the estate. The executors filed an answer to her petition, and upon the hearing thereon the court found that all of its allegations were true, and entered an order directing the executors to make the payment asked for by the respondent, and dispensed with the execution of any bond on her behalf. From this order the executors have appealed, and in support of their appeal contend that it sufficiently appeared at the hearing that they did not have in their hands sufficient money with which to pay to the respondent the amount of her legacy, and that the court erred in not requiring her to execute the bond named in section 1663 of the Code of Civil Procedure.

In their answer to the respondent's petition the executors set forth as a defense thereto that the decedent had made other bequests of equal rank with that of the respondent, which, with the interest thereon, amounted to about $2,000; that the estate in their hands was subject to a collateral inheritance tax upon the several bequests, amounting to $729.38; and that the testatrix had directed them to erect suitable tombstones over the graves of herself and her deceased husband, which they estimated would cost $200. At the hearing it was shown, from the last account filed by the executors, that they then had in their hands $3,044.86 in money, and also real estate valued at over $7,000, and that out of said money all of the legacies except that of the respondent had been paid since the filing of said account. It was not shown that the executors had disposed of any other portion of the estate. It thus appeared that they had in their hands a sum of money much in excess of the respondent's legacy, and the court did not therefore err in directing its payment.

In determining the amount of money in the hands of the executors available for the payment of the respondent's legacy, the court was not required to take into consideration the amount of the collateral inheritance tax. Such tax is not one of the expenses of administration, or a charge upon the general estate of the decedent, but is in the nature of an impost tax or tax upon the right of succession (Estate of Wilmerding, 117 Cal. 281, 49 Pac. 181), and is imposed upon the several amounts of the decedent's estate to which the successors thereto are respectively entitled (Estate of Wilmerding, supra; Estate of Hoffman, 143 N. Y. 327, 38 N. E. 311). "The tax is computed, not on the aggregate valuation of the whole estate of the decedent considered as the unit for taxation, but on the value of the separate interests in which it is divided by the will or by the statute laws of the state, and is a charge against each share or interest according to its value, and against the person entitled thereto." Matter of Westurn, 152 N. Y. 93, 46 N. E. 315. See, also, Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969. The court followed this rule in the present case, and, in fixing the amount to be paid respondent, deducted from the legacy given to her the amount of the tax thereon; and it is to be assumed that, before paying or delivering to the other beneficiaries under the will any property given to them by the testatrix, the executors either deducted therefrom, or collected from the said beneficiaries, the amount of the tax upon their respective gifts.

Neither did the court err in dispensing with a bond on the part of the respondent. The fact that a claim presented by her against the estate had been rejected by the executors, and that a suit thereon was pending, did not preclude the court from making an order for the payment of her legacy, any more than would a suit upon a rejected claim of any other person. Section 1663, Code Civ. Proc., authorizes the court to grant the petition of any legatee for the payment of his legacy if it appear at the hearing that the estate "is but little indebted" and that the payment can be made "without loss to the creditors of the estate," and to dispense with a bond from the petitioner "if the time for presenting claims has expired and all claims that have been allowed have been paid, and the court is satisfied that no injury can result to the estate." Whether an estate is "but little indebted" or the payment can be made "without loss to the creditors" are questions of fact to be determined by the court upon a comparison of the value of the estate with the amount of the debts (Estate of Crocker, 105 Cal. 368, 38 Pac. 954), and we cannot say that it appears from the record herein that the court made an erroneous decision upon these questions. It is not claimed that there is any indebtedness against the estate other than this claim of the respondent, and the executors still have in their hands property belonging to the estate many times in value the amount of the rejected claim with which to pay the same if it shall be adjudged valid.

Upon the same principles the court was not required to take into consideration the amount that may be required for erecting tombstones authorized by the will. If the moneys in the hands of the executors, after making the other payments, shall be insufficient therefor, they can resort to the realty. The respondent is not required to await such expenditure before being entitled to receive her legacy.

The order appealed from is affirmed.

We concur: COOPER, J.; HALL, J.

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1 Cal. App. 2

PEOPLE v. CARROLL.

(Court of Appeal, First District, California. May 22, 1905.)

SODOMY—INDICTMENT—STATUTES.

Pen. Code, § 286, provides that every person who is guilty of "the infamous crime against nature" committed with mankind or with an animal is punishable by imprisonment, etc. *Held*, where an information under such section designated the offense as the "crime against nature," and alleged that defendant committed the same on one Frank Derby by then and there having "carnal knowledge" of the body of said Frank Derby, it was fatally defective for failure to allege that Frank Derby was a male person, since the words "carnal knowledge" refer to sexual connection.

Appeal from Superior Court, City and County of San Francisco; Henry C. Gesford, Judge.

John Carroll was convicted of the crime against nature, and he appeals. Reversed.

William S. Barnes and H. H. McCloskey, for appellant. U. S. Webb, Atty. Gen., for the State.

COOPER, J. The information states: "The said John Carroll, on the 10th day of March, A. D. 1904, at the said city and county of San Francisco, state of California, did then and there willfully, unlawfully, and feloniously commit the crime against nature with and upon one Frank Derby by then and there having carnal knowledge of the body of said Frank Derby, contrary to the form," etc. Defendant was found "guilty as charged in the information," and sentenced to a term of 17 years in the state prison. He now claims that the information does not charge a public offense, and that is the only question that need be considered.

Defendant was prosecuted under section 286 of the Penal Code, which reads as follows: "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison for not less than five years." The section does not define the crime, nor state in what it consists, but denominates it "the infamous crime against nature." At common law the crime attempted to be charged was called sodomy. Blackstone speaks of it as the "infamous crime against nature, committed with either man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged and the negative so difficult to be proved, that the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself." 4 Black. Com. 216. The crime is now, and has been since the days of Blackstone, designated by law writers and judges as "the infamous crime against nature" (American & English Ency. of Law [2d Ed.] vol. 25, p. 144, and cases cited; Honselman v. The People, 168 Ill. 172, 48 N. E. 304; State v. Chandonette, 10 Mont. 280, 25 Pac. 438; People v. Oates, 142 Cal. 12, 75 Pac. 337), and it is so designated in the Penal Code. The information in this case, however, does not so designate it, but uses the words "crime against nature." The information, while ignoring the name by which the statute designates the crime, attempts to state what the defendant did. If the facts stated were sufficient to show plainly and unequivocally that a crime had been committed, it would be sufficient, but we do not think that they come up to this standard. It is charged that the defendant did "commit the crime against nature with and upon one Frank Derby by then and there having carnal knowledge of the body of said Frank Derby." The words "carnal knowledge" mean sexual connection. Bouvier's Law Dic.; Century Dic.; Commonwealth v. Squires, 97 Mass. 61. It is thus, in effect, stated that defendant had sexual connection with Frank Derby. If the Frank Derby named was a female, then the defendant is merely charged with haxing sexual intercourse with a female, which is not of itself a crime. There is no allegation that Frank Derby, the person of whose body the defendant is alleged to have had carnal knowledge, was a male person. We cannot take judicial knowledge of the sex of a party upon whom the crime is alleged to have been committed from the name alone. The name "Frank" is generally given to males, but it is sometimes given to females. The information might then be true, and yet the defendant be innocent of a crime. The courts do not favor technical constructions which go to the form, rather than to the substance. Particularly is this so in a criminal case where a defendant has been tried and convicted. If the facts stated are not capable of two constructions, and are such as to plainly show to a person of common understanding that a crime has been committed, the information or indictment will be held sufficient. It will also be held sufficient where the crime is substantially alleged in the words of the statute, or their equivalent. But in all cases it must clearly appear that, if the facts alleged are true, the defendant is guilty of a crime. People v. Williams, 35 Cal. 675; People v. Terrill, 127 Cal. 99, 59 Pac. 836. In the latter case it is said: "In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and, if the facts stated may or may not constitute a crime, the presumption is that no crime is charged." We therefore conclude that the facts stated do not constitute a public offense.

The judgment and order are reversed.

We concur: HARRISON, P. J.; HALL, J.

1 Cal. App. 41

PEOPLE v. BRADFORD.

(Court of Appeal, Second District, California. May 29, 1905.)

1. Lewdness—Statute—Construction.

Pen. Code, § 288, providing that any person who shall willfully and lewdly commit any lewd or lascivious act, other than the acts constituting other crimes provided for in part "II" of the Code, etc., is not rendered unintelligible merely because the statement of the acts constituting other crimes is found in part "I" and not in part "II."

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 42, 279.]

2. WITNESS—COMPETENCY OF INFANT — DISCRETION OF COURT.

Under Code Civ. Proc. § 1880, providing that children under 10 years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, shall not be witnesses, the competency of an infant as a witness is a question within the discretion of the court.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 97, 98.]

Appeal from Superior Court, San Bernardino County; B. N. Smith, Judge.

David B. Bradford was convicted of lewdness, and he appeals. Affirmed.

Curtis & Curtis, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

ALLEN, J. The defendant was charged with the offense defined in section 288 of the Penal Code, convicted thereof, and sentenced to five years in the state prison. He appeals from the judgment and from an order denying a new trial.

Defendant contends in this appeal that section 288 of the Penal Code, which provides that "any person who shall willfully and lewdly commit any lewd or lascivious act, other than the acts constituting other crimes provided for in part II of this Code," etc., is unintelligible, in that part II of the Code referred to relates solely to criminal procedure, and in no way describes acts constituting other crimes; and that, where a new offense is sought to be created by a section of the Code, it should have greater certainty in its terms. It is true that in part I, and not in part II, of the Penal Code, is to be found the statement of the acts constituting other crimes. It is evident that either by legislative oversight or by clerical misprision the characters "II" were inserted for the character "I" in such section, and that section 288 should be so construed. Such construction is warranted by the decision of our Supreme Court in California Loan Co. v. Weis, 118 Cal. 497, 50 Pac. 697, wherein it was held that the word "June" was inserted either by legislative oversight or clerical error where "July" was intended, such construction being necessary to give effect to the plain intent of the Legislature as deduced from the whole act then under consideration. The rules of statutory construction embrace also the correction of clerical errors by the insertion of the true word or words. County of Lancaster v. Frey, 128 Pa. 593, 18 Atl. 478, cited in Loan Co. v. Weis, supra. Under this construction section 288 is intelligible and certain.

It is further contended that the court erred in overruling defendant's objection to the competency as a witness of the infant upon whose body the acts were charged to have been committed, as well as in refusing to strike out her testimony after the same had been given. It was not error to admit the testimony of the child upon whom the offense was said to have been committed, nor was it error to refuse to strike out her testimony. Whether or not she was an incompetent witness on account of her age was a question within the discretion of the court. Code Civ. Proc. § 1880; People v. Stouter, 142 Cal. 151, 75 Pac. 780. The court having determined that she was a competent witness, the weight and effect of her testimony was properly left to the jury. The testimony of the child, with the corroborating testimony, sufficiently proves the corpus delicti. The testimony of the father in relation to the education and obedience of the child, and her characteristics as to pleasure, in her love for pictures, her traits as to boldness or timidity with strangers, might well have been omitted; but no prejudicial error is apparent in its admission.

The venue was sufficiently proven. While no witness testified in words that the offense was committed in San Bernardino county, it does appear that it was committed in the township of Ontario, which is a legal subdivision of San Bernardino county, Cal., and the whole testimony taken together left no room for a reasonable doubt that the offense was committed in the county. People v. Manning, 48 Cal. 338.

Judgment and order affirmed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 21

BURNS v. SCHOENFELD et al.

(Court of Appeal, Third District, California. June 3, 1905.)

1. APPEAL—QUESTIONS FOR REVIEW.

Where there is no appeal from the judgment, but only from denial of new trial, the court cannot consider the sufficiency of the findings to support the judgment, but only inquire whether the findings are supported by the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3476, 3480.]

2. FINDING OF PROPERTY BY SERVANT—OWNERSHIP—INTENTION OF MASTER—FINDING—EVIDENCE—SUFFICIENCY.

In an action to recover the value of a pocket of gold found by the plaintiff on the public domain, and reduced to possession by him while an employé of defendants in the work of grading the land, evidence examined, and *held* to sustain a finding that defendants had not, at the time the gold was found, entered on the land with the intent to appropriate any gold that might be discovered by their employés while doing the work.

3. APPEAL—CONFLICTING EVIDENCE.

The finding of the court on conflicting evidence is conclusive on appeal.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by J. M. Burns against Jacob Schoenfeld and others. From an order denying a motion for a new trial, defendants appeal. Affirmed.

F. W. Street, for appellants. J. C. Webster and E. W. Holland, for respondent.

CHIPMAN, P. J. Action to recover from defendants the value of certain gold and gold-bearing rock of which plaintiff alleges ownership and possession, and that defendants, wrongfully and against his will, took, carried away, and converted to their own use. The cause was tried by the court without a jury, and plaintiff had judgment for $600, with interest from February 23, 1899, and costs. Defendants moved for a new trial, which was denied, and they appeal from the order.

There is no appeal from the judgment, and we, therefore, cannot consider the sufficiency of the findings to support the judgment, and can only inquire whether the findings are supported by the evidence. Rauer v. Fay, 128 Cal. 523, 61 Pac. 90.

It appears from the findings that defendants are owners of a mine of which one Bleck (originally made a defendant) was general manager; that near said property, and on public lands of the United States, defendants selected a site for a quartzmill, and were engaged in grading said site for the purpose of erecting a quartzmill thereon, and on February 23, 1899, employed plaintiff as a laborer to do grading for them for the purpose of erecting said quartzmill, which said grading was being done on the public land of the United States, on which defendants had made no location with a view of acquiring title under the laws of the United States; "that on said day plaintiff discovered, near the northwest corner of the excavation made in the hill, and within the outer limits of said excavation, a pocket of gold of the value of $600, and dug the same out and took possession thereof, with the intent of appropriating it to himself; that one Clark [originally one of defendants] took said gold from plaintiff's possession, without his consent and against his will, and delivered it to said Bleck, who delivered it to defendants, who appropriated it to their own use; that plaintiff was never employed or instructed by defendants, or any of them, to do mining or prospecting for gold, and that his sole employment by defendants on said 23d day of February, and the work he was then engaged in, was that of a laborer to do grading for the purpose of erecting a quartzmill on the public lands as above stated"; and that defendants' occupation of said grade was for the purpose of erecting a quartzmill, and not otherwise, and the object of the excavation was to construct a quartzmill, and for no other object or purpose; that at the times mentioned said Clark was superintending said grading for said purposes, and said Bleck was general manager of defendants' business, and neither said Clark nor said Bleck has any interest in said gold so converted.

This is the second appeal of the case. 133 Cal. 634, 66 Pac. 12. Substantially every principle of law now involved was decided adversely to defendants in the first appeal. Assuming that the evidence showed, as the findings on sufficient evidence now show, that plaintiff, on discovery of the gold, reduced it to possession with intent to appropriate it to himself, and that it was taken from him by Clark, the agent of defendants, it was held that mere occupancy of a thing, as against all except the state and the owner, is a sufficient title (Civ. Code, § 1006); that where things are found that have no owner they belong, as in a state of nature, to the first occupant or fortunate finder (2 Blackstone's Commentaries, 402; 1 Blackstone's Commentaries, 295; 2 Kent, Com. 356); that in the case of valuable mineral deposits the title of the first taker is confirmed by express statutory grant (Rev. St. U. S. § 2319 [U. S. Comp. St. 1901, p. 1424]; Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313); that defendants' claim to the gold by virtue of their occupancy (Civ. Code, § 1006), in point of law, could not be maintained, because they could acquire no title to mineral land by occupancy, except for the purpose of mining or extracting the minerals (Rev. St. U. S. § 2319; McClintock v. Bryden, 5 Cal. 97, 63 Am. Dec. 87; Lindley on Mines, §§ 216 et seq. 219), and, in point of fact, the evidence was that defendants did not enter upon the land for any such purpose, but to establish a mill site, which was permissible only on nonmineral land (Rev. St. U. S. § 2337 [U. S. Comp. St. 1901, p. 1436]); Lindley on Mines, § 519 et seq.); that defendants did not acquire any title to the gold by virtue of plaintiff's employment under the provisions of section 1985, Civ. Code, because defendants were engaged in excavation, not for minerals, but for the purpose of removing and throwing away the matter excavated, and the gold found by plaintiff was property without owner, or intending owner, and therefore subject to his right of appropriation by occupancy; and the case comes within the same principle as that in Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172, where the property was found by the employé in the course of her employment, and in the similar cases of Hamaker v. Blanchard, 90 Pa. 377, 35 Am. Rep. 664, and Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528. In the course of the opinion, however, it was said: "Had the object, or one of the objects, of the excavation been to obtain the gold, any gold found by an employé would doubtless belong to his employers." Appellants contend that the uncontradicted testimony submitted at the second trial established the fact that they did enter upon the land, or, at least, before the pocket of gold was found, did pursue the excavation work with the intent to appropriate any gold that might be discovered. The court found against defendants upon this point, and the case may be said to hinge upon this finding. There is evidence tending to show that, after the excavation work had progressed somewhat, some stringers were brought to Bleck's attention containing gold, and that Bleck was told by one of the owners "to watch it and appropriate it and look out for it; look out for it and take the gold"; and Bleck testified that he told Clark "to watch those stringers closely, and if anything turned up to let me know. * * * I continued these men in their employment for the purpose of grading that floor down to its proper level, and incidentally to uncover more of this ledge—that was the second purpose, the uncovering of this ledge." It is not claimed that he or any one else so informed the men who were at work there. His testimony was out of harmony with his testimony at the former trial, at which time he testified that the purpose of the excavation was to grade a mill site, and did not then claim that defendants had any other purpose. The testimony taken at the former trial went into all the circumstances attending the work with much particularity, but no witness hinted at any intention on the part of defendants such as they now claim was incidentally their purpose. The trial judge had all the witnesses before him, and was in a better position to weed out the improbabilities from the evidence than we are. It was said in Sarraille v. Calmon, 142 Cal. 651, 76 Pac. 497: "We cannot put ourselves in the shoes of the judge who had the witnesses before him; we cannot say to what extent he discovered what he thought were inherent improbabilities in the statements of witnesses; nor can we say how far witnesses, by their manner of testifying, may have given rise to doubts of their sincerity, or may have impressed the judge with their having given a wrong coloring to material facts." We do not think the claim of defendants that the evidence as to their intention in excavating the ground in question was absolutely without conflict is maintainable. True, no witness for plaintiff could or did testify to what was passing in defendants' minds. But there were physical facts and circumstances surrounding the work which did tend to dispute the concealed intent of defendants, conceding that they had any such intent. We think that there is evidence sufficient to support the findings.

The order is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

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1 Cal. App. 114

LAMBERT v. LAMBERT.

(Court of Appeal, Third District, California. June 3, 1905.)

TRIAL—ADMISSIONS OF PARTIES—FINDINGS—CONCLUSIONS OF LAW.

Where the complaint in a suit for divorce alleged that certain real estate was community property, and the allegation was expressly admitted in the answer, a finding that the land was purchased by and conveyed to plaintiff before his marriage with defendant was contrary to the admission, and did not affect the validity of either the court's conclusion of law that the land was community property, or the decree dividing the property equally between the plaintiff and defendant.

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Suit by W. H. Lambert against Emma Lambert for divorce. From a portion of the decree plaintiff appeals. Affirmed.

Clark & Clark, for appellant. George A. Lamont, for respondent.

McLAUGHLIN, J. The appellant sued for and was granted a divorce from respondent on the ground of desertion. In paragraph 14 of his complaint it was alleged "that there is community property belonging to plaintiff and defendant, 160 acres of hill land, and some stock and farming implements." This averment was not denied in the answer. On the contrary, its truth was expressly admitted. This admission, manifestly, made a finding unnecessary, but the lower court, in the finding of facts, recited that this particular parcel of hill land was purchased by and conveyed to plaintiff before his marriage with defendant; that about $800 of the purchase money was borrowed by plaintiff from defendant before marriage, the plaintiff giving to defendant his promissory note for said sum, which note has not been paid; that $1,150 of the purchase price paid was money received from the sale of certain water rights appurtenant to said land; that the remainder of the purchase price was paid from money earned by the husband and wife after marriage. The conclusions of law contained a recital that this parcel of land "is the community property of plaintiff and defendant," and in the decree this land is so treated, and is equally divided between the parties. From this portion of the decree plaintiff appeals, on the ground that it is not supported by the findings of fact.

He contends that, under the findings, the land mentioned was his separate property, and that, as the decree awards him a divorce upon the ground of respondent's desertion, the court had no power to divide such separate property equally between the parties; citing section 146, Civ. Code. The solution of the problem thus presented depends in a great measure upon the legal effect of the unnecessary finding of probative facts above mentioned. That such finding was unnecessary is established by many authorities. First National Bank, etc., v. Maxwell, 123 Cal. 366, 55 Pac. 980, 69 Am. St. Rep. 64; Faulkner v. Rondoni, 104 Cal. 143, 37 Pac. 883; Gregory v. Gregory, 102 Cal. 52, 36 Pac. 364. That it is a finding of probative facts is so plain that no citation of authorities seems necessary. "Facts admitted by the pleadings should be treated as 'found.' If the court finds adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings." In re Doyle, 73 Cal. 570, 15 Pac. 125; Ortega v. Cordero, 88 Cal. 226, 26 Pac. 81. In the latter case it was said, "Any finding adverse to the admitted facts drops from the record;" and it has been held time and again that findings contrary to the facts admitted by the answer must be disregarded. Bradbury v. Cronise, 46 Cal. 289; Burnett v. Stearns, 33 Cal. 474; Rudel v. Los Angeles County, 118 Cal. 287, 50 Pac. 400. The reason underlying this rule is obvious. Courts may decide where there is a difference, but they cannot make differences where none exist. If a finding of an ultimate fact, contrary to admissions in the pleadings, "drops from the record," how much stronger is the reason why a finding of mere probative or evidentiary facts must fall before such admissions. It needs but the statement of the proposition to show that evidence, no matter how conclusive, must be idle as against an express admission in a pleading. And it needs as little reflection to convince that a finding of evidentiary facts can be no more potent in this regard than the evidence on which it rests. Waiving the proposition that the recital as to the status of this property in the conclusions of law might be viewed as a finding of ultimate fact, nullifying the finding of probative facts, and resting on the admissions, it is clear that under the pleadings the conclusion was the only one the court could reach. Therefore the decree, resting upon the admissions in the answer "as facts found," is fully supported.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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1 Cal. App. 8

PEOPLE v. DAVIS.

(Court of Appeal, Third District, California. May 24, 1905.)

1. Criminal Law—Burglary—Evidence.

Where, in a prosecution for burglary alleged to have been committed by defendant in the room of an inmate of a house of ill fame, another inmate testified that after midnight on a certain day she saw defendant standing at a dresser in the room occupied by prosecutrix, taking some money from the latter's purse, and many questions were asked and answered by her touching her acquaintance with defendant and the frequency of his visits to the house, but all of her evidence was thereafter directly assailed by evidence tending to prove an alibi, it was not error to permit prosecutrix to testify as to the defendant's familiarity with the premises, and his knowledge of her manner of keeping money and other articles in the dresser and room.

2. Same—Cross-Examination.

Where, in a prosecution for burglary alleged to have been committed in a house of ill fame, most, if not all, of the evidence as to prosecutrix's connection with defendant's trunk, and as to defendant's relations with her, came out through defendant's agency, and in his direct examination defendant introduced the subject of his marriage, and testified fully as to happenings, conduct, and conversations at the house in question, it was not error for the court to require him to answer, on cross-examination touching his marriage engagement and his failure to take his trunk from such house of prostitution.

3. Same—Argument—Misconduct of Counsel.

Where, in a prosecution for burglary alleged to have been committed in a house of prostitution, defendant claimed that the prosecution was a malicious attempt of a jealous abandoned woman to ruin him, and introduced evidence to support such contention, he was not entitled to object to arguments of the prosecuting attorney with reference to the degree of credit to be accorded to the testimony of defendant and the women, by which defendant was subjected to severe and scathing criticism.

4. Same.

Where, in a prosecution for burglary alleged to have been committed in a house of prostitution, defendant introduced evidence showing that he had obtained money from prosecutrix, he was not entitled to object to argument of the prosecuting attorney that defendant had been living off of prosecutrix's earnings.

5. Same.

Where defendant's mother and other relatives were present with him during a prosecution for burglary, it was not error for the prosecuting attorney to refer to such fact.

6. Same—General Character — Instructions.

Where, in a prosecution for burglary, defendant introduced evidence showing that he had consorted with prosecutrix, an abandoned woman, in a house of prostitution where the burglary was alleged to have been committed, an instruction carrying with it a presumption that his general character was fair was properly refused.

7. Same—Weight of Evidence.

Where, in a prosecution for burglary, the jury was told that their judgment as reasonable men was the test of their right to believe or disbelieve the testimony of a witness, as provided by Code Civ. Proc. § 2061, it was not error for the court to give a further instruction, at the request of the state, that the jurors were the exclusive judges of the weight and sufficiency of the evidence.

8. Same.

An instruction is not objectionable by reason of omitted elements plainly stated in other instructions.

9. Criminal Law—New Trial—Newly Discovered Evidence.

It is not an abuse of the trial court's discretion to refuse a new trial for newly discovered evidence which was merely cumulative.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Sam Davis was convicted of burglary, and he appeals. Affirmed.

Rehearing denied by Court of Appeal June 26, 1905; by Supreme Court July 21, 1905. See 81 Pac. 718.

L. L. Chamberlain, for appellant. U. S. Webb, Atty. Gen., for the State.

McLAUGHLIN, J. The defendant was convicted of burglary, and appeals from the judgment and an order denying his motion for a new trial.

We will notice only assignments of error discussed by counsel for appellant, assuming that all others are waived.

Misconduct of Court and Prosecuting Officers and Errors Touching Evidence.

It is first urged that the district attorney and his assistant, upon the examination of witnesses and in argument, indulged in misconduct calling for reversal, and that the trial court likewise transgressed to the detriment of defendant. It appears from the evidence and the unchallenged statement of counsel for appellant that Lillie Banks and Bertha Hodge were inmates of a house of ill repute in Chinatown, at Auburn. The burglary charged consisted of entering the room of the former in said house with intent to commit larceny. Bertha Hodge was the principal witness for the prosecution, and testified that after midnight on July 17, 1904, she saw the defendant go up the back stairs of this house, and presently thereafter saw him standing by a dresser in the room occupied by Lillie Banks, taking some money from the latter's purse; that later he came out, said he wanted to see Lillie, and went the way he came. During her examination many questions were asked and answered touching her acquaintance with defendant and the frequency of his visits to this house. The prosecuting witness Banks was allowed to testify as to defendant's familiarity with the premises, and his knowledge of her manner of keeping money and other articles in the dresser and room. She also enumerated articles missed by her that night. Upon this examination, and the arguments of counsel touching the facts elicited, many charges of misconduct against counsel and court are based. The evidence was certainly relevant. It tended strongly to show that the witness Hodge could not have been mistaken as to the person she saw in that room that night, and accounted for the rapidity and certainty of movement manifested by the intruder. If any doubt as to its relevancy existed at the time of its introduction, that doubt must have vanished when the accuracy and credibility of the witness Hodge was directly assailed by evidence tending to prove an alibi. True, such evidence had a tendency to place defendant before the jury in an unenviable light, but it was admissible under the same rule which would make it unquestionably proper had it related to a similar occurrence in a house occupied by respectable people. The character of the house was placed before the jury by defendant, and its character could not affect the admissibility of the evidence assailed.

It is argued that the cross-examination of defendant touching his engagement and marriage, and his failure to take his trunk from that house, was erroneous, and, as the objection of misconduct pertains thereto, that phase of the case will be examined now. Most, if not all, of the evidence as to the woman's connection with the trunk, and defendant's relations with her, came before the jury through defendant's agency, and the defendant in direct examination introduced the subject of marriage. In his direct examination he testified fully as to happenings, conduct, and conversations at that house, and it was perfectly competent to cross-examine him touching everything which occurred during the period covered by the direct examination, including his failure to remove his trunk from the house where the irate Miss Banks was domiciled. People v. Teshara, 141 Cal. 636, 75 Pac. 338; People v. Russell, 46 Cal. 123. In his direct examination, as well as in the direct and cross examination of other witnesses, there was an evident attempt to make it appear that the woman Banks, when informed by him of his intended marriage, became enraged and threatened to cut the heart out of any woman he married, and that the subsequent unfounded accusation against him was the result of her jealous resentment. In view of this fact, his conduct was very significant, and the prosecution certainly had the right to cross-examine him as to any matter or period of time embraced in his direct examination. Sufficient has been said to indicate that the charges of misconduct, and errors assigned relating to the testimony above referred to, are not well taken.

Nor was there error in rulings as to other evidence offered by the prosecution. Most of the matter objected to was admissible under well-settled rules of law (Code Civ. Proc. § 1870, subd. 3, section 1881, subd. 1), and that which was not admissible was either excluded when offered, or subsequently stricken out.

Other assignments of error relating to the admissibility of evidence have been carefully examined, and we are satisfied that no prejudicial error was committed. No substantial right of defendant was prejudiced by the remarks of the court here criticised.

Turning to alleged misconduct in argument and in the opening statement, we find no error sufficient to justify reversal. One theory of the defense, clearly deducible from the evidence, was that this prosecution was but the malicious attempt of an abandoned woman, inspired by jealous hatred, to ruin a man who had turned away from her. Argument touching this theory and the degree of credit which should be accorded the testimony of these women and this defendant did bring upon him severe and scathing criticism. But evidence upon which it was based was in the case through his election, and under these circumstances he can hardly complain. It is said that there is no evidence justifying the assertion in argument that the women were of negro extraction. Doubtless their appearance on the stand indicated such fact, and there is some evidence that one of them was "colored." It is also urged that it was improper to charge that defendant was living off the earnings of Lillie Banks, but defendant himself introduced evidence showing that he obtained money from her. The references to the presence of his mother and other relatives during the trial might well have been omitted, but these references were as apt to help as to injure defendant, and too often attempts to arouse sympathy for defendants in this way make such references proper, if not necessary, and there is nothing before us to show that it was not proper here. It follows that there was no such misconduct as would justify reversal. People v. Wells, 100 Cal. 459, 34 Pac. 1078; People v. Ward, 105 Cal. 340, 38 Pac. 945; People v. Romero, 143 Cal. 458, 77 Pac. 163; People v. Perry, 144 Cal. 753, 78 Pac. 284.

There was no impropriety in the opening statement. People v. Lewis, 124 Cal. 559, 57 Pac. 470, 45 L. R. A. 783.

Instructions.

Instructions numbered 10, 17, 18, 19, requested by defendant, were properly refused. People v. Rodley, 131 Cal. 259, 63 Pac. 351; People v. Perry, 144 Cal. 754, 78 Pac. 284.

There was no error in refusing instruction numbered 13, requested by defendant. We have seen that there was evidence in the case which would hardly permit an instruction carrying with it the presumption that his general character was fair. Besides, the instruction was altogether too broad. A defendant is clothed with a fair character for the purposes of the case. People v. Fair, 43 Cal. 149. But this presumption extends only to traits of character necessarily involved in the particular case. If defendant's veracity, honesty, or any other trait is in issue, it applies. But it would hardly be contended that, in a case of assault, evidence as to chastity or honesty would be relevant, and we are of the opinion that this presumption applies only where evidence to the same effect would be proper. People v. Ackley, 9 Barb. 609; Danner v. State, 25 Am. Rep. 665.

Instruction numbered 20, also requested by defendant, was properly refused, the substance thereof being covered by other instructions.

Nor was there error in modifying instruction numbered 23.

There was no error in giving instruction numbered 9, requested by the prosecution. It was predicated upon evidence in the case, and, as it expressly states that the intent to commit larceny must exist at the time of entry (People v. Lowen, 109 Cal. 381, 42 Pac. 32), has no application.

Instruction numbered 25, given at the request of the people, is not erroneous. It is but a restatement of the principle that juries are exclusive judges of the weight and sufficiency of evidence, stated elsewhere in the charge. The jurors were told that their judgment as reasonable men is the test of their right to believe or disbelieve the testimony of a witness, and this, of necessity, is the rule governing the exercise of the discretion mentioned in section 2061, Code Civ. Proc.

Instruction numbered 14, given at request of the people, standing alone, would be objectionable, as omitting the elements that possession must be recent and unexplained. But instructions must be viewed in the light of evidence to which they apply, and the only evidence of possession in this case was confined to a period of three days after the offense, and the defendant denied such possession in toto, only explaining that one article, a collar, was never in the possession of the prosecuting witness. Again, instructions must be read as a whole, and this instruction, read in connection with instructions 28 and 29, given at the request of defendant, where the omitted elements were plainly stated, could not have misled the jury. People v. Gleason, 122 Cal. 372, 55 Pac. 123; People v. Morine, 61 Cal. 367; People v. Gibson, 106 Cal. 458, 39 Pac. 864; People v. Worden, 113 Cal. 569, 45 Pac. 844; People v. Jackson, 138 Cal. 462, 71 Pac. 566. The instruction was general in its nature, and therefore it did not and could not assume a fact not proven. It contains no intimation that defendant had committed larceny.

We think the instruction given by the court of its own motion, though perhaps unnecessary, was not erroneous. It is not within the rule invoked by counsel, and, if it was, the testimony of the district attorney is of such slight importance that the instruction could have caused no prejudice.

Motion for a New Trial.

A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and, unless it clearly appears that this discretion was abused, the conclusion of the trial court will not be disturbed. People v. Buckley, 143 Cal. 392, 77 Pac. 169. The newly discovered evidence was entirely cumulative, and hence no abuse of discretion here appears.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

(147 Cal. 346)

PEOPLE v. DAVIS. (Cr. 1,222.)

(Supreme Court of California. July 21, 1905.)

APPEAL — SUPREME COURT — JURISDICTION—REMOVAL OF CAUSES—DISCRETION.

Const. art. 6, § 4, as amended by Acts 1903, p. 738, provides that the Supreme Court shall have appellate jurisdiction in all cases pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred for hearing as provided, and that the court may order any case pending before the Supreme Court to be heard by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard by the Supreme Court. *Held*, that the removal of a case pending in a District Court of Appeal to the Supreme Court for determination was within the discretion of the latter court, which would be exercised for the purpose of securing a proper distribution of cases, to secure uniformity of decision of doubtful and disputed questions of law, or of the construction of statutes, etc., but would not be exercised to revise the decision of a District Court of Appeal as to the facts shown to exist by the record.

In Bank. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Application for the determination of an appeal by the Supreme Court in bank. For opinion of the Appellate Court, see 81 Pac. 716. Denied.

L. L. Chamberlain, for appellant. U. S. Webb, Atty. Gen., for the People.

SHAW, J. In this case the District Court of Appeal of the Third District pronounced judgment affirming the judgment of the superior court against the defendant. This affirmance became final in that court on June 23, 1905. The defendant now asks an order that the cause be heard and determined by the Supreme Court. The authority for such action by this court is found in the following clauses of section 4 of the amendment of 1903 to article 6 of the Constitution: "The said [supreme] court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided. * * * The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a District Court of Appeal, and to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a District Court of Appeal, or within thirty days after such judgment shall have become final therein. The judgments of the District Courts of Appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced."

It is not seriously claimed that the opinion of the District Court of Appeal is erroneous in its statement of the law. The claim is that that court has erroneously decided that the record before it shows that upon the trial evidence of certain facts was first introduced in the case by the defendant, and consequently that he could not complain of it, whereas, as defendant claims, the record shows that the facts had been previously referred to by witnesses for the prosecution in direct examination. There is thus presented for the first time the question how far this court will go in the exercise of its revisory power over the decisions of the District Court of Appeal. It will be conceded that this power is not given for the purpose of correcting mere errors in matters of fact not determinative of the case. But the question is, shall this court devote itself to the correction of alleged errors of fact by the District Courts of Appeal, which are important only to the decision of the particular case in which they are made, and to the rights of the particular parties there concerned? As the question is new, and the nature of our power in this respect has not been heretofore the subject of judicial consideration, we deem it proper to state our views thereon.

One object of the constitutional scheme was to enable the Supreme Court to distribute the work in hand among the several courts having appellate jurisdiction in such a manner as to give to each, as nearly as possible, its due share, keep all of them continuously supplied, and thereby secure a speedy disposition of pending cases. For this purpose the power of this court to transfer any case of any character from one of these courts to another, or to the Supreme Court itself, is made absolute, and does not at all depend on the character of the case, or on the class of cases over which original appellate jurisdiction is given to the particular court. This court may exercise this power for this purpose without the assignment of any reason, or the existence of any reason other than its own discretion. Another object, doubtless, was to enable this court, in its discretion, to supervise and control the opinions of the several District Courts of Appeal, each of which is acting concurrently and independently of the others, and by such supervision to endeavor to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, a uniform rule of decision throughout the state, a correct and uniform construction of the Constitution, statutes, and charters, and in some instances a final decision by the court of last resort of some doubtful or disputed question of law. These two objects cover the entire scope of the exercise of the power. It is with the latter object only that we are here concerned. The existence of this power and its exercise for the purposes last stated do not give a right of appeal from the District Courts of Appeal to the Supreme Court, nor anything which is in legal effect equivalent thereto. The language of the Constitution, as amended, does not provide for such an appeal. It declares that the Supreme Court "shall also have appellate jurisdiction in all cases * * * pending before a District Court of Appeal which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision." The appeals over which appellate jurisdiction is thus given are manifestly appeals from the superior courts, the original appeals in the respective cases, the appeals which are "pending before" the district courts. There is no reference to any other appeal intended, and no other right of appeal is conferred. This is rendered clearer by the language of the subsequent clause giving the power of transfer. It gives the power without requiring any proceeding, notice, or petition to invoke it. In case of transfers before a decision by the district court, it would be necessarily the original appeal only which was to be heard and decided by the Supreme Court. The same grant extends to both classes of cases—those not yet decided, and those already decided, but not yet become final by lapse of time—and, as there is no distinction made between them, the appeal to be heard must be the same in the one case as in the other. This distinction is important in its results. For it follows that the parties have no right to insist upon the exercise of this power. They may petition for it, but the action of this court in any case is purely discretionary, and to be taken for the accomplishment of the objects above stated. The District Courts of Appeal are established for the purpose of ascertaining and enforcing according to the rules of law the particular right of each case committed to their arbitrament. The state has done its full duty in providing appellate relief for its citizens, when it has provided one court to which an appeal may be taken as of right. There is no abstract or inherent right in every citizen to take every case to the highest court. The district courts must be deemed competent to the task of correctly ascertaining the facts from the records before them in each case decided therein, and they should be held solely responsible to that extent for their judgments.

At the time this constitutional amendment was put forward and adopted, this court had been for years unable to dispose of the business before it as fast as it accumulated, and the cases were decided from two to three years after the appeals were filed. The same condition still exists, and must exist for several years more. The amendment was adopted chiefly for the purpose of affording a remedy for this evil. If this court shall now adopt the policy of inquiring into the facts of each case in that court, we would be required to examine minutely the records and briefs of each case there decided in which our intervention was invoked, to ascertain whether or not the facts involved were accurately stated and considered in the opinion of that court. This would involve this court in a vast amount of additional labor, and would in great measure defeat the object which the amendment was intended to secure.

In view of these facts, and the general nature of the purposes for which the power was chiefly given, as heretofore stated, and of the nature of the power itself, this court is disposed to place rather strict limits upon its exercise. We therefore in this case refuse to order the transfer for the purpose of revising the decision of the District Court of Appeal in regard to the facts shown to exist by the record. We state this rule in this case because it is the first case which has come before this court upon an application for such transfer, and because we desire to lay down a precedent in order that parties concerned, as well as the District Courts of Appeal, may understand and appreciate their respective rights, duties, and responsibilities. It is proper to add that the denial in any case of an application for the transfer of a case decided by a District Court of Appeal is not to be taken as an expression of any opinion by this court, or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, nor, indeed, as an affirmative approval by this court of the propositions of law laid down in such opinion. The course to be pursued by this court in the exercise of this power in any case is a matter in which the objects above stated are the controlling considerations, and it will not hold itself bound, even where questions of law alone are involved, to order a transfer of the cause, after a decision of the district court, except where it shall appear necessary in order to carry out the above-stated purposes of securing uniformity of decision and the settlement of important questions of law. The significance of such refusal is no greater than this—that this court does not consider that the interests of justice, or the purposes for which the power was given, require its exercise in the particular case.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; McFARLAND, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

1 Cal. App. 126

GIBSON v. TWADDLE et al.

(Court of Appeal, Third District, California. June 3, 1905.)

1. Elections — Canvassing Board—Reconvention—Mandamus.

When a board of supervisors, authorized by Pol. Code, §§ 1278–1284, to act as a canvassing board, has completed its labors and adjourned sine die, it cannot be compelled by mandamus to reconvene and permit election officers to sign and attest a tally sheet, which they had omitted to sign and attest as required by section 1260, on account of which the board refused to canvass the returns or count the votes of the precinct.

2. Same — Certificate of Election — Conclusiveness—Cancellation.

When a board of supervisors, authorized by Pol. Code, §§ 1278–1284, to act as a canvassing board, has issued a certificate of election, it is prima facie evidence of the right of the holder to the office, and the only remedy for setting aside or canceling the certificate is that provided by Code Civ. Proc. § 1111 et seq., relating to election contests.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Elections, §§ 242, 243.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Petition by J. F. Gibson against T. B. Twaddle and others for a writ of mandamus. From a judgment in favor of defendants, petitioner appeals. Affirmed.

Rehearing denied by Supreme Court July 25, 1905.

C. G. Lamberson and H. B. McClure, for appellant. M. E. Power, Hannah & Miller, and Bradley & Farnsworth, for respondents.

McLAUGHLIN, J. The appellant and one Crowley were candidates for assessor of Tulare county at the general election held in 1902. The respondents are members of the board of supervisors of Tulare county, and as such, on November 10, 1902, met for the purpose of canvassing the election returns, pursuant to section 1278 et seq. of the Political Code. At that time the returns from all the precincts in the county had been received, and the board proceeded to canvass the same. When Liberty precinct was reached, it was found that the tally sheet had not been signed or attested by any of the members of the election board, as required by section 1260 of the Political Code. The board of supervisors refused to canvass the returns or count the votes of that precinct, but canvassed the returns from all other precincts in the county. Finding, upon the completion of such canvass, that Crowley had received a majority of all the votes cast, they declared him elected, and directed that a certificate of election issue to him. Had the votes of Liberty precinct been counted, appellant would have had three majority on the face of the returns. On November 11th, while the board of supervisors was still canvassing said returns, the election officers of Liberty precinct appeared before them, and asked permission to sign and attest the tally sheet. This was after the returns from said precinct had been opened and passed. The board of canvassers refused to allow the election officers to sign or attest the tally sheet, and proceeded with the canvass. On December 3, 1902, after the canvass of said returns had been fully completed, and after the result had been declared and the certificate of election had issued to Crowley, this action was brought. The appellant in his petition recited the above and other pertinent facts, and prayed that a writ of mandate might issue to the respondents, as a board of supervisors, commanding them to permit the election officers of Liberty precinct "to sign said tally list, and thereupon to canvass and count the returns of said election from said Liberty precinct." To this petition respondents demurred, upon the grounds that no cause of action was stated, and that petitioner had a plain, speedy, and adequate remedy in the ordinary course of the law. The demurrer was sustained, and from the judgment thereupon entered, denying the writ, this appeal was taken.

The writ of mandate will issue to a board of supervisors to compel the performance of an act which the law specially enjoins as a duty resulting from their office, and then only where there is not a plain, speedy, and adequate remedy in the ordinary course of the law. Code Civ. Proc. §§ 1085, 1086. The returns referred to in section 1268 of the Political Code "are the sealed packages containing the regular lists, papers, and ballots," prescribed by sections 1261 and 1263 of the same Code. In canvassing such returns the board has no authority "to consider anything but the returns before it." It has no judicial powers. The duties of canvassers are simply to add, and ascertain by calculation, the number of votes given for any office. They were not authorized to decide in any other mode than by an examination of the returns made to them according to law. They are not required, or authorized, to hear witnesses or weigh evidence. They have no power to canvass, as election returns, any papers not duly authenticated in the mode prescribed by law. An attempted canvass, in which the result declared was based on papers not thus authenticated, may be treated as a nullity by the party injured." People v. Stewart, 132 Cal. 285, 64 Pac. 285. If the powers of a board of supervisors are thus limited, it is indeed difficult to conceive how it can be their duty to allow persons who voluntarily appear before them to add to or subtract from the "returns made to them according to law." If they can only act on papers "duly authenticated as required by law," they are certainly under no obligation to permit a post factum authentication. If they can only "add, and ascertain by calculation, the number of votes given for any office, by an examination of the returns made to them," according to sections 1260 to 1264, inclusive, of the Political Code, it is clear that they cannot be compelled by mandate to ascertain such fact in another way. Pacheco v. Beck, 52 Cal. 7; Carlson v. Burt, 111 Cal. 131, 43 Pac. 583. Therefore the acts here sought to be compelled are not specially enjoined by law, nor are they duties resulting from the office of supervisor.

Turning to the other point, we are at a loss to see how a writ of mandate can be a panacea for appellant's legal ills, much less the only plain, speedy, and adequate remedy he can invoke. Boards of supervisors, in canvassing returns, must commence and conclude their labors, as required by sections 1278 to 1284, inclusive, of the Political Code. When this has been done, their functions as a canvassing board cease, and we have found no law which even hints that they may reconvene for the purpose of recanvassing the returns and annulling the certificate of election previously issued. We are positive that they cannot be compelled to do so by mandamus, and it is only in this way that appellant could be benefited by this proceeding. This special body, born of the law for a special purpose, had adjourned sine die before this action was commenced, and, unless it could be revivified and compelled to undo its work, mandate would be futile. Appellant's adversary held a certificate which was prima facie evidence of his right to the office, and relief must be inadequate, unless this certificate could be canceled. Crowley had been "declared elected," and section 1111 et seq. of the Code of Civil Procedure certainly provide a plain, speedy, and adequate remedy in such cases. In our opinion, these sections provide the exclusive remedy for setting aside or canceling the certificate of election issued as a result of the official canvass by the board of supervisors. Sweeny v. Adams, 141 Cal. 560, 75 Pac. 182. To hold otherwise must lead to incongruous results. If appellant could seek and procure a cancellation or amendment of the certificate of election through mandamus, then certainly any other citizen could invoke the remedy permitted under the sections last cited, and ask judgment according to the terms of section 1122, Code Civ. Proc. It might frequently happen, if this was allowable, that the face of the returns would authorize such cancellation, while a count of the ballots would compel a very different result in the other proceeding. In that event there would be divergent judgments affecting the same office or right. This would be intolerable. The law will bear no such construction, and, if it would, the law demands that it be given an interpretation which will avoid absurd results.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

1 Cal. App. 57

In re STEWARD'S ESTATE.

FIFE v. CLEVELAND.

(Court of Appeal, First District, California. May 29, 1905.)

1. ESTATES OF DECEDENTS—ORDER FOR SALE OF REALTY — PERSONS INTERESTED — GRANTEE OF HEIR.

Code Civ. Proc. § 1678, provides that partition or distribution of real estate may be made, although some of the original heirs have conveyed their shares to other persons, and that such shares must be assigned to the person holding the same, as if they had been the heirs; and section 1540 provides that, on a petition for the sale of land of a decedent, the court must hear and examine the allegations and proofs of all persons interested in the estate, who may oppose the application. *Held*, that the grantee of an heir of deceased was entitled to oppose an application for an order for the sale of real estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 1275, 1276, 1283, 1381, 1382.]

2. SAME—PARTY IN INTEREST—EVIDENCE OF INTEREST—DEED.

On an application by an administrator for a sale of lands of the estate, an objection at the hearing to the introduction in evidence of a deed to one who appeared in opposition to the order, on the ground that it did not appear that such person's grantor had any interest in the estate, was fully overcome by the averment in the administrator's petition that the grantor was the husband of the deceased.

3. SAME—ADMISSIBILITY OF DEED—ADVERSE RIGHTS.

Where, on an application by an administrator for a sale of lands of the estate, the application was opposed by one claiming as grantee of an heir, the admission of her deed in evidence did not involve the determination of any adverse claim to the property.

4. ESTATES OF DECEDENTS—SALE OF LANDS—REVIEW OF DECISION.

The decision of the superior court on a question whether it would be for the advantage, benefit, and best interests of a decedent's estate to order a sale of both parcels of real estate, or only of one, was, so far as it depended upon inferences to be drawn from the situation of the property or of the parties interested, not open to review.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 1295, 1476.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Proceedings on the settlement of the estate of Sarah P. Steward, deceased. Petition of George C. Cleveland, administrator, to sell real estate. From an order sustaining objections of Alice B. Fife, the administrator appeals. Affirmed.

Rehearing denied by Supreme Court July 25, 1905.

Chas. B. Younger, Jr., for appellant. Martin & Gardner and Lindsay & Netherton, for respondent.

HARRISON, P. J. The appellant, as administrator of the estate of the above-named decedent, presented to the superior court a petition for an order for the sale of the real estate belonging to said estate. In his petition he set forth that the said real estate consisted of two parcels, one in the county of Santa Cruz, and the other in the county of Inyo; that it was necessary to sell one of the parcels for the purpose of paying the expenses of administration already incurred and those yet to be incurred; that the heirs at law of the deceased were upwards of 20 in number, and that neither of said pieces of real property could be subdivided between them with advantage; and that for this reason it was for the benefit and best interests of the estate and those interested therein that all of the real estate should be sold; and he therefore prayed for an order directing him to sell both parcels. Upon the day appointed for the hearing of the petition, the respondent appeared and filed an opposition thereto, setting forth that she had an interest in the estate by virtue of a conveyance of the Santa Cruz property and of an interest in the Inyo property, made to her by one of the heirs at law of the deceased subsequent to her death; that the value of the Inyo property was sufficient to pay all the debts and expenses of administration of the estate; and that it was for that reason unnecessary to sell the Santa Cruz property. The administrator objected to the entertaining or hearing by the court of this opposition to his petition, on the ground that the matters set forth therein did not state sufficient objections to granting the same, and that the contestant was not a person interested in the estate, and that the court had no authority in this proceeding to hear or determine adverse or hostile claims to real property of the estate. The court overruled the objections, and proceeded to hear the evidence in support of the petition and the opposition thereto. It was shown that the Inyo lot had been appraised at $900 and the Santa Cruz lot at $700, and that these were the values of the respective lots at that time; that after the death of the decedent one of her heirs had executed to Mrs. Fife, the contestant, a deed of conveyance, which purported to convey to her the Santa Cruz property; and the court found that the expenses of administration already incurred amounted to $200, and that those to be incurred would amount to $250. The court thereupon made an order, authorizing the administrator to sell the real estate in Inyo county, and denying his petition for a sale of the Santa Cruz property, "upon the ground that the title to the same is in litigation and undetermined." From the portion of this order denying the petition to sell the Santa Cruz property the administrator has appealed.

It is a sufficient answer to this appeal that none of the parties interested in the property have objected to the terms of the order; and as it is a matter of indifference to the administrator whether those interested will be better subserved by a sale under the order of the probate court, or by a distribution to them, he is not aggrieved by the order made by the court, and under section 938, Code of Civil Procedure, is not entitled to an appeal therefrom; but, as counsel have presented the case without making this objection, we have considered the merits of the appeal as though it were authorized.

1. The court properly overruled the objection of the administrator to hearing the opposition of Mrs. Fife. As grantee of one of the heirs of the deceased she would be entitled, upon a distribution of the estate, to the share of the heir so conveyed to her

(Code Civ. Proc. § 1678; Estate of Vaughn, 92 Cal. 192, 28 Pac. 221), and was thus a person interested in the estate, and under section 1540, Code of Civil Procedure, entitled to oppose the application for the order of sale. The objection at the hearing to the introduction in evidence of the deed to her, on the ground that it did not appear that her grantor had any interest in the property, was fully overcome by the averment in the administrator's petition that the said grantor was the husband of the deceased. Its introduction did not involve the determination of any adverse claim to the property of the estate, but was proper for the purpose of establishing a right in Mrs. Fife to object to a sale of the entire property, and to ask the court to limit its order to a sale of the Inyo property.

2. Whether it would be for the advantage, benefit, and best interests of the estate, or those interested therein, to order a sale of both parcels of the real estate, was a question of fact, to be determined by the superior court upon the evidence before it in reference thereto; and to the extent that its decision depends upon inferences to be drawn from the situation of the property, or of the parties who are interested therein, it is not open to review. The fact that, after considering all the evidence before it, it directed the sale of the Inyo property, and denied the petition for the sale of the Santa Cruz property, is a sufficient declaration by it that in its judgment it would not be for the benefit of the parties interested to sell the latter; and this decision was not without evidence for its support. While the ground stated in its order, viz., "that the title to the same is in litigation and undetermined," is technically incorrect, in that it is not shown that there is any action pending in court with reference to its title, yet there was evidence that the title was in controversy. Mrs. Fife had stated in the objections filed by her that she claimed to be the owner in fee; and although the deed to her purported to convey the entire property in the lot, yet she had in fact only such interest in the lot as was in her grantor, and that interest was not shown to be other than such as he had by virtue of being an heir of the deceased. Although the Santa Cruz lot is so small in extent as to render its subdivision among the heirs impracticable, yet the court might reasonably conclude that, if it should be distributed to them, a better price would be realized upon its sale in an action between them for its partition, where the title could be judicially determined, than at a probate sale, where the title of the deceased was admittedly in controversy. The court, therefore, exercised a wise discretion in determining that it would not be for the advantage of the parties interested to order its sale.

The order appealed from is affirmed.

We concur: COOPER, J.; HALL, J.

1 Cal. App. 95

MURPHY v. STELLING et al.

(Court of Appeal, First District, California. May 31, 1905.)

1. APPEAL — MOTION TO DISMISS — DENIAL— LAW OF CASE.

An order denying a motion to dismiss an appeal becomes the law of the case, and is conclusive against a subsequent motion on the same ground.

2. SAME—PROPOSED CASE—SETTLEMENT—DENIAL—REVIEW.

Where, on the hearing of an application to settle a proposed statement on motion for a new trial, defendant offered no excuse, and did not deny that the statement was not filed in time, it was not an abuse of the trial court's discretion to refuse to relieve defendant from an order denying his application to settle such statement, under Code Civ. Proc. § 473, authorizing the court to relieve a party from an order taken against him through his mistake, inadvertence, surprise, or neglect, on proof tending to show that the statement was in fact delivered to an employé in the clerk's office within the time required, that defendant's counsel during the time was ill, and that a part of the delay was due to the engagements of plaintiff's counsel and at his request, etc., all of which might have been presented at the hearing of the application for settlement.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by J. C. Murphy against F. E. Stelling and others. From an order denying defendant Stelling's motion to be relieved from an order refusing to settle his proposed statement on motion for a new trial, and dismissing the proceedings, he appeals. Motion to dismiss appeal denied. Order affirmed.

Rehearing denied by Court of Appeal June 30, 1905; by Supreme Court July 25, 1905.

John B. Kerwin, for appellant. Nicholas Bowden, for respondent.

HALL, J. This is an appeal by defendant F. E. Stelling from an order made by the trial court, denying appellant's motion, made under section 473, Code of Civil Procedure, to be relieved from an order theretofore made, refusing to settle appellant's proposed statement on motion for a new trial, and dismissing said proceedings.

Counsel for respondent moves that the appeal be dismissed on the ground that the order appealed from is not appealable, but he has heretofore made the same motion, which was denied. Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176. The order denying his motion to dismiss has become the law of the case, and makes it necessary to determine the appeal on its merits.

The record before us shows that, after judgment for plaintiff, defendant in due time gave notice of intention to move for a new trial on a statement to be thereafter settled; that the proposed statement was served on respondent in due time, and on the 15th day of September, 1900 (also in due time), respondent served his proposed amendments thereto; that thereafter, during the month of October, 1900, the settlement of said statement was stricken from the calendar, and was subsequently restored on the 8th day of November, 1901, by consent; that thereafter plaintiff objected to the settlement of the said proposed statement on motion for a new trial on the grounds and for the reason that said proposed statement and said proposed amendments were not and had not been presented by the moving party to the judge who tried the cause, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge within the time required by law, and that the court had no jurisdiction to settle said proposed statement; that thereupon the hearing of said matter and said objections was, on motion of said defendant F. E. Stelling, continued to the 18th day of November, 1901. Said matter and the hearing thereof was again continued by the court to the 9th day of December, 1901, at the request of plaintiff. On this last-named day plaintiff filed and presented in evidence the affidavits of Pfister, the clerk, and of Shilue, Schilling, Sex, Argues, and Denker, his deputies, together with the indorsement on the said proposed statement and amendments as follows: "Received Sept. 28, 1900. Henry A. Pfister, Clerk, by J. M. Shilue, Deputy Clerk." The affidavits above referred to are incorporated in the bill of exceptions, and strongly tend to show that the proposed statement and the amendments were left with the clerk September 28, 1900, and not before. This was three days too late. The defendant did not offer any evidence at all on this hearing, but after argument of the respective counsel the matter was submitted to the court for decision; and thereafter, on the 23d day of December, 1901, the court sustained said objections of said plaintiff to the settlement of said statement, and ordered that the matter of said settlement be dismissed. Thereafter, on the 26th day of December, 1901, appellant served and filed a notice of motion to be relieved from the order of December 23, 1901, and that said statement on motion for a new trial be settled, on the ground that said order of December 23, 1901, was taken and obtained by plaintiff and entered against defendant by reason of the mistake, inadvertence, and excusable neglect of defendant's attorney, etc. With this motion were filed affidavits of defendant's attorney and of the clerk and of the deputy who had indorsed the statement as received September 28, 1900. On the hearing of defendant's motion the said last-mentioned affidavits were read, and oral testimony given by two other deputy clerks. Plaintiff again read in evidence the same affidavits that he had used on the hearing of his objections to the settlement of the proposed statement. The court denied defendant's motion, and the question is now presented, did the court commit error in so doing?

The affidavit of counsel for defendant tends to show that he did in fact deliver the proposed statement and the amendments to some employé of the clerk in the office of said clerk on September 21, 1900, and contains statements as to sickness under which defendant's counsel labored during the year 1900, engagements of the court and counsel for plaintiff during the same year, and of the fact that a portion of the delay in bringing the matter of the settlement of the statement on for hearing was due to the engagements of plaintiff's counsel and at his request, and the like, all of which might well have been presented to the court by appellant on the hearing of respondent's objection to the settlement of the statement, but was not. Although defendant's counsel was apprised of the grounds of respondent's objections at some date between November 8, 1901, and November 18, 1901, and, according to his own affidavit, was informed on November 18, 1901, of the indorsement on the statement, showing its receipt by the clerk September 28, 1900, when the said matter and said objections came on to be heard on December 9, 1901, he made no effort to contradict or to avoid in any way by evidence the effect of any of the evidence offered by plaintiff. He did not ask for a continuance to prepare affidavits, although every person whose affidavit was used by plaintiff was a clerk of the court, and every person whose affidavit or evidence was subsequently used by defendant on his motion to be relieved from the order of December 23d was one of the same clerks or counsel for defendant. No fact was attempted to be proved by defendant on the hearing of his motion that might not as well have been proven by him on the hearing of plaintiff's objections December 9, 1901, and no reason was given, in the affidavit of counsel for defendant or otherwise, why the matters that he relied on for relief from the order of December 23, 1901, were not presented at the hearing on December 9, 1901. In Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332, the party in default made application for relief under section 473 before any steps had been taken for settling the bill of exceptions; and on the hearing the trial court found that the bill had not been filed in time by reason of mistake, inadvertence, and excusable neglect, etc., yet, being of the opinion that it had no jurisdiction to settle the bill, refused to settle it. This order was reversed. In Banta v. Siller, 121 Cal. 415, 53 Pac. 935, the proposed statement came up for hearing in the trial court March 16th, and upon objection of respondent the court refused to settle the same. On the same day appellant served notice to be relieved from the order refusing to settle the statement, and the court granted the motion, and the appeal was from the order granting the motion to be relieved. On the appeal it was held that in granting such relief the court certainly did not abuse its discretion. So in this case, if the court had granted the relief, it may be that we would have been unable to say that it had abused its discretion in so doing. Nevertheless we do not think that under the facts of this case we can say that the court abused its discretion in refusing to grant appellant's motion to be relieved from the order of December 23, 1901. The order of December 23d seems to have been clearly justified on the evidence then before the court, as the appellant, though fully advised three weeks before the hearing of the grounds of the objections to the settlement of the statement, put in no evidence to contradict the evidence of respondent. The real matter to be determined by the court under the objections of plaintiff at the hearing on December 9, 1901, was, should the court settle the statement, or should it refuse to do so? Of the grounds of plaintiff's objections to the settlement of the statement defendant had been fully advised as early as November 18, 1901, and all the facts upon which he subsequently relied to secure relief from the order that resulted from the hearing on December 9, 1901, were known to defendant's counsel on and before said hearing, and yet he failed, without any reason disclosed in the record, to present such matters to the court at that hearing. The matter of granting relief under section 473 is largely a matter of discretion with the trial court. We cannot say, under the facts as disclosed by the record in this case, that the trial court abused its discretion or committed error in denying appellant's motion.

The motion to dismiss the appeal is denied. The order appealed from is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

1 Cal. App. 84

In re KOPPIKUS' ESTATE.

(Court of Appeal, Third District, California. May 31, 1905.)

1. Wills—Direction for Monument—Duty of Executor.

Where testatrix's will directed that she be buried in a certain cemetery and that a monument should be erected over her grave, and she was buried there with the knowledge and consent of her husband, and the body remained so buried for over a year, but, after a petition was filed asking a sale of real estate for the purpose of raising funds to erect the monument, the husband caused the remains to be cremated, and the ashes were not returned to the grave, the executor was nevertheless obliged to erect a monument on the spot where testatrix had been buried.

2. Same—Validity—Setting Apart Sum for Monument.

A provision in a will of a married woman setting apart a specified sum out of her separate estate with which to erect a monument over her grave was valid.

3. Same—Care of Grave—Invalid Provision.

A provision in a will that testatrix's grave be cared for and kept in order for at least 20 years after her death was unenforceable for indefiniteness.

4. Executors and Administrators—Erection of Monument.

Though there is no testamentary disposition or direction, a reasonable sum will be allowed to be paid from the estate of a decedent for the erection of a monument.

Appeal from Superior Court, El Dorado County; M. P. Bennett, Judge.

Proceedings on the settlement of the estate of Emma Koppikus, deceased. From an order and judgment granting an order for a sale of real estate, Henry G. Koppikus appeals. Modified and affirmed.

Rehearing denied by Supreme Court July 25, 1905.

C. E. Peters, for appellant. E. W. Whitmore and Geo. H. Thompson, for respondent.

BUCKLES, J. This is an appeal from the order and judgment granting an order of a sale. Emma Koppikus died testate March 31, 1903, leaving her surviving her husband, Henry G. Koppikus, her sole heir. The reasons for the sale, as set up in the petition and found by the court, are to pay commissions of executor, $280, attorney's fee, $250, for erecting a monument over the grave of testatrix, etc., $1,000, and for paying $100 to keep the grave, etc., in repair, making a total of $1,630; and that the personal property is not sufficient to pay these amounts.

The court below made an order directing the sale to be made, and this is complained of and objected to on the following grounds: (1) That the direction in the will as to monument over the grave of testatrix is an attempt on the part of testatrix to dispose of her dead body by will, and is not a proper funeral expense. (2) That there is no grave of testatrix wherein the remains of the said Emma Koppikus are interred, and that her remains were, by her said husband, caused to be cremated, and the ashes are not in the cemetery.

The court made findings, among which are the following, bearing upon the matters tried (the will is set out in full in finding 3, and the part relating to the monument is as follows):

"I desire that my body be buried from the Roman Catholic Church of Georgetown and be laid to rest in the Georgetown cemetery, and that a monument of Scotch granite be erected over my grave and the lot to be surrounded with a granite curbing, the said monument and curbing to cost one thousand dollars. And I desire that the said lot be cared for and kept in order for at least twenty years after my death."

Finding 4. "That in accordance with the desire of testatrix, expressed in the said will, she was buried on the —— day of April, 1903, in the said Georgetown Cemetery; that her burial in the said cemetery was with the full knowledge and consent of her husband, Henry G. Koppikus, who was present at her burial and grave, and made no objection to her burial in said grave in the said Georgetown Cemetery; * * * that the body of Mrs. Koppikus was buried as aforesaid in a private lot ten feet square, selected and paid for to the cemetery association by the executor of the said estate, as such, with the funds of the said estate."

Finding 5. "That on the —— day of June, 1904, and subsequent to the filing of the petition herein by the executor for the order of the court for a sale of real property, Henry G. Koppikus, the husband of said deceased, * * * caused the body of the said testatrix to be exhumed from her grave in said Georgetown Cemetery, * * * and caused it to be removed to Oakland and there cremated, and her ashes have not been returned to her said grave."

And, as conclusions of law, the court found that the request of testatrix in her will as to the burial of her body and monument over her grave at a cost of $1,000 "is a valid and legal direction to her executor; * * * that by the burial of Mrs. Koppikus, in accordance with the directions of her last will, in the Georgetown Cemetery, by and with the consent of her said husband, her grave was there located and established; that the subsequent removal of her body from the said grave and the cremation of the same do not destroy the character of the original resting place of her mortal remains as her grave, but the said spot where she was buried remains, for the purpose of carrying out the directions of her will, her grave; that the erection of a monument over the said grave, and the construction of a curbing about the same, will be a compliance with the directions of said will, and will require the expenditure of $1,000"; and "that the expenditure of $100 for the care of said lot for at least 25 years, if such expenditure can be made by the executor with adequate security that such care will be bestowed upon the said lot for said period, will be a legal expenditure of the funds of said estate, and in compliance with the directions of said will."

The court thereupon made its order and judgment directing the sale to be made.

It is contended by the appellant that the testatrix, by the direction in her will, attempted to dispose of her dead body. But supposing she did so intend, her intention was carried into execution, not against the wish of her husband, who would have the right to dispose of it himself, but it was with his knowledge and consent that the body was buried in the Georgetown Cemetery. The case is unique, and we have failed to find any case similar in any of the books of reports. The husband allowed the said body of his wife to remain where it had been buried for over a year, and made no move toward removing and cremating it until after the petition was filed by which the court was asked to direct a sale for the purpose of raising funds with which to erect the monument. We think the court was committing no error when it said that her grave was located and established in the Georgetown Cemetery, and that when, a year later, the husband removed the remains from the grave and had them cremated, the establishment and location of the grave was not changed so as to defeat the direction of the testatrix; that, for all purposes of the will and the duty of the executor, the grave remained the same, and for all purposes of this case became a certain, fixed, and definite place, a grave over which the executor must erect a monument as contemplated in the will.

As to the right of the testatrix to set apart $1,000 out of the money of her own separate estate with which to erect a monument over her grave, we think there can be no doubt. But as to the $100 for care of lot for 25 years, we think the court erred in its decree in that respect. The provision in the will is entirely too indefinite ever to be enforced. There can be no question as to the right of the testatrix to dispose of her own property as she may please, so long as the disposition was a legal one, and the erecting of a monument over the grave of a deceased person is a legitimate and proper act. Detwiller v. Hartman, 37 N. J. Eq. 352; Canfield v. Canfield (N. J. Ch.) 50 Atl. 471. Even where there is no testamentary disposition or direction that this be done, the courts will allow a reasonable sum to be paid out of the funds of the estate for the erection of a monument, putting the expenditure upon the ground of funeral expenses. Van Emon v. Superior Court, 76 Cal. 589, 18 Pac. 877, 9 Am. St. Rep. 258.

As it appears necessary that the real estate should be sold as prayed for in the petition, and for the reasons and purposes therein set forth, except as to the $100 for caring for the lot for 25 years, the order of sale and judgment appealed from are modified by striking out all reference to said $100 for caring for the lot, and such order and judgment thus modified are affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 88

In re KOPPIKUS' ESTATE.

(Court of Appeal, Third District, California. May 31, 1905.)

ESTATES OF DECEDENTS—SETTLEMENT—RIGHT TO DISTRIBUTION.

A petition by an heir for a distribution to him of the share of the estate to which he was entitled was properly denied where there was pending an application for a sale of the real estate to raise funds for the charges and funeral expenses.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 1279, 1290.]

Appeal from Superior Court, El Dorado County; M. P. Bennett, Judge.

Proceedings on the settlement of the estate of Emma Koppikus, deceased. From a decree denying the petition of Henry G. Koppikus for an order distributing to him his share of the estate, he appeals. Modified and affirmed.

Rehearing denied by Supreme Court July 25, 1905.

C. E. Peters, for appellant. E. W. Whitmore and Geo. H. Thompson, for respondent.

BUCKLES, J. The appellant, Henry G. Koppikus, filed a petition as the only heir at law asking to have distributed to him the sum of $25, which is a specific devise in the will of deceased to Elmer Koppikus and assigned to petitioner, and asking the court to make an order distributing to him the share of said estate to which he is entitled. Josephine Doyle, a legatee, petitions the court at the same time for an order distributing to her a certain diamond cluster cross which was devised to her by the said last will. These petitions were heard together, and the court by its order decreed that the said $25 be distributed to the said Henry G. Koppikus, and that the said certain diamond cluster cross be distributed to the said Josephine Doyle, and this part of the order, decree, and judgment is affirmed.

That part of the petition of the said Henry G. Koppikus asking a distribution to him of his distributive share of said estate was denied, on the ground, as we understand, that there was then pending an application for sale of the real estate to raise the funds necessary to pay charges and funeral expenses, and therefore no distribution of the kind asked could be made. We have this day affirmed the order of sale of real estate in said matter (No. 3. Sac. No. 1,366). 81 Pac. 732. The order, decree, and judgment are therefore affirmed as to the part denying distribution.

The order, decree, and judgment contain the following recital: "It is further adjudged and decreed that the expenditure of $100 for the care of said lot for at least 25 years, if such expenditure can be made by the executor with adequate security that such care will be bestowed upon the said lot for said period, will be a legal expenditure of the funds of said estate, and in compliance with the direction of said will." This provision, being based upon what we deem a direction of the will which cannot be enforced because of being uncertain, and the decree itself making the enforcement more uncertain and indefinite, is reversed.

As so modified, the order, decree, and judgment are affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

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1 Cal. App. 25

PEOPLE v. McROBERTS.

(Court of Appeal, Third District, California. May 24, 1905.)

1. CRIMINAL LAW — TRIAL — ARGUMENT TO JURY—ASSUMPTION OF FACT.

On a prosecution for homicide the district attorney, apparently in reply to some comments of defendant's attorney, remarked during his address to the jury concerning a knife said to have been found in the possession of the deceased, and which the prosecution identified as belonging to deceased, but did not offer in evidence that: "This county has paid to have the knife examined, and, if the defendant wants that evidence, he can have it." On objection of defendant's attorney the court ordered the district attorney's statement struck out. The district attorney further remarked concerning the knife that, if they had said deceased cut defendant, then it would have been proper to have introduced the knife, and, if there was blood on it, that would be evidence in defendant's favor. *Held*, that the district attorney's remarks concerning the knife were not in violation of the rule rendering it prejudicial error for the district attorney against objection to state facts pertinent to the issue, and not in evidence, or to assume arguendo such facts to be in the case when they are not.

2. SAME.

It is within the right of the district attorney to urge in argument to the jury that the evidence is conclusive of defendant's guilt.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1670, 1677.]

3. SAME—APPEAL—HARMLESS ERROR.

Reference to the past criminal history of the county by the district attorney, in arguing to the jury, as showing that too many murderers escape punishment, though unwarranted, was not cause for reversal of a judgment of conviction.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1668.]

4. SAME.

Though it was a gross and reprehensible breach of duty for the district attorney to say, in arguing to the jury, that it would have been a good thing for the community if defendant had been lynched, the remarks were not cause for reversal of a judgment of conviction.

5. SAME—INSTRUCTION—INTENT.

A charge that there must be a union or joint operation of act and intent or criminal negligence, followed by an explanation that it was not possible to look into the mind of a man, and see what its workings are, or to bring a photograph of the mind of the man and exhibit it to the jury, so as to determine clearly and absolutely what the workings of a human being's mind are, and that from necessity the law required the jury to gather the intention with which the act was done from all the surrounding circumstances, was not objectionable as being argumentative, misleading, or suggestive.

6. SAME—MALICE.

A charge defining murder substantially as it is defined in Pen. Code, § 188, and stating that malice does not necessarily mean that the accused must have entertained toward the deceased feelings of spite, hatred, or ill will, but that the word meant more under the statute, and that there might be legal malice where there was no spite or hatred or ill will, and explaining that an unlawful act done intentionally, without just cause or excuse, is an act, in the contemplation of law, done with malice as that word is understood in criminal judicature, was not erroneous.

7. SAME—REASONABLE DOUBT.

Where the court instructs fully on the doctrine of reasonable doubt in a criminal case, it is not necessary to repeat the doctrine in every instruction.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1991.]

Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

James McRoberts was convicted of murder in the second degree, and he appeals. Affirmed.

Rehearing denied by Supreme Court July 21, 1905.

Charles W. Thomas, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was tried on an information charging him with the murder of one John Murphy, and was convicted of murder in the second degree. Defendant appeals from the judgment.

There is no claim made that the evidence was insufficient to justify the verdict. The grounds of appeal urged in defendant's brief are misconduct of the district attorney in his address to the jury, and that certain instructions given the jury by the court were erroneous statements of the law, and prejudicial to defendant.

1. The district attorney, apparently in reply to some comments of defendant's attorney during his address to the jury concerning a knife said to have been found in the possession of the deceased, and which the prosecution identified as belonging to deceased, but did not offer in evidence, remarked: "This county has paid to have the knife examined, and if he [defendant] wants that evidence he can have it." Upon objection of defendant's attorney, the court said, "Let that be stricken out—the statement, 'This county has paid to have the knife examined,' etc." And again: "As I was going to say, if they had said that Mr. Murphy cut him, then it would have been proper to have introduced the knife; and if there was blood upon it it would be evidence in their favor." Remarking upon the duty of the jury in the light of the evidence, claimed by him to be conclusive of defendant's guilt, the district attorney said that the community ask only simple justice, and added: "This has usually been denied, judging from the past criminal history of this county. 110 murders have been committed and but one hung." Again: "Murder flourishes freely. Within the past six months two men have come into this county, strangers, and have committed murders." The district attorney then called attention to what he claimed was the fact that it made but little difference what crime was committed; "there is always some defense manufactured to save the culprit's neck," continuing in like language to some extent, and concluding: "If the people of Dunnigan had taken him [referring to defendant] out that day and strung him to a tree, they would have done a good thing for this community, and taught these red-handed devils that there is such a thing as law and punishment for their deeds." It is claimed to be prejudicial error for the district attorney "against objection to state facts pertinent to the issue and not in evidence, or to assume arguendo such facts to be in the case when they are not." It was so held in People v. Mitchell, 62 Cal. 411, and People v. Ah Len, 92 Cal. 282, 28 Pac. 286, 27 Am. St. Rep. 103, and perhaps other cases. We cannot see that the remarks of the district attorney respecting the knife referred to were in violation of this rule. He was simply rebutting any inference that the defendant's counsel may have drawn from the fact that the knife was not introduced in evidence. There was no claim made that the knife proved anything one way or the other. If there was any inference, it would be, under the rule, favorable to the defendant. Moreover, defendant could have introduced the knife if its presence would have helped his case. Nor was there any overstepping the limitations of duty to urge that the evidence was conclusive of defendant's guilt, as this was but a conclusion of the district attorney, drawn by him from the evidence before the jury. It was, however, unwarranted license to refer as he did to the past criminal history of the county, and it was a gross and reprehensible violation of duty to avow his belief in the efficacy of mob law, and to say, as he did, that the lynching of defendant by the people of Dunnigan would have been a good thing for the community. There were no facts or circumstances disclosed by the evidence which would have justified such an expression of opinion even from one having little regard for the rights and duties of the public; but there was no conceivable excuse, much less justification, for a sworn officer of the law to indulge in utterances which, if put into execution, would be subversive of all the safeguards of the law thrown around the citizen. No allowance for the zeal which, rightly exercised by a district attorney is commendable, can condone so flagrant a burst of unrestrained passion.

While this is true, the question remains, should the judgment of conviction be set aside for this misconduct? We must assume that the jury was composed of men possessing ordinary intelligence, and as having at least ordinary regard for their oaths as jurymen. The ordinary or average American citizen is not, under ordinary circumstances, influenced by appeals to mob law. The provocation must be great and the exigency pressing to impel him to countenance or yield to such appeals. In the present case the homicide was admitted, and the evidence was such as to make it reasonably certain that the jury was not led by the misconduct of the district attorney to return a verdict which they otherwise would not have found. The question now before us is not the instance of attempt to argue from pertinent facts not in evidence, nor the other case, so often condemned by the courts, of seeking to get before the jury prejudicial facts not pertinent or relevant, by persistently stating and offering to prove them, which was the case in People v. Lee Chuçk, 78 Cal. 317, 329, 20 Pac. 719, cited by defendant. As to the remarks of the district attorney about the frequency of crime and the failure to punish it, see People v. Molina, 126 Cal. 505, 59 Pac. 34, where such comments were held not prejudicial error.

2. The court, in its instruction marked 2, correctly stated the law that there must exist a union or joint operation of act and intent or criminal negligence. The court explained that it was not possible "to look into the mind of a man, and see what its workings are. We cannot bring a photograph of the mind of a man and exhibit to you so as to determine clearly and absolutely what the workings of a human being's mind are. Hence from necessity the law says that you shall gather the intention with which the act was done from all the circumstances surrounding," etc. This instruction was not, we think, either argumentative, misleading, or suggestive, as claimed by defendant. The illustration used by the court made the instruction more lucid and easier of comprehension by the jury.

Instruction 4 (erroneously referred to as 6 in defendant's brief) defines murder, following substantially the definition given in section 188 of the Penal Code. The court also stated that the word "malice" does not necessarily mean that the accused must have entertained toward the deceased feelings of spite, hatred, or ill will, but that the word "malice" meant more under the statute; and the court said that there may be legal malice where there is no spite or hatred or ill will, and explained that an unlawful act done intentionally, and without just cause or excuse, is an act, in the contemplation of the law, done with malice as that word is understood in criminal judicature. We see no ground for criticism of this instruction.

Instruction No. 5 is a correct definition of murder. The court added, "Under the information in this case, as aforesaid, the defendant may, if in your judgment the facts warrant it, be convicted of manslaughter." The court then proceeded to define manslaughter correctly. It is claimed that the instruction "excludes the principles of reasonable doubt." The court instructed the jury very fully as to the doctrine of reasonable doubt. It was not necessary to repeat this doctrine in every instruction. In using the language, "if in your judgment the facts warrant it," the jury must have understood from the very explicit instructions on the subject that they could find no verdict except convinced by the evidence beyond a reasonable doubt.

Instruction numbered 11 was given in People v. Iams, 57 Cal. 115, 117, except the latter part, the omission of which does not affect or change the substance of the instruction. It is complained that the beginning of the instruction—"From these definitions the jury will see," etc.—left the jury in doubt as to what previous instructions or definitions were referred to, citing People v. Valencia, 43 Cal. 552. It is obvious that no others could have been referred to except such as defined murder in its two degrees. The point decided in the case cited was that where, on a trial for murder, two parts of the charge of the court to the jury as to what constitutes murder are contradictory, and one is correct and the other is erroneous, the judgment of conviction will be reversed. No such condition of the instructions exists here.

The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

1 Cal. App. 44

PEOPLE v. NOON.

(Court of Appeal, First District, California. May 29, 1905.)

1. BURGLARY—ENTRY—INTENT—EVIDENCE.

In a prosecution for burglary, evidence *held* sufficient to justify a finding that the entry was made with intent to commit larceny.

2. SAME — INFORMATION — CONTENTS—PARTIAL LOSS.

Where, in a prosecution for burglary, with several alleged prior convictions, it appeared at the trial that one page of the original information was missing, and defendant objected to a trial thereon before any testimony was introduced, and again by an objection to the first question put to the witness, and the contents of such missing page was not shown, it could not be presumed that such page contained only a charge of prior convictions, and its absence therefore harmless, and hence a conviction based thereon was erroneous.

3. SAME—DISMISSAL.

Where a conviction was reversed because it was had on an information, one page of which was missing at the time of the trial, and its contents were not proved, such defect did not necessarily invalidate the information, so as to require the appellate court to order the information dismissed.

4. SAME — PRIOR CONVICTIONS—ADMISSION—RECORD.

Where defendant was charged with burglary and several prior convictions, if he admitted the charge of prior convictions such admission should be disclosed in the minutes of the plea, a copy of which is required to be inserted in the judgment roll by Pen. Code, § 1207.

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

William Noon was convicted of burglary, and he appeals. Reversed.

H. Krouse (A. S. Newburgh, of counsel), for appellant. U. S. Webb and Lewis F. Byington, for the People.

HALL, J. This is an appeal by the defendant in a criminal action from an order denying his motion for a new trial, and from the judgment of imprisonment in the State Prison for the term of 20 years. The information charges the defendant with burglary, together with several prior convictions. The entry is alleged to have been of the "house, room," etc., "of one C. Heuser, located at 503 Mason street," etc.

It is urged by appellant that the evidence was insufficient to justify a finding of an entry of the premises by the defendant, or that such entry was with the intent to commit larceny. A careful examination of the evidence set forth in the bill of exceptions does not, in our opinion, sustain the contention of defendant in this regard. C. Heuser, the occupant of the room alleged to have been entered, testified in substance, among other things, that he left his room at 503 Mason street at 11 o'clock in the forenoon of the 20th day of January; that he did not light the gas at all that morning; that he returned to the room at a quarter to 1 in the night, and found the room in the same condition as when he left it; nothing was disturbed. His room was the back room on the second story. Edward Asher, who, according to the evidence, resided in the same house, in a room immediately under Heuser's room, testified that on the night in question he heard a noise, and, continuing, said: "I didn't pay particular attention at first. I heard the window upstairs open. It came down with a bang. I heard somebody walking. I jumped up and ran upstairs. I knew Mr. Heuser never came home at that time. I knew where he was employed. I went upstairs immediately. I heard walking quickly around. I started to open the door, and I said 'Who is there?' and, just as I said that, bang went the window. Then I ran into the bathroom, and I said, 'What is the matter down there?' and I did not receive any response, and just then there was a crash." He further testified that, after getting a pass-key and entering the room, he found nothing disturbed, except that the gas was lighted. Josephine La Fargue testified that she occupied the adjoining house, which was separated by a court from 503 Mason street; the court being at the rear of 503 Mason street. On the night in question she heard a noise, and saw defendant in her house. He ran out of the house, but left an overcoat. She further testified that when she went to bed that night a stepladder was against the house 503 Mason street. It was then unbroken, but when she saw it next morning it was broken. The arresting officer testified that after the arrest of the defendant he said to the officer, "You can't convict me of burglary, because I did not take anything out of that room." From the foregoing statement of the evidence, it is a fair deduction that the defendant did enter the room of Mr. Heuser, and on being interrupted, escaped through the window into the court, and thence fled through the adjoining house. Considering the time of the entry, the clandestine manner thereof, and the precipitate flight of the defendant, the jury were justified in finding that the entry was with the intent to commit larceny.

A more serious objection to the action of the trial court arises out of the following state of facts: Upon the arraignment of the defendant, it was discovered that the original information contained one page more than the copy furnished the defendant. This irregularity, however, was at the time waived by the defendant. Defendant pleaded not guilty, with privilege to withdraw plea. At the trial, after the jury had been sworn, the clerk read to the jury the information as the same now appears in the judgment roll, omitting to read the prior convictions therein charged, and stated the plea of not guilty on behalf of the defendant thereto. A witness was called for the prosecution and sworn, but, before any testimony was given, defendant's counsel called the attention of the court to the fact that the information that had just been read contained one page less than the information on file at the arraignment, and on which defendant had been arraigned, and, in effect, objected to the defendant being tried on the mutilated information. The court thereupon took testimony as to the alteration in the information, and overruled the objection, and the defendant excepted. The objection was in substance repeated upon the first question being put to the witness, and was overruled, and exception reserved. The testimony taken on the hearing of the objection shows that a page of the original information, containing printed and written matter had been removed or had become detached, and was missing at the trial. No evidence was given on the hearing of the objection as to what the missing page contained. The clerk of the court, the deputy district attorney, the judge of the court, and counsel for defendant each testified; but no effort was made to prove the contents of the missing page, or to contradict the testimony that a page was missing. In the remarks made by the court in ruling on the objection, the court seems to have assumed that the missing page contained only a charge of a prior conviction. Before judgment was rendered the same matter was again presented to the court upon a motion in arrest of judgment, and testimony was again taken. On this hearing the clerk did testify that the missing page contained a charge of prior conviction, but that it might have contained something else. No effort was made to prove the precise contents of the missing page. The entry in the clerk's register under date of February 26, 1904, is as follows: "Information for felony, to wit, burglary, and five prior convictions, presented by the district attorney and filed;" while the information now in the judgment roll, from which confessedly one page is missing, still contains five charges of prior conviction. The fair inference from this is that the missing page contained something else than a charge of prior conviction. However this may be, it certainly nowhere appears in the record that the missing page contained only a charge of prior conviction. As the information was signed by the district attorney, and was presumably drafted by some one connected with his office, the proof of the contents of the missing page may well be presumed to have been peculiarly within the power of the district attorney. If it had been clearly shown that the missing page contained only a sixth charge of prior conviction, we are of opinion that defendant could not have been injured or prejudiced by the removal of such charge from the information. Indeed, counsel for defendant, in his brief, concedes this to be so, and cites us in that connection to People v. Carroll et al., 92 Cal. 568, 28 Pac. 600, in which case the defendants, together with one John Murphy, were charged in the information with the crime of robbery. The court said: "It appears that afterwards the information was withdrawn as against Murphy, and that some one connected with the court erased the words 'and John Murphy' and the word 'and' where it occurred in another place, by drawing a black line through the same. This was certainly an unauthorized and dangerous act, and if it did not appear clearly what the alterations were, and that they could not have prejudiced or injured appellant, the consequence might have been serious. But as the alterations clearly appear, and as they could not 'have actually prejudiced defendants or tended to their prejudice in respect to a substantial right,' they are not good grounds for a reversal of the judgment, no matter how censurable the act of making them. We hope, however, that this case will not be taken as a precedent for similar conduct hereafter." In this case, as it does not clearly appear what the missing page contained, we cannot say that it did not contain matter that would have been a defense or a material modification of the main charge. For this reason, the judgment and order denying the motion for a new trial must be reversed.

We are asked by counsel for the defendant not only to reverse the judgment in this case, but also to order the information dismissed, upon the theory that, the information having been altered, no new trial can be had thereon, and he cites us to Calvin v. State, 25 Tex. 789, and Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849. Calvin v. State was an indictment by the grand jury for murder, which, by agreement of counsel, was amended by striking therefrom certain words which went to the description and identification of the person killed. Manifestly an indictment emanating from the grand jury cannot be amended in matter of substance by either the court or the district attorney. It was consequently held in this case that all proceedings under the indictment must be annulled, and the prisoner held to answer to the next grand jury. The court did say, however, "We do not believe that every accidental or intentional mutilation or partial obliteration of an indictment would have the effect to destroy its vitality, because this would be to place the power of the courts to punish offenses too much at the mercy of reckless and unscrupulous men." In accord with the foregoing quotation, we say we cannot believe that a court can be deprived of the jurisdiction to try a defendant because some portion of an information be removed from the document by some unknown person, or perhaps accidentally detached and lost, especially if it be shown that the matter removed does not in any way affect what remains, or be of such a nature that defendant could not be prejudiced by its removal. Ex parte Bain also was an indictment by a grand jury which had been changed by order of the court in a matter of substance that went to the description of the particular offense charged, and the prisoner was discharged on a writ of habeas corpus. In the case of People v. Granice, 50 Cal. 447, where it was conceded that certain words were interpolated in an indictment for manslaughter so as to change the charge to one for murder, the court reversed the judgment and remanded the cause for a new trial. So, in People v. Carroll, supra, where it clearly appeared what the alteration was, and that it could not have prejudiced the defendant, the irregularity was held not to warrant a reversal. Upon the return of this case to the trial court, if it clearly appear that the missing page contained only a charge of a prior conviction, no reason is perceived why such charge may not be dismissed or withdrawn, and the trial then proceed on the information as it now stands.

At the oral argument our attention was also called to the fact that the minutes of the plea show only the general plea of not guilty. Neither do the minutes of the court contained in the judgment roll show that the charge of prior convictions was admitted, nor did the jury return any finding as to the charge of prior convictions, although the judgment recites a conviction of five such charges. If in fact the defendant did admit the charge of prior convictions, the proper place to show the same is in the minutes of the plea, a copy of which should be inserted in the judgment roll. Pen. Code, § 1207. However, it is not necessary to discuss the effect of this error, as a new trial must be had for the reasons hereinbefore set forth, and we only call attention to this matter in order that it may be corrected when the case is again before the trial court.

Judgment and order denying motion for a new trial are reversed, and cause remanded for new trial.

We concur: HARRISON, P. J.; COOPER, J.

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1 Cal. App. 61

Ex parte BUNKERS.

(Court of Appeal, Third District, California. May 29, 1905.)

1. BRIBERY — STATUTES — CONSTITUTIONAL LAW.

Pen. Code, § 86, as amended by Act April 6, 1880 (Amend. Pen. Code 1880, p. 7, c. 42), providing that every member of the state Legislature who asks, receives, or agrees to receive any bribe, on any understanding that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given in any manner, or on any particular side of any question or matter, on which he may be required to act in his official capacity, etc., shall be punished by imprisonment in the state's prison, and in addition shall forfeit his office, be disfranchised, etc., was an independent enactment, and not contrary to Const. art. 4, § 35, declaring that any member of the Legislature who shall be influenced in his vote or action on any matter pending before the Legislature by any reward or promise of future reward, etc., shall be guilty of a felony, and, on conviction, "in addition to such punishment as may be provided," shall be disfranchised, etc.

2. SAME — CORPORATIONS — LEGISLATIVE EXAMINATION.

Const. art. 12, § 1, provides that corporations may be formed under general laws, and that all laws concerning corporations, and laws that may be thereafter passed, may be altered from time to time or repealed; and Civ. Code, § 383, declares that the Legislature, or either branch thereof, may examine into the affairs and condition of any corporation, and for that purpose any committee appointed by the Legislature, or either branch thereof, may administer all necessary oaths to directors, officials, and stockholders of such corporation, and may examine its safes, books, papers, documents, etc., and compel the production thereof. *Held* that, under such sections, the legislative committee on commissions and retrenchment had authority to examine the affairs of certain loan associations incorporated under the general laws of the state.

3. SAME—INDICTMENT.

An indictment alleging that defendant, a state senator and member of the committee on commissions and retrenchment, willfully, feloniously, and corruptly asked and received from J. a bribe, to wit, the sum of $300, pursuant to an agreement that defendant's official vote, opinion, judgment, and action as such senator should be influenced thereby, and should be given to secure certain named corporations from legislative examination, etc., sufficiently charged a violation of Pen. Code, § 86, prohibiting legislative bribery.

4. SAME—HABEAS CORPUS.

Where an indictment showed an evident attempt to state the essential facts constituting the crime sought to be charged, of which the court had jurisdiction, the party charged could not be released on habeas corpus.

Application by Harry Bunkers for a writ of habeas corpus. Writ discharged.

H. V. Morehouse and H. L. Partridge, for petitioner. A. M. Seymour, Dist. Atty., for respondent.

CHIPMAN, P. J. Application for writ of habeas corpus. Petitioner was indicted for the crime of bribery, convicted by a jury, and sentenced by the court to imprisonment in the state prison at San Quentin for the term of five years, and is now in the custody of the sheriff of Sacramento county by virtue of the judgment of conviction and an order of commitment indorsed thereon.

The indictment is as follows: "The said Harry Bunkers on the ——— day of January, A. D. 1905, at the said county of Sacramento, in the said state of California, and before the finding of this indictment, the said Harry Bunkers being then and there a member of one of the houses, to wit, the Senate, composing the Legislature of the state of California, to wit, the senator of the state of California in and for the Eighteenth senatorial district, and being then and there a member of a regularly constituted committee of the said Senate of the state of California, to wit, the committee on commissions and retrenchment, and the said Legislature of the state of California being then and there duly and regularly convened in its thirty-sixth session, did then and there willfully, unlawfully, feloniously, and corruptly ask and receive from one Joseph Jordan a bribe, to wit, the sum of three hundred dollars in lawful money of the United States, upon the agreement and understanding that his, said Harry Bunkers', official vote, opinion, judgment, and action, as such senator and member of said house of said Legislature, should be influenced thereby, and should be given in a particular manner and upon a particular side of a question and matter upon which he might be required to act in his official capacity, to wit: The said bribe, to wit, the sum of three hundred dollars lawful money of the United States, was so given by said Joseph Jordan to the said Harry Bunkers, and was so received by the said Harry Bunkers from said Joseph Jordan, upon the understanding and agreement that he, said Harry Bunkers, as such member of one of the houses of the Legislature of the state of California, to wit, the Senate, and as such member of said committee on commissions and retrenchment, would give his official vote to secure the Renters' Loan & Trust Company, a corporation, and the Phœnix Savings, Building & Loan Association, a corporation, immunity from investigation of their affairs and business by said senator of the state of California, and by said committee on commissions and retrenchment, and that he, said Harry Bunkers, would give his official vote as such senator and such member of said committee as aforesaid to secure the said Renters' Loan & Trust Company, a corporation, and the said Phœnix Savings, Building & Loan Association, a corporation, immunity from any unfavorable comment or report by the said Senate of the state of California, and by the said committee of the Senate of the state of California, to wit, the committee on commissions and retrenchment, there being then and there pending before said committee on commissions and retrenchment an investigation of the affairs and business of said corporations, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California. A. M. Seymour, District Attorney of Sacramento County, in the State of California."

The points urged by defendant at the argument were: (1) That section 86 of the Penal Code, under which the indictment was drawn, was repealed by force of section 35, art. 4, of the state Constitution; (2) that the Legislature, and necessarily this committee, has no power to investigate the business of a private corporation, and that the act, for the doing of which petitioner was charged, was not an act within his official duty, and hence there could be no bribery involved; (3) even if the Legislature had the power to make such investigation, still the indictment fails to state matters of substance required by law, and hence charges no offense; (4) that the writ of habeas corpus will lie, because the court before which the cause was tried was without jurisdiction.

1. The argument of counsel at the hearing of the return was based on the assumption that section 86 was enacted under the old Constitution. The contention was that this section as it then stood was inconsistent with section 35, art. 4, of the present Constitution, and therefore was repealed by virtue of section 1, art. 22, and that it does not help the matter to say that section 86 has been amended since the adoption of the new Constitution. Upon this latter point the claim is that, the old section 86 being repealed, because of its being inconsistent with section 35, art. 4, it follows that there was nothing to amend, and hence the amendatory act is void. Section 24 of article 4 of the Constitution provides, among other things, as follows: "No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." Section 86 of the Penal Code, under which this indictment was found, was passed April 6, 1880, subsequent to the adoption of the Constitution. Amend. Pen. Code 1880, p. 7, c. 42. It was said in Pennie v. Reis (Cal.) 22 Pac. 176, that the provision of section 24, art. 4, does not apply to an independent act; and in Donlon v. Jewett, 88 Cal. 530, 26 Pac. 370, it was held that a revised or amended act must be construed as a new and original piece of legislation. We have examined with much care section 86 of the Penal Code and section 35, art. 4, of the Constitution, and have not been unmindful in doing so of the rules of interpretation relied on by petitioner, and our opinion is that the Constitution did not work the repeal of the Code section. We are, therefore, to be guided by the rule laid down in Donlon v. Jewett, rather than the rule in Pennie v. Reis. The sole question, then, is, was the power of the Legislature to legislate upon the subject of legislative bribery withdrawn by section 35, art. 4?

The Constitution does not, either by its terms or by necessary implication, forbid the Legislature to pass such a statute as is found in section 86 of the Penal Code. The language of the Constitution is: "Any member of the Legislature, who shall be influenced in his vote or action upon any matter pending before the Legislature by any reward, or promise of future reward, shall be deemed guilty of a felony, and upon conviction thereof, in addition to such punishment as may be provided by law, shall be disfranchised and forever disqualified from holding any office or public trust." In declaring the acts therein described to be a felony, and upon conviction thereof that the guilty party "shall be disfranchised and forever disqualified from holding any office or public trust," the provision is mandatory and self-executing, and as a penalty for the acts such guilty party must be so adjudged to suffer; but this is not the sole penalty, but is what the Constitution declares a penalty "in addition to such punishment as may be provided by law." In re-enacting section 86 the Legislature very properly, in addition to imposing imprisonment on its own initiative, as the Constitution clearly implies it may do, included the constitutional punishment, in order, probably, that the entire penalty to be inflicted might appear in a single section of the Penal Code. It will be observed that the crime of lobbying, denounced by this same section 35, art. 4, is to be punished as the Legislature may provide. It is not possible by any reasonable interpretation of these provisions of the Constitution to say that the framers of that instrument intended it to embrace all needed legislation on the subject of legislative bribery and to forbid further legislation on that subject. It is hardly necessary to point out the distinction between the constitutional powers of the United States and the like powers of the states. Suffice it to state briefly that the latter possess general powers of legislation, while the former possess such only as are granted. A state law is conclusively presumed to be within the powers of the Legislature, unless in the Constitution of the United States or of the state we are able to discover that it is prohibited. Cooley's Constitutional Limitations (7th Ed.) p. 126; Ex parte Mabry, 5 Tex. App. 93. Petitioner's contention, therefore, that there is now no law punishing legislative bribery, except it be found in the provisions of the Constitution, cannot be maintained.

2. It is further claimed that petitioner was not charged with any official duty in respect of the investigation mentioned in the indictment, and therefore bribery cannot be predicated of his alleged acts. Stripped of its technical formalities, the indictment shows that petitioner was a member of the Senate then in session, and was also a member of a regularly constituted Senate committee, before which an investigation of the affairs and business of certain building and loan corporations of this state was then pending, and that he corruptly asked and received a bribe of $300 upon the agreement and understanding that his "official vote, opinion, judgment, and action as such senator and member of said house of said Legislature, should be influenced thereby and should be given in a particular manner, upon a particular side of a question and matter upon which he might be required to act in his official capacity," and that such bribe was received with the further understanding that as such senator and as a member of this committee he would give his official vote to secure these corporations immunity from investigation of their affairs by the Senate and the committee, and also give his official vote to secure them immunity from any unfavorable comment or report by the said committee. The point made by petitioner was strongly urged at the argument, and reliance was especially placed upon Matter of Pac. Railway Commission (C. C.) 32 Fed. 241, 12 Sawy. 559, and Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377, and also article 3, § 1, Const. Cal. Respondent cites numerous cases, holding that the Legislature has the power to investigate the business and affairs of corporations, and that whether or not the Legislature had such power is immaterial, as the matter of an investigation was pending and official action was called for—citing, as to the power, Burnham v. Morrissey, 14 Gray, 226, 74 Am. Dec. 676; Crease v. Babcock, 23 Pick. 334, 34 Am. Dec. 61; Keeler v. McDonald (N. Y.) 2 N. E. 615, 52 Am. Rep. 49; Ex parte McCarthy, 29 Cal. 395; Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; section 1, art. 12, Const. 1879; section 383, Civ. Code. As to the immateriality of the question of power, the investigation being in fact pending, the following citations are given: State v. Potts, 78 Iowa, 656, 43 N. W. 534, 5 L. R. A. 814; Glover v. State, 109 Ind. 391, 10 N. E. 282; Commonwealth v. Lapham (Mass.) 31 N. E. 638; State v. Ellis, 33 N. J. Law, 102, and note in 97 Am. Dec. 707; State v. Lehman (Mo. Sup.) 81 S. W. 1118, 66 L. R. A. 490; Pen. Code, § 86.

Section 1, art. 12, of the Constitution, provides that corporations may be formed under general laws, and declares that "all laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed." Section 383 of the Civil Code, passed March 21, 1872, provides as follows: "The Legislature, or either branch thereof, may examine into the affairs and condition of any corporation in this state at all times; and, for that purpose, any committee appointed by the Legislature, or either branch thereof, may administer all necessary oaths to the directors, officials, and stockholders of such corporation, and may examine them on oath in relation to the affairs and condition thereof; and may examine the safes, books, papers, and documents belonging to such corporation, or pertaining to its affairs and condition, and compel the production of keys, books, papers, and documents by summary process, to be issued on application to any court of record or any judge thereof, under such rules and regulations as the court may prescribe." What the limit is of the powers which may be exercised under these provisions of the Constitution and the statute is not necessary now to prescribe; but, whatever that limit may be, we are clearly of the opinion that it was not reached by the committee of the Legislature in entering upon an investigation of the affairs of the corporation mentioned in the indictment, which investigation we must presume was either within its regular and ordinary duties under standing rules of the Senate or was specially devolved upon it by that body. If the Legislature cannot exercise this power through a committee, it had not the power to create a board of commissioners of loan associations, upon which, by the act of March 23, 1893 (St. 1893, p. 299, c. 215), even greater powers are conferred than were alleged to have been assumed by the legislative committee of which petitioner was a member. Similar powers also are being exercised by the bank commissioners and other bodies created by the Legislature. The argument which would destroy the power of the Legislature through its committees to inquire into the affairs of corporations, with a view to correct corporate abuses, would also destroy the power of the commission created by it for that purpose. But such exercise of legislative power has been long exercised and universally acquiesced in, and is, we think, unquestionably intrenched in our system of government. The learned trial judge, whose opinion is before us, well observed: "Corporations of the character of those under investigation by the committee on commissions and retrenchment of the Senate are creatures of the law. While they are not, under our Constitution, created by direct act of legislation, they are, nevertheless, just as much creatures of the legislative power as they were previous to the adoption of our present organic law. Our legislators necessarily gather wisdom evidenced in our system of laws from experience, and it is therefore one of the duties of citizens elected to the legislative branch of the government to gather all information, facts, and data necessary to a proper performance of their duty, and thus place themselves in a position where they can give the state as nearly a perfect code of laws as human ingenuity is capable of. The Legislature has passed general laws by virtue of which corporations of all kinds and classes may come into existence. It is true that, if these corporations violate the laws by which they are formed and organized, and thereby deprive citizens of their rights, the remedy would be an appeal to the judicial arm of the government. But, where there are manifest defects in the general laws authorizing the establishment of such corporations, it is not only proper, but absolutely the duty of the legislative department, to gather information upon the subject in all legitimate ways to enable it to make such reforms in those general laws as will prevent, or at least minimize, the wrongs which flow from such defects. * * * This may be called a visitorial or supervisorial power; but, whatever its proper designation, it is nevertheless a power that exists, and one which ought to exist, and without the existence of which the public would have no adequate protection from corporations which, legally established, are managed so as to perpetrate fraud upon the rights of the people with whom they do business." Similar and equally pertinent views will be found expressed in Keeler v. McDonald, supra, and other cases above cited by the district attorney.

3. It is contended that the indictment "is defective in some matter of substance required by law," and petitioner should be discharged by virtue of subdivision 3, § 1487, Pen. Code. But it also provides that the defect referred to must have the effect of "rendering such process void"; i. e., the indictment in this case—citing People v. Ward, 110 Cal. 368, 42 Pac. 894; People v. Dunlap, 113 Cal. 72, 45 Pac. 183, and some other cases. People v. Ward was a case of bribery, and the indictment charged that defendant did willfully, feloniously, etc., "give a bribe" to a certain member of the board of supervisors, with intent to corruptly influence him in a certain matter. The court said that this was not an averment of any act of defendant sufficient to bring his alleged conduct within the legal meaning of bribery as defined by subdivision 6 of section 7 of the Penal Code. Meeting the contention of respondent, the people, that it was sufficient to allege an offense in the language of the statute, the court said: "The offense charged in the case at bar is not alleged in the language of the statute in the indictment under review. It does not allege 'the acts and facts which the Legislature has said shall constitute the offense.' The material acts or facts constituting the legislative definition of bribery are the giving to a public officer something 'of value or advantage, present or prospective,' or giving 'any promise' or entering into any 'undertaking' to give something of value or advantage. There is no averment that appellant gave the supervisor anything of value, or of advantage, or that he gave anything at all, or that the thing was of present or prospective advantage, or that it was a promise to do something, or an undertaking of some kind which was or would be, beneficial to the supervisor." In the indictment before us the district attorney seems to have been careful to meet the requirements as set forth in People v. Ward. It was further said in that case, speaking of the rule of pleading where the pleader follows the statute: "It means simply this: that, when the statute defines or describes the acts which shall constitute a particular offense, it is sufficient in an indictment to describe those acts in the language employed in the statute, applying them, of course, concretely to the person charged." We think the indictment here is sufficient to charge bribery as defined in subdivision 6, § 7, and section 86, of the

Penal Code. Nor can we see how the district attorney could have well stated with greater particularity the acts of which the crime alleged is predicated. It was held in Ex parte McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257, that, even where unartificially drawn, "if the complaint shows an evident attempt to state the essential facts which constitute the crime sought to be charged, the defect in the statement would not warrant the discharge of the defendant" on habeas corpus. See, also, Ex parte Kowalsky, 73 Cal. 120, 14 Pac. 399, where it was said: "If enough appears in such defective indictment to show that an offense has been committed of which the court has jurisdiction, the party charged cannot be discharged under a writ of habeas corpus."

4. Upon petitioner's fourth point it need only be said that the court in our opinion had jurisdiction of the cause.

The writ is discharged and prisoner remanded.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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1 Cal. App. 80

In re BUHRMEISTER'S ESTATE.

(Court of Appeal, Third District, California. May 31, 1905.)

WILLS—CONSTRUCTION—PRECATORY WORDS.

Civ. Code, § 1317, requires a will to be construed according to testator's intention. Section 1318 provides that in case of uncertainty the intention is to be ascertained with a view to extrinsic circumstances. Sections 1321, 1325, require a will to be construed as a whole, and so as to give some effect to every expression. A will devised testator's property to his six children in equal shares, and expressed a "desire" that a designated son have the use and profits of a fruit ranch for the period of five years immediately succeeding testator's death at a specified annual rental, to be paid to the other children, and "directed" the other children to execute to such son a lease of the premises for the term and upon the conditions specified. *Held*, that the provision was not to be construed as merely precatory, but should be given effect as a mandatory expression of testator's intention.

[Ed. Note.—For cases in point, see vol. 49, Cent Dig. Wills, §§ 1587-1589.]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

In the matter of the estate of H. G. Buhrmeister, deceased. From a decree settling the final account of the executors and distributing the estate, certain devisees appeal. Affirmed.

Rehearing denied by Court of Appeal June 26, 1905; by Supreme Court July 25, 1905.

Reese Clark, for appellants. Geo. A. Lamont, for respondent.

CHIPMAN, P. J. Settlement of final account of executors and distribution. The testator by article 2 of his will devised all his property to his six children, naming them, "in equal shares, share and share alike." Article 3 of his will is as follows: "It is my desire that my son, Walter Buhrmeister, shall have the use and occupation, rents, issues and profits of my fruit ranch of about (60) sixty acres, near Manka's Corner, for the period of five (5) years immediately after my death, should he live so long, together with all my household and kitchen furniture and all personal property belonging to me and used in connection with said fruit ranch, at the annual rental of three hundred dollars ($300) to be paid annually at the end of each year, to his brothers and sisters, sixty dollars ($60) to each, together with all taxes of every kind which may be levied upon said property during said term; and, I direct all my other children to execute to my said son Walter, immediately after my death, a lease of said premises and said personal property for the said term and upon the conditions herein expressed." The court distributed the estate, subject to these provisions of the will.

Appellants contend that the whole estate was vested in the devisees by article 2 of the will, that article 3 expressed but a mere wish or suggestion, that Walter was not bound to take under this article, that there was no imperative obligation imposed on him, and, "if he is not bound, it cannot be said that the other devisees are bound to be divested of their estate for five years at the option of Walter"—citing Estate of Marti, 132 Cal. 666, 61 Pac. 964, and 64 Pac. 1071; Hess v. Singler, 114 Mass. 56; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138. In Estate of Marti, supra, the principles upon which courts have in the past interpreted, and now interpret, similar provisions of wills, are very fully discussed, and, as far as seems possible, the decisions are sought to be harmonized by a very full examination of the English and American cases. Our Code provisions on the interpretation of wills (Civ. Code, § 1317 et seq.) are also elucidated to some extent. We feel relieved, by this discussion, from the necessity of re-examining the questions. In the Marti Case the entire estate was given by will to the testator's wife. Following this devise was the following provision: "Upon the death of my wife, I desire that one-half of the property bequeathed to her shall be devised by her to my relatives." It was held that the devisee was entitled to the entire residue of the estate of her husband, free from any limitation or trust. "A will is to be construed according to the intention of the testator." Id. § 1317. "In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made exclusive of his oral declarations." Id. § 1318. "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail." Id. § 1321. "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." Id. § 1325. Notwithstanding all efforts by statute and by decisions of the courts to simplify and make clear the rules by which to interpret wills, there are certain uses of words which seem beyond absolute and unvarying definition when used in wills. Among these are precatory words. It was said in the Marti Case to be "impossible to harmonize the several decisions upon the subject" as to what estate may be created by such words, and it was added "that the decision in any one case cannot be taken as a precedent for another."

Having in view the rules of interpretation stated in the Civil Code, and without violating the reasoning in the Marti Case, we think it reasonably clear that the testator, in the present case, intended to do more than leave a mere request behind him as to his son Walter. In the paragraph of his will expressing his desire, and concerning its subject-matter, he directs certain things to be done in a way to show clearly an intention, and not a mere desire, that Walter should have the use of the property described for a period of five years. It is this feature of the will, set forth so specifically, that differentiates it from the Marti will. It is true that the court said in that case that no case had been cited to it in which it had been determined that a devise in absolute terms had been held to be in trust by reason of words of request or desire contained in a subsequent clause of the will. But this statement must refer to some such will as that then before the court, where there were no other provisions tending to throw light upon the testator's intention. Here the language in article 3 is so plain a direction that it would do violence to it to say that the testator expressed but a mere wish or desire.

The decree is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

1 Cal. App. 50

PEOPLE v. CLEARY.

(Court of Appeal, Third District, California. May 29, 1905.)

GRAND LARCENY—INDICTMENT — SUFFICIENCY.

An indictment charging that defendant willfully, unlawfully, and feloniously took from the person and possession of prosecutor a specified amount of money by means of force, and without prosecutor's consent, was insufficient to sustain a conviction for grand larceny for failing to charge that the property taken was not that of defendant, or was that of some other person, though Code Civ. Proc. § 1963, subd. 11, provides that it is presumed that what a person possesses is owned by him.

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

William Cleary was found guilty of robbery, and the state appeals from an order granting defendant's motion in arrest of judgment. Affirmed.

U. S. Webb, Atty. Gen., and T. T. C. Gregory, Dist. Atty., for the People. George A. Lamont and M. C. Chapman, for respondent.

McLAUGHLIN, J. Respondent was indicted by the grand jury of Solano county for the crime of robbery, and found guilty of grand larceny. On the day fixed for pronouncing judgment, he made his motion in arrest of judgment upon the ground "that it appears upon the face of the indictment on which said defendant was tried and convicted that the facts stated therein do not constitute the public offense of grand larceny, or any other public offense, for the reason that said indictment does not charge that the property taken was not the property of the defendant, or was the property of any person other than the defendant." The motion was granted, and thereupon this appeal was taken.

It is thus apparent that the sole question here is the sufficiency of said indictment to sustain a conviction of grand larceny. The part of said indictment pertinent to this inquiry reads as follows: "The said William Cleary * * * willfully, unlawfully, and feloniously did take from the person and possession of one Peter Cadloni seventy dollars in gold and silver coin of the United States of America, which said taking of said lawful money aforesaid was then and there without the consent and will, and was then and there against the will, of said Peter Cadloni, and was then and there accomplished by means of force used upon and against the said Peter Cadloni by said William Cleary."

"Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another," and, unless it can be said that the indictment in this case charges that the property taken was owned by some other person than the defendant, the action of the court below must be sustained. In People v. Hanselman, 76 Cal. 461, 18 Pac. 425, 9 Am. St. Rep. 238, it was said: "Under all definitions of larceny found in the books, the ownership of the property averred to have been stolen, in some other person than the one charged with stealing it, is an essential element of the crime. The Code of this state provides that it must be the property 'of another,' and all the authorities are concurrent to the point that this essential part of the crime must be stated in the indictment. To disregard this firmly fixed and universal rule, in order to condone the faultiness of the information in this case, would be to commit an act of judicial usurpation."

Counsel for appellant concedes that this is the rule, but contends that, it being alleged that the property was taken from the possession of Cadloni, it follows that this must be taken as an averment of Cadloni's ownership. In support of this contention, section 1963, subd. 11, Code of Civil Procedure, is cited. The presumption "that things which a person possesses are owned by him," if uncontradicted, is accepted as proof; but we are here dealing with a pleading, and "in no case can an indictment be aided by presumption." People v. Terrill, 127 Cal. 100, 59 Pac. 836; People v. Robles, 117 Cal. 684, 49 Pac. 1042. People v. Nelson, 56 Cal. 77, and People v. Anderson, 80 Cal. 206, 22 Pac. 139, merely dealt with such presumption as proof; for in both cases the ownership of the property is distinctly averred. People v. Price, 143 Cal. 353, 77 Pac. 73, has no application to the case at bar. In People v. Hicks, 66 Cal. 104, 4 Pac. 1093, there is no hint that the mere averment of possession carries with it an averment of ownership. The language there used will bear the construction that the property taken was the personal property of Frederick Schwartz, and in his possession, and, this construction being adopted, there was a sufficient averment of ownership in another. This is pointedly shown by two cases in which People v. Hicks was cited. People v. Hanselman, 76 Cal. 461, 18 Pac. 425, 9 Am. St. Rep. 238; People v. Ammerman, 118 Cal. 26, 50 Pac. 15. In the latter case it was contended that the offense was described in the language of the statute defining robbery; but the court held that this was not sufficient, and that a distinct averment of ownership was necessary. Now, robbery is the felonious taking of personal property from the possession of another, and, if the averment of possession carried an averment of ownership, then certainly nothing more could be requisite; and yet for 40 years it has been the rule that in addition to this an averment of ownership is necessary. People v. Vice, 21 Cal. 346; People v. Ammerman, 118 Cal. 26, 50 Pac. 15; People v. Piggott, 126 Cal. 509, 59 Pac. 31; People v. Nelson, 56 Cal. 80; People v. Jones, 53 Cal. 59.

If it need only be stated that the property taken was in the possession of another, then in reason, as well as under the authorities, it need only be alleged that the taking was from the person of another; for it would thus appear that the taking was from one having possession. People v. Shuler, 28 Cal. 493; People v. Ah Sing, 95 Cal. 655, 30 Pac. 796; People v. Walbridge, 123 Cal. 274, 55 Pac. 902. This construction would emasculate section 484 of the Penal Code, and be judicial legislation, denounced as usurpation in People v. Hanselman, supra. It would necessarily lead to a reductio ad absurdum, abhorred in law and logic.

The order is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

147 Cal. 328

Ex parte **ZHIZHUZZA.** (Cr. 1,240.)

(Supreme Court of California. July 13, 1905.)

1. Municipal Corporations — Police Power — Ordinances — Uniformity — Garbage—Removal.

A city ordinance providing that the city should have exclusive charge of the removal of garbage, and providing a different charge for garbage removed from a private dwelling house from that removed from any shop, store, or business house, was not thereby rendered invalid for nonuniformity.

2. Same.

Under Const. art. 11, § 11, granting power to municipal corporations to enforce within their limits all such local police, sanitary, and other regulations as are not in conflict with general laws, a city ordinance providing that garbage should be removed only by the city or its authorized agents in the manner designated in the ordinance was not invalid, in that its classification was based on the character of the buildings from which garbage was to be removed, and not directly on the quantity to be removed.

3. Same.

Const. art. 1, § 11, providing that all laws of a general nature shall have uniform operation, has no application to ordinances of a city, adopted in the exercise of police power, providing for the city's exclusive right to remove garbage, etc.

4. Same—Objections—Right to Urge.

Where petitioner was convicted of violating a city ordinance, providing that the city should have the exclusive right to remove garbage, and not for his refusal to pay for removing garbage, he was not entitled to object that the city had no power to exact a fee from householders for the removal of garbage.

5. Same.

The city of Oakland, having charter power to declare what shall constitute a nuisance and abate the same, and to regulate business of every description that may endanger the public safety, health, and comfort, had jurisdiction to pass an ordinance providing that the city should have the exclusive right to remove garbage, and providing for a small fee for the removal thereof, recoverable by civil action.

In Bank. Application by Antone G. Zhizhuzza for writ of habeas corpus. Writ discharged.

Harding & Sargent and James H. Creely, for petitioner. Goodfellow & Eells and Snook & Church, for respondent.

VAN DYKE, J. The petitioner is a scavenger in the city of Oakland, and was convicted of gathering and removing garbage in violation of an ordinance of that city, and his conviction in the police court of the city of Oakland was affirmed in the superior court of Alameda county. The petitioner claims that the ordinance under which he was arrested and convicted is void and unconstitutional. The ordinance in question is entitled "Ordinance No. 2257," and the provisions thereof involved in the consideration of the case are sections 1, 2, 7, 8, and 21, the latter section as amended by ordinance designated No. 2269; the amendment consisting in adding the portion following the word "provided" in section 21. The sections of said ordinance referred to are as follows, to wit:

"Section 1. The city of Oakland, its duly authorized agents, servants, or employés, shall have the exclusive right to gather and collect garbage within said city, and it shall be unlawful for any person, firm, or corporation, except as otherwise provided in this ordinance, to collect or gather garbage within said city.

"Sec. 2. For the purpose of this ordinance the word 'garbage' shall be held to include and mean kitchen and table refuse and offal, swill, and also every accumulation of animal, vegetable, and other matter that attends the preparation, consumption, decay, or dealing in or storage of meats, fish, fowls, birds, fruits, or vegetables (saving and excepting that dead animals and offal of slaughter houses are not included within the meaning of said word 'garbage' as herein defined). The term 'waste matter' shall include and be held to mean broken crockery, broken bottles, broken bricks, tin vessels, trimmings from lawns and flower gardens, pasteboard boxes, berry boxes, paper, straw, sawdust, packing materials, shavings, boxes, natural soil, street sweepings, earth, and stone, and all noncombustible waste matter. The term 'street sweepings, earth, and stone,' as used herein, does not mean or include street sweepings, earth, and stone under public control, and removed by other agencies of the municipality, either by public contract or by the street department. The term 'ashes' shall be held to include and mean the residue of materials burned. The term 'night soil' shall include and mean the contents of privy vaults, cess pools, dry wells, and sinks."

"Sec. 7. All garbage accumulated at any private dwelling house or residence shall be removed by the city of Oakland, its agents, servants, or employés, at regular intervals of once a week (or oftener, at the request of any tenant, occupant, or lessee), and must be taken to the city garbage crematory or such other crematory as may be hereafter legally established in said city, and must forthwith be consumed and incinerated therein to an odorless ash, and the city of Oakland, its agents, servants, or employés, shall remove all ashes and waste matter. For such services the occupant, tenant, or lessee of each house or flat shall pay to the authorized agent, or collector, of the city garbage crematory, the sum of 35 cents per month for each ten-gallon garbage can, removed once a week or less per month; and for such can removed additional to the removal of once a week 7½ cents per can. All ashes and waste matter must, when requested by the tenant, lessee, or occupant of any residence, house, or flat, paying for the removal of garbage (but not oftener than once in two weeks), be removed by the city's agents free of charge, providing such ashes and waste matter do not exceed twenty gallons per week from the same premises.

"Sec. 8. All accumulations of garbage at any store, shop, business house, boarding house, meat, vegetable, or fish stand, or other place not a private residence, shall be removed and burned in the garbage furnace of the city garbage crematory or other garbage crematory legally established, to an odorless ash, and such crematory shall also remove all ashes from such premises. All such garbage accumulations shall be kept upon such premises in receptacles furnished by the city garbage crematory or other legally established crematory, as provided in sections 5 and 6 of this ordinance. For such service each keeper of such business house, meat, vegetable or fish stand, or place other than a private residence, and all apartment houses containing more than ten families, provided all the garbage in such apartment house is placed in one receptacle, shall pay to the authorized agent or collector of the city or other garbage crematory the sum of 85 cents per cubic yard for removing such garbage and ashes; and such crematory shall also remove all waste matter from such premises at the sum of $1.25 per cubic yard. The removal of all ashes and waste matter by such garbage crematory shall be optional with the person, firm, or corporation producing the same."

"Sec. 21. Any person violating any provision of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than five (5) dollars nor more than fifty (50) dollars, or in default of payment of the same shall be imprisoned in the city prison one day for every two (2) dollars of said fine remaining unpaid: Provided, that such penalty of fine or imprisonment shall not be imposed upon any person for failure to pay to the agent or collector of the city garbage crematory the charges fixed by this ordinance for the removal of garbage, but lessee of said crematory shall be entitled to recover the amount of such charges, with interest and costs, by civil action from any person, firm, or corporation incurring or liable for the same under the provisions of this ordinance; and provided, further, that if the charges hereby fixed for the removal or incineration of any garbage, night soil, waste matter, or other material from any house or premises shall not be paid to the lessee of said crematory within ten (10) days after demand for such payment, said lessee shall thereafter be under no obligation to collect or remove any garbage from such house or premises or to furnish receptacles therefor, until all such charges shall have been paid to it in full."

The ordinance also declares:

"Sec. 14. All garbage furnaces and works shall be kept in a sanitary condition and shall at all times be under the inspection of the board of health."

"Sec. 16. All garbage shall be removed or carried through said city on carts or wagons in water-tight covered carts, or in covered wagons, so that the contents thereof shall not be offensive, and said carts and wagons shall be so loaded and drawn that none of their contents shall fall or spill therefrom; and every such cart or wagon shall be kept clean, well painted on the outside, and shall be marked with the words 'City Garbage,' and the carts and wagons shall be numbered in numerical order, with the number of each painted on the outside thereof, so as to be plainly seen. Each driver of such cart or wagon, and all assistants employed in connection therewith, shall wear a distinctive coat and badge, with the words 'Garbage Collector,' thereon."

On the part of the petitioner it is contended:

That the ordinance in question is void, because it is unreasonable, unfair, partial, and discriminating; and it is said that the persons affected by it are the purchasers of garbage, waste matter, and ashes in the city of Oakland, and that the ordinance is not uniform in its operation, because it makes an arbitrary and senseless discrimination between the charge for the removal of garbage accumulated at a private dwelling house, and that accumulated at any store, shop, business house, or boarding house, or any place not a private residence. It might be remarked in passing, however, that the persons referred to as being injuriously affected by the ordinance are not complaining here, to wit, owners of private dwelling houses, but a person who gathers up and removes garbage in a mode and manner not authorized by the ordinance in question. It may be, also, that the cost of collecting and removing garbage, where the quantity is less, as at private houses, may justify a difference in the cost of removal. Besides, it is provided that the ashes and waste matter of the householders shall be removed without charge; and this might have been considered sufficient to equalize the expense of removal. A municipal ordinance must be very clearly obnoxious to such objection before it will be declared invalid. "Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the Constitution, or laws made in pursuance thereof." Ex parte Haskell, 112 Cal. 416, 44 Pac. 725, 32 L. R. A. 527; Ex parte McKenna, 126 Cal. 432, 58 Pac. 916; Ex parte Lemon, 143 Cal. 563, 77 Pac. 455, 65 L. R. A. 946. In this latter case this court upheld an ordinance of the city of Marysville, which imposed a lower license upon hotels and boarding houses where the meals were wholly cooked and served by the proprietor and members of his family than upon all other hotels and boarding houses. It is said in that case: "We must, however, judge of the reasonableness of the ordinance in question by what we know of the general conditions, and not hold it void simply because in some exceptional case it may result in imposing unequal burdens. * * * The classification here adopted is probably no more likely to practically result in unfair discrimination between those similarly situated as to amount of business than a classification according to a number of rooms in a hotel or the number of employés in a laundry, and the ordinary effect of the enforcement of the provision as it stands will be that those doing the greater amount of business will pay the higher tax fixed thereby."

Petitioner's counsel seem to rely upon Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642. But that involved an ordinance of the city and county of San Francisco, which exacted a license for selling goods, fixing one rate of license for selling goods within the corporate limits, or in transit to the city, and another much larger license for selling goods which were not in the city or in transit to it; and it was properly held in that case that such ordinance was unjust, unequal, partial, oppressive, and in restraint of trade. That, however, has no relation to the exercise of police power to prevent or to abate a nuisance, as in the case of garbage, slaughter houses, etc.

2. It is also contended on behalf of petitioner that the fees for the removal of garbage must be based on quantity, and not determined by the place from which the garbage is removed. The authority for the ordinance is found in section 11 of article 11 of the state Constitution, granting a power to municipal corporations, such as cities and towns, to make and enforce within their limits all such local police, sanitary, and other regulations as are not in conflict with general laws. Putting hotels, shops, and boarding houses into one class, and private dwellings into another, it would seem is based upon the relative quantity of garbage produced by them, and it cannot be said to be an unfair or unreasonable way of determining such matter. Besides, the ordinance provides that such garbage shall be removed only by the city, or its authorized agents, in the manner designated in the ordinance.

3. It is further contended on behalf of petitioner that the ordinance is void, because it makes the removal of garbage from dwellings a penal offense, and not from other places; but it will be seen that the first section of the ordinance declares that the city of Oakland, its authorized agents, servants, or employés shall have the exclusive right to gather and collect garbage within said city, and it shall be unlawful for any person, firm, or corporation, except as otherwise provided in this ordinance, to collect or gather garbage within said city. As the section stands, it forbids all persons, not expressly authorized, to collect or remove garbage.

4. It is further claimed that the ordinance in question violates section 11 of article 1 of the Constitution, which provides that "all laws of a general nature shall have a uniform operation." This provision of the Constitution has no application to ordinances of a city of the character in question. In Hellman v. Shoulters, 114 Cal. 146, 44 Pac. 915, 45 Pac. 1057, it is said: "There is no constitutional provision which expressly requires the uniform operation of municipal ordinances. Nevertheless, where they unjustly discriminate, they are sometimes declared unreasonable, and therefore void." A law is general which applies to all of a class, the classification being a proper one; and the requirement of the constitutional provision in question is satisfied if it applies to all the class alike. "The word 'uniform' in the Constitution does not mean 'universal.' The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law; that is, all the facts of whose cases are substantially the same." People v. Judge Twelfth District, 17 Cal. 547. See, also, Ex parte Mirande, 73 Cal. 375, 14 Pac. 888; Ex parte Moynier, 65 Cal. 35, 2 Pac. 738; Ex parte Jackson, 143 Cal. 573, 77 Pac. 457.

5. It is next objected on the part of petitioner that the city has no power to exact a fee from householders for the removal of garbage. The petitioner, however, is not convicted of a refusal to pay for removing garbage. Further, by the ordinance itself, refusal to pay for the removal of garbage is not punishable by fine or imprisonment; the only remedy being an ordinary civil action.

This point, however, has been settled against the contention of the petitioner. Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394; Walker v. Jameson, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 679, 683, 49 Am. St. Rep. 222. "Laws or ordinances enacted under the police power for the protection of the public health, reasonably adapted to that end, are not unconstitutional because they may incidentally operate to deprive individuals of their property or its use without compensation, or interfere with their personal liberty, nor because they may give one person a monopoly of a certain business or occupation, private rights being required to yield in such case to the public good." California Reduction Co. v. Sanitary Reduction Works, 126 Fed. 29, 61 C. C. A. 91.

6. It is further claimed on behalf of the petitioner that the ordinance in question is an admitted police regulation, and is unconstitutional, because its scope exceeds the police power of the city of Oakland; that the city does not possess the power of invading private premises and removing garbage therefrom, garbage not being a nuisance per se. The removal and disposition of garbage, as well as the regulation of slaughter houses, in cities and towns, is peculiarly a subject of municipal control, as without proper regulation either might become an intolerable nuisance and dangerous to the health and lives of the citizens. The city of Oakland is organized under a freeholders' charter, as prescribed by the Constitution of the state. By such charter the city council is given power by ordinance "to declare what shall constitute a nuisance and abate the same," and to regulate "business of every description that may endanger the public safety, health and comfort." Ordinances and regulations enacted by such city in pursuance of its charter have the same force and effect within the limits of the city as laws passed by the Legislature. They both spring from the same source—the state Constitution, enacted by the people in their sovereign capacity.

Writ discharged, and prisoner remanded.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

BEATTY, C. J. I concur in the judgment. The only objection to the validity of the ordinance which the petitioner is in a position to urge relates to the power of the municipality to reserve to itself the exclusive right, through its own selected agents, to collect and remove those refuse matters which are, or by delay in removal may become, a public nuisance. That the city has this right I think is clear, and so far as the ordinance secures it no doubt it is valid. The petitioner has, therefore, violated its valid provisions, and subjected himself to the penalty imposed. As to the alleged discrimination in rates, and other questions discussed in the briefs, I prefer to express no opinion until they are raised by some person injuriously affected by the provisions of the ordinance out of which they arise.

(147 Cal. xvi)

Ex parte GUGHMINI. (Cr. 1,239.)

(Supreme Court of California. July 13, 1905.)

In Bank. Application by Alasandro Gughmini for a writ of habeas corpus for the discharge of the applicant. Writ discharged, and applicant remanded.

Harding & Sargent and James H. Creely, for petitioner. Goodfellow & Eells and Snook & Church, for respondent.

PER CURIAM. This case involves the same questions considered in the application of Antone G. Zhizhuzza for a writ of habeas corpus (Cr. No. 1,240) 81 Pac. 955. The two cases were argued and submitted together, and by stipulation the briefs subsequently filed apply to both cases. On the authority of that case, just decided, the writ in this case is also discharged, and the prisoner remanded.

(147 Cal. 299)

McCOWEN et al. v. PEW et al. (S. F. 3,182.)

(Supreme Court of California. July 11, 1905.)

VENDOR AND PURCHASER—OPTIONS—ACCEPTANCE—WASTE—DEDUCTIONS — MEASURE OF DAMAGES.

Where, pending an option for the sale of timber lands, the vendors cut a quantity of timber therefrom, whereupon the vendees gave immediate notice that they elected to exercise their option, the amount the vendees were entitled to have deducted from the price because of the waste was the difference in the value of the land as stripped of the timber cut and the land with all the timber growing thereon at the date the vendors were ready to perform.

Van Dyke, J., dissenting.

In Bank. Appeal from Superior Court, Mendocino County; J. M. Mannon, Judge.

Action by George McCowen and another against J. W. Pew and others. From a judgment in favor of defendant J. W. Pew, and from an order denying plaintiffs' motion for a new trial, they appeal. Reversed.

Rehearing denied, August 10, 1905.

The following is the opinion in department referred to by VAN DYKE, J., in his dissent:

"This appeal is from a judgment in favor of the defendants and an order denying plaintiffs' motion for a new trial. The plaintiffs, being the owners of a certain tract of land in Mendocino county, near Willits, on the 16th day of October, 1899, executed an agreement as parties of the first part, and defendant J. W. Pew as party of the second part, whereby, 'for value received by said party of the first part from said party of the second part, and to induce said party of the second part to undertake the disposition of said property, said party of the first part has granted unto said party of the second part, his representatives and assigns, for the period of 12 months from the date hereof, an exclusive and irrevocable option to acquire from said party of the first part for said party of the second part, or his assigns, or such parties as he may negotiate with, for the sum of $15 per acre, a good and sufficient title to the property situate in Mendocino county, state of California, and more particularly described as follows [then giving the description], containing 1,160 acres more or less. In consideration of the foregoing, the said party of the second part has agreed, without cost to said party of the first part, to use his best endeavors to dispose of said property, either by acquiring same or selling the same to others: Provided, however, that nothing herein contained shall require said party of the second part, his representatives or assigns, to pay or account to the said party of the first part any sum realized in such acquisition or disposition above the consideration herein fixed as the value of said property.' This agreement was duly acknowledged and recorded in the recorder's office of Mendocino county. It appears that at the making of said agreement defendant Pew was not acting in his own interest or behalf, but for others associated with him, and that said agreement was made for the benefit, not only of himself, but also of said others associated with said defendant Pew, although made and taken solely in his name as party of the second part; that at the time said agreement was made, defendant Pew and the persons so associated with him were contemplating and preparing for the building of a railroad from some point on the line of the railroad of the San Francisco & North Pacific Railroad Company into some portion of Mendocino county from which timber and wood could be procured in large quantities; that at said time different locations or routes for said road were under consideration by them, and it had been determined by them to so build said railroad, and one of the contemplated locations was from Ukiah northerly to Willits in said county of Mendocino, and that the building of said railroad along the route last mentioned greatly increased the value of the lands described in the agreement to sell, or option to buy, by making the timber thereon accessible to a market, and that the selection of the route and location depended largely upon securing options upon timber lands along the line of the proposed railway, and that these facts were known to the plaintiffs at the time of the making of said agreement, and said agreement was made by them in order to induce the building of said railway from Ukiah to Willits in preference to other routes; that between the date of the making of the agreement mentioned and October 11, 1900, the plaintiffs cut and removed or destroyed, or caused to be cut and removed or destroyed, from or on said lands, a large quantity of redwood, pine, and oak timber; that on October 11, 1900, defendant Pew gave written notice to each of the plaintiffs that he elected to exercise the option granted to him in said agreement of October 16, 1899, and offered to purchase and pay for said land according to the terms of said agreement, upon proper compensation and deduction from said purchase price for the depreciation in value thereof, caused by the destruction and removal of the timber standing upon said land at the time of entering into the agreement, but the plaintiffs refused to execute or deliver a deed to said premises, except upon the payment of the sum specified in the agreement, less an allowance, not to exceed $600, for the destruction and removal of said timber and cordwood. The parties being unable to agree upon the proper amount of deduction or allowance in consequence of the cutting and removing and destruction of timber by the plaintiffs as aforesaid, the plaintiffs, on March 1, 1901, brought this action, setting forth the agreement in question, and alleging the failure to comply with the same on the part of the defendant Pew, and asking that the same be declared void and of no validity, and that the defendants have no estate or interest whatever in said land and premises adverse to the plaintiffs.

"To this complaint defendant Pew interposed an answer and also filed a cross-complaint. In the cross-complaint (as amended) the making of the agreement in question and the facts already stated are set forth, and, further, that said defendant and persons associated with him in the said agreement had secured the selection of a route and location for said railroad to Willits, and had surveyed and located the same, and it was in process of construction, and being rapidly built and pushed toward completion; that the consideration and inducement causing preference to be given to said location was the option given in said contract of the privilege of purchasing said land, and other similar contracts with reference to other lands adjacent thereto; and that said options were all had, and said contracts all entered into, solely for the purpose of securing freight for said railroad, and the added valuation that would be given to said lands by the construction of the railroad in excess of the price set forth in said contracts, respectively. It is further alleged in said amended cross-complaint that subsequent to the making of said agreement, and prior to the 11th day of October, 1900, and during the years covered by the option, the plaintiffs knowingly and wrongfully violated the rights of the defendant, arising out of said contract, by cutting and removing from said lands large and valuable quantities of timber and wood products (giving the quantity so cut, removed, and destroyed), and that the lands described in said contract and agreement were thereby depreciated in value, and were worth $4,000 less than before such destruction and removal, and that said defendant Pew and the persons associated with him as aforesaid suffered damages thereby in the sum of $4,000; that defendant had duly performed all the conditions of said agreement on his part to be performed, and ever since the making thereof had been ready, willing, and able, and still was ready, willing, and able, to fulfill said agreement on his part. Wherefore the defendant asked judgment against the plaintiffs that the court ascertain, fix, and adjudge the amount due and which should be paid to complete the said purchase in accordance with the contract, and allow due and equitable deductions from the price named in the contract on account of the wrongful cutting, destruction, and removal of the timber aforesaid, and also that an allowance be made on account of certain incumbrances therein mentioned and described; and the defendant offered to complete the purchase upon a proper compensation for the wrongful removal and destruction of the timber on the property in controversy. (The incumbrances referred to, however, at the date of the trial, December, 1901, had been satisfied of record.)

"The court found against the plaintiffs, and substantially according to the allegations of the defendants' amended cross-complaint, and assessed the damages caused by the removal and destruction of the timber in the amount of $3,787.36, and judgment upon the findings was accordingly entered that the plaintiffs take nothing, and that the agreement set forth in the cross-complaint be specifically performed, and the plaintiffs execute and deliver to the defendant Pew a good and sufficient conveyance upon the premises in question, on payment by defendant Pew of the sum of $13,537.04, being $15 per acre, as mentioned in the agreement, less the sum of $3,787.36, damages for the destruction, or cutting and removal, of the timber standing on said premises at the date of said agreement.

"One of the main contentions on the part of the appellants is, as stated by their counsel, 'that the option in this case was merely an offer to sell the property, and that in order to make a valid contract, capable of specific performance, it was necessary for the defendant Pew, within the time set in the option and before its withdrawal, to accept the offer in the exact terms in which it was made. * * * An acceptance of an offer to purchase the property must be unconditional in order to create a contract, and the slightest condition attached to an attempted acceptance of the option prevents an agreement of the parties.' This contention cannot be maintained. In Burks v. Davies, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213, it is said that the vendor of an option to purchase is in duty bound to be ready at all times within the period of the option given, during which a conveyance may be demanded by the purchaser, to convey a good title to all the land which he has agreed to sell. In this case, as admitted by the appellants, the land, at the time of executing the agreement to sell, or 'option,' as it is termed, was 'chiefly valuable for timber,' and it is stated and found by the court that the consideration moving the defendant in securing the option was the construction of the contemplated railroad by the tract of land in question for the purpose of obtaining the timber upon said land, and within the time allowed by the option by the act of the plaintiffs the land was depreciated, as found by the court, by the removal of the timber in question, in the sum of $3,787.36. The plaintiffs, therefore, did not hold themselves ready at all times during the period of the option to convey the land in question which they had agreed to convey; that is, with the timber standing on it, which was, as stated, a very material part of the realty. Defendant within the year had the right to accept the option and have the land conveyed to him as it existed at the date of the agreement, and, inasmuch as the plaintiffs could not convey the land in such condition, the defendant had the right to have it conveyed as it was at the expiration of the year, upon payment of the price agreed to be paid, less the deficiency in the value of the property caused by the act of the plaintiffs. In Marshall v. Caldwell, 41 Cal. 611, the contract showed that the plaintiff in said action sold the whole of the land in question, but it appeared he only held an undivided interest therein, and it is said the plaintiff would not be allowed to aver, in the face of the agreement, that he sold less than the whole title to the land. 'Upon the discovery by the vendee that the plaintiff held only the undivided half of the land, he was entitled to proceed at once to rescind the contract; but he was not obliged to adopt that course. He was entitled to proceed, as he has done in this case, to have the contract specifically enforced to the extent of the plaintiff's interest in the land.' Spires v. Urbahn, 124 Cal. 110, 56 Pac. 794, was a case involving the construction of a contract of option something similar to the one here under consideration. The complaint in that case alleged that the plaintiff's assignor built and put in operation an electric road in pursuance of the agreement within the time limited. The court found the allegation of the complaint to be true. The point contended by the appellant there was that there was no consideration or mutuality in the contract. The court say: 'It is now too well settled to permit of controversy that in such cases the completion of the work is an executed consideration, which is sufficient to give mutuality to the contract. * * * These contracts have become familiar as stimulants to the construction of railroads and other public works; the inducement to the promisor, whether expressed or presumed, being the probable enhancement of the value of property by the construction. That such contracts, or mere offers, unilateral at first, may be enforced when mutuality is secured by an executed consideration, is sustained upon well-recognized principles. The consideration takes its strongest form when it is executed.' The same question was also under consideration in this court in the case of Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536, and Sayward v. Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44. In the latter case it was said: 'An original lack of mutuality in the right to specific performance will not preclude the enforcement of the contract, where this want has been removed at the time the action is brought.' As already stated, the road was laid out from Ukiah to Willits on the route as contemplated in case the option was secured, and was under construction at the time the action was brought, and at the trial was so far completed as to allow trains to pass over the same.

"The agreement or option was executed, as appears, to the defendant Pew and his representatives or assigns, and the allegation of the cross-complaint and the finding of the court are that others were associated with him in the transaction. In fact, the testimony shows that the real party was a general development company, a corporation in which Pew was a stockholder, and that this general development company built the road from Ukiah to Willits. It is therefore claimed on the part of the plaintiffs that defendant Pew could not maintain a cross-action in his own name. 'An executor or administrator, or trustee of an express trust, or person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another is a trustee of an express trust, within the meaning of this section.' Code Civ. Proc. § 369. Although Pew was interested in the corporation, he was, nevertheless, in the transaction under consideration a trustee, within the meaning of the Code. Giselman v. Starr, 106 Cal. 651–657, 40 Pac. 8.

"There is nothing in the contention that the option was not accepted on the part of the defendant Pew within the time specified. Notice of acceptance was given within the year, as already shown; and it was alleged in the cross-complaint, and so found by the court, that the option was accepted within the time. In fact, the only question remaining, as appears by the notice from the plaintiffs to the defendant Pew, was the amount of damages or deduction to be allowed in order to carry out the contract. The defendant Pew claimed as the amount of damages the value of the timber taken or destroyed during the period of the running of the option—in other words, according to the enhancement of the value of the property to be purchased by the completion of the railroad, including the timber standing thereon; and, on the other hand, the allowance proposed by the plaintiffs of $600 deduction or damages was based upon the value of the timber so cut and removed from the land in question at the date of the agreement, and while this controversy as to the amount to be allowed was pending the plaintiffs brought the suit in question. The action of the plaintiffs in the premises was a waiver of any tender of the amount stipulated in the agreement. The proper sum to be tendered at the time had not been ascertained, and could not be until the true amount of damages caused by the wrongful act of the plaintiffs themselves in cutting and removing the timber in question had been determined; and it further appears that the plaintiffs refused to make a conveyance, except for the full amount specified in the option, less the sum of $600 which they estimated as being the damages. Dowd v. Clarke, 54 Cal. 48; Merrill v. Merrill, 95 Cal. 338, 30 Pac. 542; Sheplar v. Green, 96 Cal. 218, 31 Pac. 42; Barsolou v. Newton, 63 Cal. 226.

"The testimony offered on behalf of the plaintiffs in reference to the value of the timber or stumpage referred to the time as of a date before the building of the road, and without regard to the same, which testimony was admitted subject to objection and motion to strike out; and at the conclusion of the trial the court granted defendant's motion and struck out said testimony, and thereupon plaintiffs moved to strike out defendant's testimony as to the value of the lumber, wood, and tan bark as of a time when the road was located and built, which motion was denied by the court. Clearly the rule insisted upon by the plaintiffs would not afford an equitable compensation to the defendant for the wrongful acts of said plaintiffs in stripping the land in question after the agreement of option had been entered into. At the time when the defendant was required to take said land and pay the amount stipulated in the agreement, the true measure of compensation and amount to be deducted from the price would seem to be the difference in value between the land as stripped and the land with all the timber standing and growing upon the same.

"We have examined the other alleged errors and improper rulings as claimed by the appellants, but are of the opinion that if any errors were committed, as claimed, they are not of sufficient importance to be of any substantial injury to the appellants or to justify a reversal. For the foregoing reasons, the judgment and order denying motion for new trial must be affirmed; and it is so ordered."

James W. Oates, McNab & Hirsch, and D. M. Delmas, for appellants. J. W. Lilienthal and Seawell & Pemberton, for respondents.

PER CURIAM. This is an appeal by the plaintiffs from a judgment in favor of the defendant J. W. Pew, and from an order denying the plaintiffs' motion for a new trial. The plaintiffs were the owners of a tract of land in Mendocino county, containing about 1,160 acres, and on October 16, 1899, they and the defendant Pew executed an agreement whereby they granted to Pew the option during the ensuing 12 months to acquire from the plaintiffs the land in question for himself or his assigns for the sum of $15 per acre. At the time of the making of the agreement Pew was not acting in his own interest solely, but for others associated with him, and the agreement was made in his name for the benefit of himself and of these other persons. These persons contemplated the building of an extension of the San Francisco & North Pacific Railroad into the vicinity of the lands in question, and their purpose in obtaining the option was to get the control of the timber upon the land, so that they could realize the increased value thereof in case the railroad was built, and so that the timber, when manufactured into lumber, would furnish freight for the railroad when completed. This purpose was known to the plaintiffs when the option was given. Between the date of the making of the agreement and October 11, 1900, the plaintiffs cut and removed from about 10 acres of the land in question a large quantity of redwood, pine, and oak timber, the value of which, and the particular time at which its value is to be determined, is the principal issue in this case. On October 11, 1900, Pew, having received information of the cutting of the timber in question, gave notice in writing to the plaintiffs that he elected to exercise the right to acquire the land covered by the agreement, and offered, upon receiving a good title to the land, to pay for the same at the rate of $15 per acre, less the loss in the value of the land occasioned by the removal of the timber by the plaintiffs. There were certain incumbrances upon the title which constituted defects in the title, which were not removed until some time in December following, or about the 1st of January, 1901. The parties could not agree upon the amount to be deducted from the price on account of the removal of the timber, but, subject to the settlement of that question, the plaintiffs were ready to perform their agreement and convey a good title on the 6th of December, 1900. Not being able to agree upon the amount of compensation to be allowed for the timber removed, the plaintiffs claimed that the agreement had been forfeited, and in March, 1901, brought the present action against the defendant Pew to quiet title. Pew filed a cross-complaint, setting out the agreement aforesaid, averring the election to acquire title thereunder by himself and those associated with him and their purpose in acquiring the lands as aforesaid, asking that the court enforce the specific performance of the contract according to its terms and allow a deduction from the price as compensation for the loss to him by reason of the timber removed by the plaintiffs prior to the time he gave notice of his election to exercise the option, and alleging that the sum of $4,000 would be necessary to reimburse him for the loss occasioned by the removal of the said timber. The court found in favor of the allegations of the cross-complaint, and determined that the amount of compensation to be allowed on account of the timber removed was $3,787.36, and thereupon judgment was given for the specific performance of the agreement, upon the payment by Pew of the sum of $13,537.04, being the purchase price of the land according to the agreement, less the amount of compensation allowed by way of abatement of the price. Upon the trial it appeared that the railroad contemplated by the parties when the agreement was made was then about completed, and the defendants introduced evidence of the value of the timber removed if it had been at that time standing upon the land, and upon this evidence the court found the amount as above stated. The plaintiffs on their behalf introduced evidence to prove the value of the timber on October 11, 1900, at the time the defendant Pew gave notice of his election to exercise the option. This evidence was taken, subject to the objection of the defendants that it was incompetent, irrelevant, and immaterial, and subject to a motion to strike it out. Subsequently during the trial the motion to strike out was granted, to which the plaintiffs excepted, and this presents the controlling question in the case.

The contention of the appellants is that the amount of the compensation to be allowed to the defendant Pew for the want of entire performance of the contract of sale by the plaintiffs is to be determined in the same manner as damages recoverable upon the breach of a contract to sell real estate. They say that the case in substance is a simple breach of an agreement to sell real property, that they had agreed to sell the land, including the timber, and that when the time for performance came they had, so far as the timber is concerned, violated their agreement by removing it from the land. They concede that this must be construed to be a breach made in bad faith, within the meaning of that phrase as used in section 3306 of the Civil Code, and claim that the measure of compensation is the same as the measure of damages would be in case of a simple suit for damages for the breach of the agreement, namely, "the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach," or, in other words, the market value of the trees at the time of the breach upon October

11, 1900, if they had been at that time growing upon the land. The defendant contends that this sale is not an action for a breach of contract, but for specific performance, with compensation for the want of entire performance, as provided in section 3386 of the Civil Code, and, according to the well-established rule of equity concerning specific performance with compensation, a court of equity "will adjust the equities of the parties by placing them as far as possible in the same position they would have occupied had the agreement been completed at the prescribed day" (Pomeroy on Contracts, § 429), and that, as if the agreement had been fully performed they would have had possession of the timber, they could then have selected their own time for cutting and removing it, and would have secured all the profits contemplated by them at the time they made the agreement, by holding the timber until the completion of the railroad and then selling it at the advanced price then obtainable according to the evidence.

It is apparent that the defendant had full notice of the breach of the agreement at the time he made his offer to take the property. There is evidence indicating that he could at that time have restored himself to the same position he would have occupied if the contract had been fully performed, by purchasing other land in the vicinity of the same character, and having thereon an equal quantity of timber of the same quality, according to the evidence introduced, for about the price of $600. It would appear fully as equitable to require the defendant to take this course, and thereby replace his loss, as to require the plaintiffs, now that the value of the property had been enhanced, to make good the defendant's loss by paying the sum which could now be obtained for the property. We think the court erred in granting the motion to strike out the testimony as to the value at the time of the election by the defendant to take the property. The true rule must be that, in so far as specific performance is impossible and it becomes necessary to give compensation for the want of entire performance, the measure of damages is to be computed according to the legal rule, and the case is to be treated as to that extent an action for a breach of the contract. If the situation were such that there could not be a specific performance as to any part of the contract, there could be no question as to this. The sole remedy of the vendee would be his action for the damages given by the law. The fact that partial specific performance is still possible cannot logically justify the application of a different rule as to the part not capable of specific performance. So far as the vendee seeks compensation for the failure of the vendor to wholly perform, his action is simply one for the partial breach of contract. The fact that he is in a court of equity seeking specific performance as to the part of the contract capable thereof does not alter his situation as to the remaining part. A court of equity, having jurisdiction of the cause for the purpose of granting the equitable relief of specific performance, will in the same action, in addition to granting such relief, award such damages as may have been caused by the partial breach; but in so doing it is simply enforcing a legal remedy, and must follow the law, and is therefore bound by the rules of law as to the measure of damages for the partial breach.

Another consideration against the adoption of the rule contended for by the respondents is that it would tend to encourage the maintenance of speculative actions. Where there had been a partial breach of the contract for the sale of real estate, and lapse of time had demonstrated that the property was very much enhanced in value, there would be a great temptation on the part of the vendee to make the attempt to show that he made the purchase for the very purpose of obtaining this enhanced value, and that such purpose was communicated to the vendor, and thereby obtain the benefit of the operation of time and circumstances in his favor. The compensation to be allowed to the vendee in this case for the want of entire performance should be determined by ascertaining the value of the timber cut and removed at the time when the vendors were ready to complete the contract by making a deed sufficient to convey good title to the vendees. It is proper to say that according to the evidence given upon the trial the vendors were not ready to convey on October 11, 1900. Some defects in the title existed, which were not removed until several months thereafter, and the time was extended by consent. The proper time for ascertaining the value of the property was the time when the vendors were ready to perform.

The judgment and order are reversed, and the cause remanded for a new trial.

VAN DYKE, J. I dissent, and adhere to the opinion in department.

BEATTY, C. J. I concur in the judgment and in the main proposition upon which it is rested. In decreeing specific performance of a vendor's contract to convey lands, with compensation for a partial breach which renders full performance impossible, a court of equity must estimate the compensation for the breach by the same rule that controls a court of law in an action at law, and that is the rule prescribed by section 3306 of the Civil Code. In accordance with this rule the superior court should have limited the inquiry as to the value of the timber and wood to the date of the breach of the contract, which in my opinion was the 11th of October, 1900, the date of defendant's notice of his election to purchase. That was the date when a conveyance was due, and when the breach must be considered to have occurred.

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147 Cal. 313

GARDINER et al. v. McDONOGH et al.

(S. F. 3,087.)

(Supreme Court of California. July 11, 1905.)

1. Parol Evidence—Contract of Sale.

Code Civ. Proc. § 1856, provides that, where the terms of an agreement have been reduced to writing, no evidence of the agreement other than the writing may be given, except in case of mistake or imperfection put in issue by the pleadings. By Civ. Code, §§ 1753, 1754, one who sells personal property must deliver it to the buyer within a reasonable time after demand, and it is deliverable at the place where it is at the time of the sale or agreement to sell, or, if it is not then in existence, it is deliverable at the place where purchased. A contract of sale recited the purchase of "500 sax Bayo, more or less, at $3.50 per 100; 500 sax peas, more or less, at $2.95 per 100; 350 sax pinks, more or less, at $2.70 per 100; net on bank of river." *Held*, that parol evidence was not admissible to show that the sale was one by sample, on the theory that it was apparent from the face of the agreement that it was only intended to be an informal memorandum, in that it failed to state the time or place of delivery of the beans.

2. Same—Identification of Subject-Matter.

It was proper to admit parol evidence to show that "Bayo" meant a variety of beans known as "Bayous," and that "per 100" meant "per hundred pounds."

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2104–2108.]

3. Sale by Sample—When Title Passes—Opportunity for Inspection.

Where there is a sale by sample, and not by description merely, title does not pass absolutely until there has been an opportunity for inspection.

4. Same—Sale by Description—Delivery.

Where chattels are sold by description, and not by sample, the title passes to the purchaser by delivery.

5. Same—Identification of Property.

Under Civ. Code, § 1140, providing that the title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer and the thing itself is identified, whether it is separated from other things or not, as between the parties to a sale, title passes, though there is no immediate delivery, where there is proper identification.

6. Same—Resale by Vendor — Estoppel—Purchasers in Good Faith.

Where a completed sale of goods to general commission merchants by plaintiff was rescinded by the parties, but, notwithstanding, plaintiff permitted such merchants to retain the consignment, and so invested them with apparent authority to sell, and they sold to third persons, plaintiff could not assert a claim of ownership against such persons, if they were innocent purchasers on the faith of the apparent ownership.

7. Same — Severable Contract — Rescission.

Where a contract was for the sale of different varieties of beans at different prices, and the sale was by sample, the seller having acquiesced in the rejection of all the beans, and not having insisted that the contract was severable and not subject to rescission because some of the varieties were not according to sample, he could not subsequently insist on it; nor could the purchaser subsequently conclude to take all the beans.

Shaw, Van Dyke, and McFarland, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Wm. R. Daingerfield, Judge.

Action by Frank H. Gardiner and another against James McDonogh, Jr., and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Rehearing denied August 10, 1905.

Gunnison, Booth & Bartnett, W. J. Bartnett, and O. K. McMurray, for appellants. Lester H. Jacobs, Frohman & Jacobs, and W. E. Creed, for respondents.

LORIGAN, J. This is an action in claim and delivery to recover possession of a lot of beans. The verdict and judgment were for plaintiffs, and defendants appeal from an order denying their motion for a new trial. The only points necessary to be considered on this appeal are alleged errors in the admission of evidence, and in instructions given to the jury on behalf of plaintiffs.

The undisputed evidence in the case tended to prove the following facts: The D. E. Allison Company was a commission house engaged in business in the city and county of San Francisco, buying and selling produce on their own account, and also receiving and selling it on commission. On December 7, 1899, the following contract of sale was made by that firm, and delivered to the plaintiffs: "We have this day bought from Loy & Gardiner 500 sax Bayo, more or less, at $3.50 per 100; 500 sax peas, more or less, at $2.95 per 100; 350 sax pinks, more or less, at $2.70 per 100; net on bank of river. [Signed] The D. E. Allison Company. D. E. A. Jr. Dated December 7th, 1899." At that time the beans, which were the articles referred to in the memorandum, were on the farm of the plaintiffs in Solano county. They were shipped by the plaintiffs, in pursuance of the contract of sale, by boat to San Francisco, consigned to the D. E. Allison Company, and were delivered to the California Transportation Company, a wharfinger, at San Francisco, on December 12th, for the Allison Company. The particular beans involved in this suit are those designated in the memorandum as "500 sax Bayo, more or less." The "peas" mentioned were in fact white beans, and the "pinks" were pink beans. The plaintiff Gardiner was a real estate broker in San Francisco. Ah Loy was a Chinaman engaged in farming the plaintiff's land in Solano county on shares. The contract of sale was made between Gardiner and D. E. Allison, Jr., as agent for the D. E. Allison Company. When the beans arrived in San Francisco, the Allison Company objected to taking them under the agreement of sale, on the ground that the pea beans mentioned were not equal to a sample, which, it seems, had been given to the company by the plaintiffs prior to the sale. Some controversy ensued, the result of which was that the D. E. Allison Company refused to take any of the beans, placing its refusal on the ground that the pea beans were not equal to the sample. The plaintiffs acquiesced in this claim and in the rejection of all the beans. The agreement of sale was declared at an end, the samples, three in number, one for each kind of beans, which had been given by plaintiffs to the Allison Company, were returned to Gardiner for the plaintiffs, and the charges for freight and the public weigher's charges for weighing the entire lot of beans, which the Allison Company had paid, were charged back by that company to the plaintiffs; there being an unsettled account between them relative to another lot of beans, with a balance in favor of plaintiffs. Gardiner, considering the beans as then the property of plaintiffs, took the samples, obtained the public weigher's statement of the weights, announced his intention of selling the beans himself, and went out among the produce dealers in the city, endeavoring to sell them to other parties. At this time the beans were on the wharf in the actual possession of the California Transportation Company, to whom they had been delivered by the steamer for the consignee, the D. E. Allison Company, and subject to the consignee's order. No order or direction was given to the wharfinger to deliver them to the plaintiffs. This matter was finally concluded on December 18th. The next day the D. E. Allison Company sold and delivered to the defendants the Bayo beans here involved, at the price of three cents a pound. In the afternoon of the same day the defendants gave the Allison Company a check for the price of the beans, and the defendants immediately took possession of them. The check was not presented for payment nor negotiated by the Allison Company until after 10 o'clock of the following day, December 20th. The plaintiffs were informed of this sale on the afternoon of the 19th. On the morning of the 20th, some time after 9 o'clock, the plaintiffs informed defendants that the beans belonged to the plaintiffs, and asked them to stop payment on the check to the Allison Company. Defendants refused to do this, or to make any attempt to do so, and claimed that the beans were their property by reason of their purchase from the Allison Company, regardless of the claims or rights of the plaintiffs, and they now claim to be purchasers in good faith. There was also evidence admitted over the objection of defendants to the effect that the sale by the plaintiffs to the Allison Company was a sale by sample; the samples having been delivered to the Allison Company at or before the time of making the agreement. The Allison Company became insolvent, at least, on December 20th.

In proof of the foregoing facts there was no dispute in the evidence, although much of it was admitted over the objections of defendants, which admission is assigned as error, and will be considered presently. As to all that occurred when Gardiner visited the place of business of defendants, and asked them to stop the payment of the check, there is a conflict in the evidence; Gardiner testifying that he offered to pay defendants for any expense they would be put to in stopping payment of the check given to the Allison Company, and that, if defendants lost anything, plaintiffs would make it good, and pay them whatever their profit from the purchase might be. This was denied by defendants. We mention this conflict because it has a bearing upon the correctness of an instruction to the jury, which is one of the points presented for consideration on this appeal. The Allison Company claimed, also, while conceding that they had rejected all the beans as early as December 18th, and the rejection had been acquiesced in by plaintiffs, that the company had arranged with Gardiner by telephonic communication to take the Bayo beans on December 19th, the day they sold them to defendants. This agreement, however, was denied by plaintiffs.

1. The first point urged by appellants is that the lower court erred in permitting the plaintiffs to show by parol evidence that there was a sale by sample of the beans in question. It is insisted that the contract of sale on its face was complete and perfect; that its terms did not mention anything about a sale by sample, and that those terms could not be varied by parol evidence on that subject; that the admission of such evidence was violative of the provision of section 1856 of the Code of Civil Procedure, which declares in effect that, when an agreement has been reduced to writing by the parties, it is to be conclusively deemed to contain all the terms agreed on, and that no evidence of the agreement other than the writing can be given, except in cases of mistake or imperfection, put in issue by the pleadings; and that the admission of such evidence in the case at bar was in direct conflict with the decision of this court in Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469. We are satisfied that the admission of this evidence for the purpose of showing that the sale was a sale by sample cannot be sustained. In support of the ruling of the lower court, it is contended that the agreement does not contain a complete embodiment of the terms of the sale, but was a mere informal memorandum, which upon its face showed that it was not intended to embrace all the terms of the contract. We do not so consider it. Whether an agreement contains language importing

a complete contract is a question of law for the court, and is to be determined from an inspection of the face of the agreement. In the case of Harrison v. McCormick, this court quotes approvingly from Thompson v. Libby, 34 Minn. 377, 26 N. W. 1: "If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed." But it is insisted by respondents that it is apparent from the face of the agreement in question that it was only intended to be an informal memorandum, because it fails to state the time or place of delivery of the beans sold, or to describe them in definite or intelligible terms. As to the time and place of delivery, if these were not fixed by any express provision in the contract, they are determined by the provisions of the Civil Code of this state, which are to be deemed part of the contract. One who sells personal property must deliver it to the buyer within a reasonable time after demand, and it is deliverable at the place where it is at the time of the sale or agreement to sell, or, if not then in existence, it is deliverable at the place where it is purchased. Civ. Code, §§ 1753-1754. In any event, the failure of the contract to show when and where delivery was to be made would not in law render the contract a mere memorandum. Aside from the matter of delivery, the sufficiency of the agreement as a complete one is questioned on the ground that it is indefinite and unintelligible as to the subject-matter of the sale, in this: that "beans" are not mentioned, and that it does not appear what is meant by "per 100." There is nothing in this point. Parol evidence is always admissible to identify the subject-matter of the agreement, and in the contract in question to show, as was done, that "Bayo" meant a variety of beans known as "Bayous," and that "per 100" meant "per hundred pounds." The rule in this respect is stated in Benjamin on Sales, § 213: "Although parol evidence is not admissible to supply the omissions or introduce terms, or to contradict, alter, or vary a written instrument, it is admissible for the purpose of identifying the subject-matter to which the writing refers"—and, as illustrative of the proposition, the author says: "Parol evidence was likewise admitted to show that a sale of 14 packets of Kent hops at 100s. meant 100s. per cwt., according to the usage of the hop trade." And as a further illustration of this proposition we cite Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, 14 L. Ed. 493; Butler v. Thompson, 92 U. S. 412, 23 L. Ed. 684; Ontario & C. Co. v. Cutting, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231; Higgins v. Cal. Petroleum Co., 120 Cal. 629, 52 Pac. 1080.

These are the only matters upon which it is insisted that the agreement under consideration is but an informal memorandum and not a complete contract. Under familiar rules of law for the interpretation of contracts, evidence was admissible upon these subjects, and its admission did not at all affect the completeness of the contract, or tend to vary or contradict its terms. The admission, however, of parol evidence to show that the agreement in question here, which provided for the sale of articles by description only, was in fact an agreement for a sale of these articles by quality—a sale by sample—was violative of the general rule against the admission of parol evidence to vary or contradict the terms of the written agreement. We do not deem it necessary to elaborate this proposition, because a reference to the decision in Harrison v. McCormick, and the reasoning of the court in that case, is in our judgment all that is necessary. There is no material difference in the terms of the contract in that case and those of the agreement at bar. In fact, as far as terms are concerned, they are practically identical. The agreement in the case cited was for the sale of coal described as of a certain variety, and it may be remarked parenthetically that there was no particular time or place of delivery mentioned. Parol evidence was admitted by the lower court in that case to show, notwithstanding the agreement called for coal by description merely, that the contract was for coal of the same kind and quality that had been previously purchased by the defendants from plaintiff, and which they were using in their foundry, and that the kind or quality delivered was not of the kind or quality referred to in the sample. This court held that such evidence was inadmissible, saying: "We do not see how the admission of this evidence can be sustained. Its effect was to show that the coal was sold by sample, and thereby to import into the contract a warranty that the coal sold was to be equal to the sample. When the contract is in writing, and nothing in the written contract indicates that a sample was used or referred to, parol evidence cannot be allowed to show a sale by sample. Harrison v. McCormick, supra, page 329 of 89 Cal., page 830 of 26 Pac. (23 Am. St. Rep. 469), and cases there cited." In our judgment the case of Harrison v. McCormick is entirely in accord with the contention of appellants that the contract on its face was full and complete, and that the admission by the lower court of parol evidence to vary and contradict its terms by showing that it was a sale by sample, instead of a sale by description, was error.

Having admitted this evidence of a sale by sample, the lower court subsequently instructed the jury to the effect that if the beans originally belonged to the plaintiff, and the Allison Company made an agreement with them by which the plaintiffs agreed to sell, and the Allison Company agreed to buy, the beans, and that pursuant to this agreement plaintiffs shipped the beans to the Allison Company, and the latter rejected them, and the plaintiffs consented to such rejection and agreed that the transaction was ended, then they should find for the plaintiffs, regardless of the question whether defendants were purchasers in good faith or not. This was error. One of the claims made by the defendants was that they were purchasers in good faith, for value, and without notice. Of course, if there was a sale of the beans by sample, and not by description merely, the title would not pass absolutely to the Allison Company until it had an opportunity to inspect the beans; and when, upon inspection, it rejected them as not conforming to the sample, the effect of the rejection on that ground, if it was a sale by sample, was that the title remained in the plaintiffs. It had never passed from them; and, as the Allison Company never acquired any title, the question of the defendants being purchasers in good faith could not arise. The Allison Company, having no title, could convey none to defendants.

But as the sale to the Allison Company was by description only, and not by sample, the title in fact passed to it by delivery to it of the beans, and only revested in the plaintiffs by virtue of the transaction between them when the dispute over the quality of the beans arose, and which eventuated in a mutual rescission of the contract of sale, and a return from the Allison Company to the plaintiffs, unaccompanied, however, by a change of possession. It was out of this subsequent transaction between the parties, had after the original delivery of the beans to the Allison Company, that the rights of defendants as purchasers in good faith arose. And while the evidence of a sale by sample was inadmissible to vary the terms of the contract with a view of showing that the Allison Company never acquired any title to the property described in it, still all the evidence as to what occurred between the parties to the contract, when the beans were examined and the dispute arose, was admissible to show that they mutually agreed to call the transaction off, and that they in effect intended that the title to the property which had passed to the Allison Company should be reinvested in the plaintiffs. That this was the intention of the parties there can be no question, and it is of no moment, as affecting the sufficiency of the resale as between themselves, that there was not an immediate delivery of the property from the Allison Company to plaintiffs. Section 1140 of the Civil Code provides that "the title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer and the thing itself is identified whether it is separated from other things or not." The title to the property vests in the buyer immediately that the contract is made, regardless of whether it is delivered to the purchaser or remains in possession of the seller. It was manifestly the intention of the parties that Allison should retain the possession of the property, subject to plaintiffs' order in favor of such person to whom Gardiner might make a sale of it, as he announced his intention of doing when the sale under the contract was declared off.

While the failure by plaintiffs to take immediate possession of the property did not affect the validity of the sale back from the Allison Company to them, as revesting the title in plaintiffs, still, under familiar rules of law their failure to do so, and the subsequent sale by the Allison Company of the property while in their possession to the defendants, if they purchased for value and without notice of any claim of plaintiffs, constituted the defendants purchasers in good faith, who could successfully resist any assertion of title by plaintiffs to the property. Although as between the original parties to the contract the title vested without delivery of possession, yet as against the defendants as bona fide purchasers, if they were such, it was necessary that there should have been a change of possession to revest title in the plaintiffs. Gardiner, by his own conduct in not taking possession of the property at the time it was resold to plaintiffs, but leaving it with the Allison Company, was estopped by his own act from asserting title against the defendants, if they were in fact purchasers in good faith of the property. The Allison Company were conducting a general commission business, disposing of produce in their own behalf and for third parties upon commission; the usual evidence of title and the right to sell in the latter case being the consignments. Gardiner, notwithstanding the resale, however, having permitted the Allison Company to retain the usual evidence of title and right to sell—the consignments—and so investing the company with apparent authority to sell, could not assert a claim of ownership against the defendants, if they were innocent purchasers dealing with the company on the faith of such apparent ownership. "Where a vendor of personal property is allowed by his vendee to continue in possession of the property, and thus to give to the world a colorable appearance of continued ownership, the title of a subsequent bona fide purchaser from such vendor will be upheld as against the first vendee." Am. & Eng. Ency. of Law, vol. 24, p. 1164.

Now, one of the principal contentions of defendants was that they were purchasers in good faith from the Allison Company of the property in question, and the court instructed the jury upon the law applicable to that claim. In fact, the question as to whether defendants were such purchasers was the main point in the case, and it is doubtful, under the view the lower court took relative to the admission of evidence of a sale by sample and the instruction based upon it, whether the jury ever reached a consideration of that question at all. It is probable they did not, because, as there was no question upon the matter of sample, as far as the proof was concerned, admitted over objection of the appellants, and the instruction clear as to the effect of that evidence, the jury doubtless disposed of the case on the theory that the title to the beans never passed to the Allison Company, and so found for plaintiffs, without considering (as the court said they need not) "whether defendants were purchasers of the beans in good faith, without notice, and for value, or not." It was essentially a question in the case whether the defendants were such purchasers or not, and it was prejudicial error for the court to admit evidence of a sale by sample for the purpose of varying the terms of the contract, and to then instruct the jury that they might return a verdict, on the theory that the sale was one by sample, simply because the beans were rejected by the Allison Company as not conforming to such sample, and that this rejection was acquiesced in by plaintiffs, that hence title never at any time passed out of plaintiffs.

2. Before concluding this matter it is well to mention a contention that appellants urged below and here. It will be observed from the recited evidence in the case (assuming that evidence of sale by sample was admissible) that there was no dispute but that, as to the Bayo beans here in question, they were in all respects equal to the sample, although all the beans were rejected by the Allison Company because the pea beans were imperfect. Appellants claim that the contract was severable, because the beans were sold in different lots and at different prices; that as to the Bayo beans the condition of the sale was strictly and fully complied with upon delivery of them to the carrier for the Allison Company; that the title thereto vested in the company, and was not divested by the rejection which, as to them, was unauthorized, although the rejection was consented to by the plaintiffs. There is no merit in this contention. It was optional with the plaintiffs (on the theory of a sale by sample) whether they would insist that the contract was severable, and compel the company to take the Bayo beans and pay for them or not. It was a matter of their own choice—a right upon which they might insist or not, as they saw fit. They did not insist, but acquiesced in the rejection of all the beans, as they had a right to do; and that settled the matter. The plaintiffs, having waived their right to insist that the contract was severable, could not subsequently insist on it. Neither could the Allison Company subsequently change its mind, and conclude to take the beans without the consent of plaintiffs.

These are all the matters requiring consideration, and for the reasons given the order denying the defendants' motion for a new trial is reversed.

We concur: BEATTY, C. J.; HENSHAW, J.

ANGELLOTTI, J. I concur. Further consideration of this case has convinced me that, under the rule discussed and applied in Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469, parol evidence was not admissible for the purpose of showing that the sale was by sample. It appears very clear that the present judgment can be affirmed only upon the theory that the sale was by sample, and plaintiffs, being precluded from showing that fact, must necessarily fail upon this appeal.

SHAW, J. I dissent. The rule stated in section 1856, Code Civ. Proc., to the effect that, when an agreement is reduced to writing, such writing is to be deemed to contain all the terms of the contract, and that in such a case no evidence, parol or written, can be received of those terms, is subject to the necessary and well-known qualification that it does not apply to a written contract, which, upon its face, shows but a partial statement of the agreement, and which discloses that other terms are necessary to make it complete or effective. In all such cases the omission can be supplied by evidence aliunde. The written contract of sale which is involved in this case expressed nothing whatever upon the subject of the quality of the beans sold. It was silent on that point. The question whether under it the plaintiffs were required to deliver merchantable beans, beans not merchantable, or beans of some superior quality, was necessarily left to be determined by reference to something outside of and additional to the words contained in the writing. So far as the matter of the quality of the beans was concerned, the contract was incomplete on its face, and comes clearly within the qualification above stated. It is true that in such cases, in order to make such contract effective, where there was, in fact, no agreement by the parties upon the subject, the law steps in and assumes that the intention of the parties, in respect of the omitted term, is the intention which is usually found to exist in like transactions, namely, that merchantable beans were to be delivered. This constructive agreement is made by the law for the reason that, unless the term is supplied, there is no complete or effective contract. It is not made because in fact the parties did, either by express words, or tacit understanding to be inferred from circumstances, actually agree to that effect. There is a rule of evidence to the effect that in the absence of proof it will be presumed that the usual course of dealing was pursued. This is the foundation upon which the implication of law rests. This presumption is in itself evidence. No good reason can be shown why in such cases the rights of the parties should be determined by presumptive evidence alone, which is often contrary to the fact, and why they should be denied the privilege of showing by outside evidence precisely the agreement which they did make, and which they did not include in the contract which was reduced to writing. This rule, of course, has nothing to do with the other rule of evidence to the effect that parol evidence cannot be received to contradict a writing. There is nothing in the evidence showing that the sale was made by sample which tends in the least degree to contradict anything expressed in the written contract.

The case of Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571, is a good illustration of the proposition above stated, and is in principle an exact precedent for the case at bar. In that case the parties had executed a written agreement to pay to the plaintiff the sum of $300, but the contract did not specify the time of payment. In such cases the law implies that the money is to be paid on demand (Civ. Code, § 1567), as in case of sales the law implies that property, inaccessible to the purchaser when sold, shall be sound and merchantable when delivered (Civ. Code, § 1771). The cases in this respect are precisely parallel. In that case it was held that the qualification of the rule stated in section 1856, Code Civ. Proc., above quoted, was applicable; that with respect to the time of payment the contract was silent; and that parol testimony was admissible to supply the omitted term of the contract, by proving an agreement in parol that the payment was to be made whenever the promisors should sell a certain tract of real estate and that prior to the beginning of the action said real estate had been sold. This case is a later case than Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469, as is also the case of Guidery v. Green, 95 Cal. 635, 30 Pac. 786, to the same effect. They should be held to prevail over the doctrine laid down in Harrison v. McCormick. The distinction I have pointed out was not discussed in Harrison v. McCormick. The entire subject is discussed at great length in the recent work of Wigmore on Evidence, in volume 4, beginning with section 2400. That author there takes the ground that the principles of evidence are clearly in favor of the admission of other evidence in cases where, as here, there was obviously an omission in the writing of some terms of the contract, such as an applied warranty.

Under the proof that the sale was made by sample, the law would imply a warranty that the quality of the property sold was equal to the sample exhibited. Civ. Code, § 1766. This warranty would constitute a condition of the contract of sale, and in such cases the delivery of the goods to the carrier for transportation to the buyer does not have the effect of passing title to the buyer. The title will not pass until there has been an acceptance. Mechem on Sales, §§ 746, 522, 1212; Pope v. Allis, 115 U. S. 372, 6 Sup. Ct. 69, 29 L. Ed. 393; Taylor v. Saxe, 134 N. Y. 67, 31 N. E. 258; Barton v. Kane, 17 Wis. 44, 84 Am. Dec. 728; Conrad v. Dater, 2 Biss. 343, Fed. Cas. No. 3,127; Aultman v. Clifford, 55 Minn. 159, 56 N. W. 593, 43 Am. St. Rep. 478; Fogel v. Brubaker, 122 Pa. 10, 15 Atl. 692; Filley v. Pope, 115 U. S. 219, 6 Sup. Ct. 19, 29 L. Ed. 372; Norrington v. Wright, 115 U. S. 203, 6 Sup. Ct. 12, 29 L. Ed. 366; Grimoldby v. Wells, 10 L. R. C. P. Cas. 391. The consequence of these rules is that in this particular case the title to the beans did not pass to the Allison Company. Its rejection of the beans on inspection put an end to the contract, and the title remained in the plaintiff. There was no conflict in the evidence upon the fact that the sale was actually made by sample. It was substantially conceded; the only objection being that it was not competent evidence. The court was authorized to instruct the jury that the sale was made by sample, and that as a consequence thereof the title did not pass to the Allison Company, nor to their vendees, McDonogh and Runyon. The instruction given was therefore correct, and the verdict is sustained by the evidence. I think the judgment should be affirmed.

We concur: VAN DYKE, J.; McFARLAND, J.

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1 Cal. App. 169

PEOPLE v. LEE.

(Court of Appeal, Second District, California. June 13, 1905.)

1. JURY—EXCUSING JUROR.

The act of the court in excusing, over the objection of defendant, a juror who is not in fact disqualified, is not error.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 385.]

2. CRIMINAL LAW — DENIAL OF CHALLENGE—CURE OF ERROR.

Error in denying defendant's challenge to the panel of jurors without permitting him to prove the facts upon which his challenge was made was cured where on the following day the court, on having its attention directed to the matter, offered to permit defendant to make such proof, and defendant declined to do so.

3. JURY—CHALLENGES—COMPLETION OF PANEL.

Where eight jurors had been accepted and sworn, and, the original twelve having been disposed of, four others were drawn from the box by the court, the action of the court, on excusing one of the latter for cause, in ordering the name of another juror to be drawn from the box, over defendant's objection and insistence that the remaining three should be first examined, was not in conflict with Pen. Code, § 1068, requiring challenges to be taken when the juror appears, and before he is sworn.

4. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

In homicide, testimony that defendant, at the commencement of the affair which resulted in the homicide, ordered deceased to throw up his hands, saying that he was a peace officer, was res gestæ, and could be controverted by evidence that defendant was not a peace officer.

5. Homicide—Presumptions—Character of Accused—Instructions.

In homicide, a charge that defendant is presumed to be a man of good character, and that such presumption, coming in aid of the general presumption of innocence, is not to be left unconsidered by the jury, but is a fact in the case tending to establish defendant's innocence, was properly refused.

6. Same—Defense of Another—Evidence.

In homicide, evidence *held* insufficient to call for a charge on defendant's right and duty to prevent deceased from carrying out an intention to kill or commit a violent assault upon another.

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Phillip Lee was convicted of murder in the second degree, and appeals. Affirmed.

Rehearing denied by Court of Appeal July 11, 1905.

F. H. Thompson and Byron Waters, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Dep. Atty. Gen., for the People.

SMITH, J. The defendant was convicted in the lower court of murder in the second degree, and sentenced to imprisonment in the State Prison for 30 years. He appeals from the judgment, and from an order denying a new trial.

Several points are urged for reversal, which will be considered in the order stated in appellant's brief. The first of these is that the court erred in excusing, over the objection of defendant, one of the jurors examined, who was in fact not disqualified. But this point has been determined adversely to the defendant by the decision in People v. Arceo, 32 Cal. 40, and several later cases affirming that decision.

The next point is that the court erred in denying the defendant's challenge to the panel of jurors without permitting, or at least without waiting for, him to prove the facts upon which his challenge was made. This doubtless was error. But it seems to have been the result of a misunderstanding upon the part of the court as to the defendant's offer to prove the facts, and on the next day, when the court's attention was directed to the error, it offered the defendant opportunity to make the proof, which the defendant declined to avail himself of. The effect of the proof, if made, would have been to set aside the panel, and thus to give to the defendant all the advantage he would have had, had he been allowed to make the proof in the first place. He was therefore in no way injured.

Another point is an alleged departure from the method prescribed by the provisions of the Code for the impaneling of a jury. Eight jurors had been accepted and sworn to try the case, and, the original twelve having been disposed of, four others were drawn from the box by the clerk. Of these, one was challenged for cause, and the challenge allowed, and the court ordered the name of another juror to be drawn from the box, over the defendant's objection, who insisted that the remaining three should be first examined, before a new name was drawn. And the same ruling occurred with reference to one or more of the other jurymen. But this was not in conflict with the provisions of the Codes governing the subject. It is, indeed, provided by section 1068 of the Penal Code that the challenges of the defendant, both peremptory and for cause, "must be taken when the juror appears and before he is sworn to try the cause"; and under this provision it was competent for the court to require the defendant to exercise his right of challenge, both peremptory and for cause, as to each juror, immediately upon his appearance. People v. Scoggins, 37 Cal. 679. And had this course been pursued, the defendant would have been entitled, upon the rejection of a juror, to have the panel filled before he was called upon to use his peremptory challenges. But all that is required by the provisions of the section cited is that the panel shall be completed before the defendant be required to exercise any of his peremptory challenges, and it appears that this privilege was allowed him.

Another error complained of is in the admission of the testimony of certain witnesses. It appears from the testimony of several witnesses that the defendant, at the commencement of the affair which resulted in the homicide, ordered the deceased to throw up his hands, saying that he was a peace officer, and the prosecution was permitted to prove by several witnesses that the defendant was not what he claimed to be. But the declaration of the defendant, being part of the res gestæ, was evidence in the case, and it was therefore competent for the prosecution to controvert it.

The other point relates to two instructions asked by the defendant, but refused by the court, the first of which was as follows: "The court instructs you that the defendant is by law presumed to be a man of good character for peace and quiet, in the absence of any evidence to the contrary. Such presumption of good character, coming as it does in aid of a general presumption of innocence, is no more to be left out by the jury in their deliberation than the original presumption of innocence which the law gives it. The good character of the defendant, which the law presumes, is itself a fact in the case. It is a circumstance tending in a greater or less degree to establish the defendant's innocence, and it is not to be put aside by the jury in order to ascertain if the other facts and circumstances, considered by themselves, do not establish his guilt beyond a reasonable doubt, but his good character must be considered by you in determining whether or not the defendant is guilty. And after considering such presumptions of good character, together with all the other evidence in the case, if the jury entertain a reasonable doubt as to the guilt of the defendant, you must give him the benefit of such doubt and acquit him." This instruction, we think, was rightly refused. It has, indeed, been said that "the law assumes that a defendant who is upon trial for an offense has a fair character" or reputation, and "he is entitled to the benefit of this presumption in their consideration of the weight to be given to the testimony bearing upon his guilt." People v. Gleason, 122 Cal. 371, 55 Pac. 123. But the presumption, we think, amounts to nothing more than that the character or reputation of the party is not bad; and, if any inference may be drawn from the fact thus presumed, it is contained in, and much more strongly supported by, the legal presumption of the defendant's innocence until evidence to the contrary may appear. This is something very different from a presumption that the party accused is of "good" character, or to justify the assumption that the defendant was of such character as to justify a higher probability of his innocence of the crime than would result from the general presumption of his innocence. This fact can only appear by evidence, which the defendant will, upon its admission, be allowed to contradict. Danner v. State, 54 Ala. 127, 25 Am. Rep. 662. The instructions given as to the legal presumption of innocence were sufficient on the subject of presumptions. People v. Johnson, 61 Cal. 142.

The other instruction, so far as material, was as follows: "If you believe from the evidence that the defendant, acting as a reasonable man, believed that the deceased, when he came to the hotel, was armed with a revolver, and that he came to the hotel with the intention to either kill or commit a violent assault upon Mrs. Hurlburt, it was not only the defendant's right, but it was his duty, as a law-abiding citizen, to intercept the deceased, and prevent him, if possible, from carrying out his intentions; and the defendant would be justified in using all means which appeared to him, as a reasonable man, to be necessary to make his resistance and interference effectual." As explanatory of this point, a brief review of the evidence will be necessary. The homicide took place on the 2d of February, 1904, at a place called the "Berwick Hotel," in the city of Los Angeles. The deceased had been ejected from the premises by the defendant, at the request of the landlady, during the preceding night; and there is much evidence to the effect that he sought to borrow a pistol from several parties for the purpose of going back to the place and killing the defendant. It also appears that a short time before the killing he did obtain a pistol, with which he returned to the house, and which was found upon his person after his death. The evidence relied upon to support the instruction is that of Mrs. Hurlburt, the daughter of the landlady, who testified, in effect, that, at some time before the deceased came to the house upon the occasion of his death (what time does not appear), the deceased came to the house, and, upon meeting her, threw up his gun and said, "I will kill you," and that after his departure she told her mother and the defendant about his drawing a gun on her and threatening to kill her. When the deceased came again she saw him at the top of the stairs, and he said, "Come here, Alice, come here," and motioned to her, and she said, "No, Jack; I am afraid." Upon which, she says, the deceased put his hand back to his right hand pocket, and said, "Oh, I don't know as I will or not," and then she looked upstairs and said, "Lee" —referring to the defendant. Thereupon Lee came down stairs, and told deceased to throw up his hands, and he would not do it. The defendant then attacked the deceased, but was separated, and, again attacking him, was again separated, but renewed the attack, and the homicide occurred. It is fair to defendant to say that the evidence tended very strongly to show that when the defendant used his pistol the deceased was about to resort to his, or at least that the circumstances were such as to justify the defendant in so believing. But the jury found otherwise, and no point is made as to the sufficiency of the evidence to justify the verdict of murder. We have, therefore, to consider only whether the evidence was sufficient to support the theory embodied in the instruction; and on this point we are of the opinion that there is nothing in the testimony to indicate that Mrs. Hurlburt was in any danger of attack from the deceased, or to produce such an impression upon the mind of the defendant. On the contrary, the case seems to be one of an ordinary fight between two men of violent temper.

We are of the opinion, therefore, that the judgment must be affirmed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 142

CALIFORNIA & N. RY. v. STATE et al. (HUMBOLDT R. CO., Intervener).

(Court of Appeal, Third District, California. June 6, 1905.)

EMINENT DOMAIN — PROCEEDINGS AGAINST THE STATE—STATUTORY AUTHORIZATION.

Const. art. 20, § 6, authorizes the institution of suits against the state in such manner and in such courts as may be directed by law. Proceedings to condemn land are required to be brought in the superior court. Code Civ. Proc. § 1240, subd. 2, enumerates among the classes of private property which may be taken in condemnation proceedings "lands belonging to this state * * * not appropriated to some public use." Sections 1244 and 1245 provide for the summons and complaint in condemnation proceedings. Pol. Code, § 472, declares that the Attorney General shall have charge of all legal matters in which the state is interested. *Held* that, where the Attorney General appeared in condemnation proceedings instituted against the state, the jurisdiction of the court attached to the same extent as if the state had been regularly summoned and the proceedings were authorized by law, although instituted prior to the passage of the act of March 15, 1901 (St. 1901, p. 307, c. 144), adding to Code Civ. Proc. § 1240, a subdivision numbered 7, requiring proceedings to condemn state lands to be conducted in the same manner as other condemnation proceedings, except that process must be served on the Governor, Attorney General, and Surveyor General.

Appeal from Superior Court, Humboldt County.

Condemnation proceedings by the California & Northern Railway against the state and others; Humbodlt Railroad Company, intervener. From a judgment in favor of plaintiff, intervener appeals. Affirmed.

C. M. Wheeler, for appellant. George D. Murray, for respondent.

BUCKLES, J. Suit was for condemnation of land belonging to the state, for use of railway. All the defendants having been served with summons, and all having failed to answer, except the state of California, default was taken against them. The Attorney General appeared on the part of the state and demurred and answered. Then the Humboldt Railroad Company intervened, filing a complaint in intervention, and also filing an answer to plaintiff's complaint. The plaintiff demurred to the complaint in intervention and to the answer of intervener. The court sustained both demurrers, and dismissed the complaint in intervention, and rendered judgment for the plaintiff and against the state of California on the written stipulation of plaintiff and the Attorney General on the part of the state of California. Judgment was also rendered against intervener. This appeal is from the whole of the judgment, and is prosecuted as two appeals—one as a defendant in said action, and one as an intervener. The points of law being the same in both, we shall consider them together.

In both complaint and answer of the Humboldt Railroad Company there is a plea in abatement, and the ground for this plea is that the plaintiff began the suit against the state to condemn state lands prematurely, and before there was any law in existence granting it authority so to do. The action was begun on March 14, 1901. Appellant claims that at that date no law existed which would authorize the plaintiff to bring such suit, and that such right was conferred by amendment to section 1240, Code Civ. Proc., which took effect March 15, 1901. St. 1901, p. 307, c. 144. The amendment is as follows, to wit: "Subd. 7. Proceedings to condemn lands belonging to this state are hereby authorized, and must be maintained and conducted in the same manner as other condemnation proceedings provided for in this title; except, that in such proceedings the summons and copy of the complaint must be served upon the Governor, Attorney-General and Surveyor-General of the state." In support of appellant's contention, he cites section 6, art. 20, Const., which reads as follows, to wit: "Suits may be brought against the state in such manner and in such courts as shall be directed by law." The only question in this case, as appears from the briefs filed is, did the plaintiff have a right to bring its action prior to the amendment of section 1240 by adding subdivision 7? The right to take the private property of the state in condemnation proceedings has been granted by subdivision 2 of section 1240, Code Civ. Proc. The proceedings to condemn must be brought in the superior court, and we are of the opinion that this applies to the state whose property may be taken, as well as to individuals. Section 1244, same Code, provides what the complaint in a condemnation proceeding shall state, and as to which no question is suggested in the briefs. Section 1245 provides for the summons, and how it shall be served. The Attorney General appeared in the case for the state, and it was his duty to do so, under the provisions of section 472, Pol. Code; and when he had so appeared, in a case where the state was a proper party as in this case, the state was just as much in court as though regularly summoned, and the jurisdiction of the court was complete.

The judgment appealed from is affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

1 Cal. App. 175

SAN LUIS OBISPO COUNTY v. SIMAS et al. (two cases).

(Court of Appeal, Second District, California. June 14, 1905.)

1. EMINENT DOMAIN — CONDEMNATION FOR HIGHWAY—COMPLAINT.

Under Code Civ. Proc. § 1244, stating the requirements of a complaint for the condemnation of land for highway purposes, a complaint was not demurrable for failure to specify the manner in which it was proposed to construct the highway, since any damage which might be sustained by the owners of abutting property on account of improvement, by establishing grades or otherwise, was a matter for subsequent determination.

[Ed. Note.—For cases in point, see vol. 18, Cent Dig. Eminent Domain, § 516.]

2. HIGHWAYS—ESTABLISHMENT—PETITIONERS —QUALIFICATIONS.

Pol. Code, § 2681, provides that "any ten freeholders who will be accommodated by the proposed road, two of whom must be residents of the road district wherein any part of the proposed road is situated and which are taxable therein for road purposes, may petition therefor," etc. *Held*, that such section only required that two of the ten freeholding petitioners should be taxable in the district for road purposes.

3. SAME—PROCEEDINGS BEFORE BOARD—COLLATERAL ATTACK.

Pol. Code, § 2690, provides that, if any award of damages for land taken for highway purposes is not accepted by the landowners, the board of supervisors shall direct proceedings to procure the right of way to be instituted by the county attorney, and that in such suit no informality in the proceedings of the board shall vitiate the suit, but that the order directing the district attorney to bring the same shall be conclusive proof of the regularity thereof. *Held*, that none of the intermediate orders or proceedings before the board of supervisors are reviewable in an action under such section, but are to be regarded as a final judgment in another proceeding before a competent tribunal, not subject to collateral attack.

4. EMINENT DOMAIN PROCEEDINGS—NOTICE.

Where, in a suit to acquire land for highway purposes, the complaint contained all of the matters required by Code Civ. Proc. § 1244, and the court found that all of the allegations were true, except that no notice was given to nonconsenting landowners, such landowners as appeared were not entitled to a nonsuit or to judgment on the merits for want of notice.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 499.]

5. SAME—PROOF—HEARING.

Where a court had jurisdiction of a proceeding to condemn land for highway purposes, it possessed all power to hear the same without determining, or to determine without hearing; and if the determination with or without hearing was not justified it was error only, and not a jurisdictional defect.

6. SAME—ORDER OF CONDEMNATION—SIGNING—OPEN COURT.

Where an order for the condemnation of land for highway purposes was signed by the trial judge in his chambers adjoining the courtroom, an open door connecting the two, it was signed in open court, under Const. art. 6, § 5, providing that the superior court is always in session.

7. SAME—HEARING.

Where, in proceedings to condemn land for highway purposes, the only fact necessary to be established on the hearing was the payment of the money into court for payment to those to whom damages had been awarded, and such payment was conceded by the bill of exceptions, the entry of the order for condemnation without a hearing was harmless.

8. SAME—BOND.

In proceedings to condemn land for highway purposes no bond is required as a prerequisite to a final order of condemnation except in the cases specified in Code Civ. Proc. § 1248, subd. 5.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 506.]

9. SAME—POSSESSION.

Code Civ. Proc. § 1254, providing that on payment into court of the amount awarded in condemnation proceedings the plaintiff may be put into possession, creates an additional exception to the general stay of proceedings provided for by section 941, so that on payment into court of the amount awarded for land taken for highway purposes an order was properly entered letting plaintiff into possession.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 630–636.]

10. SAME—SEPARATE TRIALS.

Under Code Civ. Proc. § 1244, subd. 5, providing that all parcels lying in the same county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but that the court may consolidate or separate them to suit the convenience of the parties, the separation of such parcels is within the discretion of the court, which will not be reviewed on appeal in the absence of abuse.

11. JURORS—CHALLENGE.

Under Code Civ. Proc. § 601, providing that either party may challenge the jurors, but where there are several parties on either side they must join in a challenge before it can be made, where several parcels of real estate lying in the same county were sought to be condemned for highway purposes in a single proceeding the owners were required to join in their peremptory challenges.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 609.]

12. EMINENT DOMAIN PROCEEDINGS—VIEW.

Where no formal request was made for the judge hearing the proceeding to condemn land for highway purposes, to accompany the jury on a view, an absent co-owner of certain of the property, who was represented by his co-owner, would be held to have acquiesced in the action of the court.

13. INSANE PERSONS—ACTIONS—JUDGMENT.

Where a case had been tried, submitted, and a verdict returned, it was no objection to the signing of the findings and judgment that at that time one of the parties was insane.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, § 179.]

14. TRIAL—PRESENCE OF PARTY.

Neither party to a suit is entitled to notice or to be present at the signing and filing of findings.

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Proceedings by San Luis Obispo county for the condemnation of certain land for a highway. From a judgment and order of condemnation, and from an order staying proceedings and letting plaintiff into possession, and from an order denying a new trial, Manuel Machado Simas and others appeal. Affirmed.

F. A. Dorn and William Shipsey, for appellants. A. E. Campbell and W. H. Spencer, for respondent.

ALLEN, J. Plaintiff and respondent had judgment, final order of condemnation, and order letting into possession in this proceeding brought by the district attorney of San Luis Obispo county, under direction of the board of supervisors, as provided by section 2690, Pol. Code, to condemn a right of way for a public road which such board had theretofore determined should be laid out and opened over the lands of defendants and other persons not parties to this action. Defendants appeal from the judgment upon the judgment roll, from the final order of condemnation upon a bill of exceptions, and from the order staying proceedings and letting plaintiff into possession upon a bill of exceptions, and in case No. 9 from the order of the court denying a new trial.

The entire record in all of the appeals discloses that defendant McKeen owned a tract of land adjoining a tract owned by defendants Simas and Lawrence; that the center line of the proposed road was the dividing line between said tracts; that the said proposed road continued over lands of the Rice estate, not parties to this action; that after the verdict and judgment, and upon payment into court of the condemnation money, the trial judge in his chambers adjoining the courtroom, an open door connecting the two, without previous notice being given to defendants of the motion to apply for final order of condemnation, signed such final order, which was immediately filed by the clerk in his office and duly entered; that after such final order was so entered notice of appeal was given, and a bond for $300 approved and filed; that thereafter the court, on regular motion, made its order letting plaintiff into possession; that during the progress of the trial defendant Lawrence absented himself therefrom, and, no reason therefor being made to appear by proper showing, the court proceeded with the trial. At the conclusion of the oral testimony an order was made permitting the jury to view the premises the subject of litigation under charge of an officer; that upon making such order the court announced that it would not attend such view and did not. The defendants other than Lawrence consented to such order and action of the court. The attorney for Lawrence, being also the attorney for defendant Simas, objected and excepted on Lawrence's behalf alone to such order and action of the court.

Upon the appeal from the judgment it is urged that the court erred in overruling defendants' demurrer to the complaint, which is claimed to be insufficient in that it did not specify the manner in which plaintiff proposed to construct the road, and upon the appeal from the order denying a new trial error is claimed because the court refused to require plaintiff to state to the jury the manner in which the improvement was proposed to be made. Section 1244, Code Civ. Proc., which undertakes to state what such a complaint shall contain, does not specify this requirement. The proceeding being only for the purpose of acquiring a right of way for a public road, the mere taking of the property, the damage to the remainder by severance alone, questions as to the damage to abutting property on account of subsequent improvement by establishing grades or otherwise are matters for determination when such damage is inflicted. To hold otherwise would be to say that before condemnation the supervisors must determine in advance grades and the manner of improving all public roads as a condition precedent to condemnation, which we do not think is authorized.

Upon these appeals it is further claimed that the complaint was insufficient to state a cause of action, or to authorize the introduction of testimony, because the complaint did not show that the petitioners for the road possessed the proper qualifications under the statute. The qualifications of the petitioners are determined by section 2681, Pol. Code. This section provides that "any ten freeholders who will be accommodated by the proposed road, two of whom must be residents of the road district wherein any part of the proposed road is situated, and who are taxable therein for road purposes, may petition," etc. It affirmatively appears from the complaint that ten of the petitioners are freeholders who will be accommodated by the road; that two are residents of the road district, who are taxable therein for road purposes. This, in our opinion, complies with the requirement of the section. The contention of appellants is that, properly construed and read, the section referred to contemplated that the ten freeholders should be taxable in the district for road purposes. If we are to say that the words, "who are taxable therein for road purposes," relate to the ten freeholders, then we have a sentence reading: "Ten freeholders who will be accommodated by the road, who are taxable therein for road purposes." This would be meaningless, as it is the district within which the person should be taxable and not the proposed road. That portion of the sentence referring to the two residents cannot be read as a parenthetical clause for the reason above stated. Without such reading, the section must be construed as requiring only two residents of the district taxable for road purposes and the remainder freeholders only.

Various objections and exceptions are made with reference to the complaint and the rulings of the court upon the admissibility of testimony, based upon the theory that the various orders of the board of supervisors made intermediate the filing of the petition and bond and the order to the district attorney were without jurisdiction and irregular. None of the intermediate orders or proceedings are reviewable in this action. Section 2690, Pol. Code, authorizing this action, provides that such suit shall be determined by the court or jury in accordance with the rights of the respective parties as shown in court, independent of said proceedings before the board. Here, then, is a legislative direction to the court to disregard the intermediate proceedings above referred to. In addition, such orders and proceedings are to be recognized as a final judgment in another proceeding before a competent tribunal and not subject to collateral attack. County of Sutter v. Tisdale, 136 Cal. 476, 69 Pac. 141.

Exceptions are urged to the action of the court in refusing judgment upon the pleadings and in denying the motion for a nonsuit. The complaint contains all of the matters required by section 1244, Code Civ. Proc., which section is found in the title and part of the Code of Civil Procedure which, by section 2690 of the Political Code, is made the procedure in this class of cases. The complaint was sufficient, and the court having found all of the allegations to be true, except that no notice was given to nonconsenting landowners, the motion for judgment on the pleadings was properly denied. The exception above noted, if in any sense material, loses its significance when the record discloses that all of the parties to this appeal appeared at the time and place fixed by the board for hearing the report and participated therein. This was a waiver of notice. Kimball v. Board of Supervisors, 46 Cal. 19. Under former statutes it has been held that setting apart by the treasurer of funds sufficient to satisfy the award of the viewers was necessary to entitle plaintiff to condemn; but under existing statutes (section 2690, Pol. Code) the court must disregard all orders before the board. If an order of the board, therefore, is not material, certainly its obedience would not be essential in determining jurisdiction, even had the Legislature required the treasurer to sequester and hold funds, which does not appear in the present law affecting this procedure. There is sufficient, however, in the record to show that when the order was made a sufficient amount was in the road district fund to cover these damages, and that the same was held by the treasurer a proper length of time for that particular use.

It is next urged that the final decree of condemnation is void, because made without proof, without a hearing, without knowledge of defendants, without a bond, and not in court. The court, having jurisdiction of the action, possessed all power to hear without determining, or to determine without hearing. Ex parte Bennett, 44 Cal. 88. If the determination, with or without a hearing, be not justified, it is error only. Sherer v. Superior Court, 96 Cal. 654, 31 Pac. 565. Under our Constitution the superior court is always in session. Const. art. 6, § 5; Falltrick v. Sullivan, 119 Cal. 616, 51 Pac. 947. The signing of the order, under the circumstances of this case, was in open court, as recited by the order itself. It became the order of the court and effective as such when filed with the clerk. Comstock Quicksilver Min. Co. v. Superior Court, 57 Cal. 625; Walter v. Merced Academy Ass'n, 126 Cal. 586, 59 Pac. 136. The authority to make such order depended upon proof that the money had been paid into court, or to the clerk, which is its equivalent. To make such an order without notice and opportunity to defendants to be heard was error; but the only fact necessary to be established upon a hearing, namely, payment, being conceded by the bill of exceptions, there was no prejudicial error in making the order. No bond is required before making such final order, other than in those cases named in subdivision 5, § 1248, Code Civ. Proc., of which this is not one.

The right of the court to make the order letting plaintiff into possession pending the appeal is denied. When the money was paid into court it was so paid for the owner, as is required by the Constitution. Spring Valley Water Works v. Drinkhouse, 95 Cal. 222, 30 Pac. 218. Its amount had been determined by a valid judgment, which had been fully executed. Steinhart v. Superior Court, 137 Cal. 578, 70 Pac. 629, 59 L. R. A. 404, 92 Am. St. Rep. 183. In the case of City of Los Angeles v. Pomeroy, 132 Cal. 341, 64 Pac. 477, the appeal was taken before payment or final order. Since that decision was made, section 1254, Code Civ. Proc., has been so amended that as now in force it must be taken as creating an addition to the class of cases theretofore constituting exceptions to the general stay of proceedings provided for in section 941, Code Civ. Proc. There was no error, therefore, in making the order or in refusing to permit proof of the appeal.

It is urged on this appeal from the motion denying a new trial that the court erred in denying defendants' application for separate trials and in the refusal of each of defendants' four peremptory challenges. Section 1244, Code Civ. Proc., which controls the procedure in cases of this character, provides, subdivision 5: "All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties." The discretionary power as to separation being vested in the trial court and no abuse being apparent, its order will not be reviewed. The reason for the suggestions made in Judson v. Malloy, 40 Cal. 299, are not shown to exist in this case. The trial having been ordered to proceed, without separation, the right to peremptory challenges was restricted to four, in which all defendants must join. Code Civ. Proc. § 601.

There was no error in giving or refusing any of the instructions complained of.

The failure of the court to accompany the jury upon the view is claimed, on behalf of defendant Lawrence alone, as error. The record discloses that Simas and Lawrence were joint owners of the tract; that the latter absented himself from the trial; that at the conclusion of the testimony, Simas, one of the joint owners, consented to the view and made no objection to the statement of the court that the judge would not attend the view. No formal request was made for the judge to attend. We perceive no prejudicial error in this failure of the judge to attend the view, whatever may be the effect of a view under section 610, Code Civ. Proc., as to whether or not evidence is necessarily taken on account thereof. It appears that Simas and Lawrence, as joint owners, of necessity were affected alike by the verdict and judgment. By reason of Lawrence's absence the responsibility for the management of their joint defense devolved upon Simas; he acquiesced in the action of the court, and such acquiescence was in the exercise of a right or privilege he had to have such view, and no injury is shown to Lawrence as a result of the order.

It is finally urged that the court erred in signing the findings and judgment after counsel for defendant Lawrence had requested time within which to make proof of Lawrence's insanity. The cause had been tried and submitted and verdict returned. The rights of the parties are to be determined as they existed at the time of such submission. Fox v. Hale & Norcross S. M. Co., 108 Cal. 481, 41 Pac. 328. Neither party is entitled to have notice or to be present at the signing and filing of findings. Hathaway v. Ryan, 35 Cal. 188. Even in the event of death after verdict or decision, judgment may be entered. Code Civ. Proc. § 669; Fox v. Hale & Norcross S. M. Co., supra.

We find no prejudicial error in the record, and the judgment and orders are affirmed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 156

PHŒNIX INS. CO. OF BROOKLYN v. PACIFIC LUMBER CO.

(Court of Appeal, Third District, California. June 10, 1905.)

LIMITATION OF ACTIONS—ACTION ON LIABILITY CREATED BY STATUTE—ACTION ON LIABILITY NOT FOUNDED ON WRITTEN INSTRUMENT.

After payment of a loss by a fire insurance company, the assured executed an assignment of the right of action against the person who originated the fire for damages, and the insurance company sued seeking, under the assignment and under the doctrine of subrogation, to recover a certain sum as actual damages. Pol. Code, § 3344, provides that every person negligently suffering any fire to extend beyond his own land is liable for treble damages. Code Civ. Proc. § 338, declares that an action upon a liability created by statute other than a penalty or forfeiture must be brought within three years, and that all actions upon a liability not founded upon an instrument in writing must be brought within two years. *Held* that, as the insurance company was limited by the assignment, the doctrine of subrogation, and its complaint, to the recovery of actual damages, the action was one upon a liability not founded upon an instrument in writing within section 338, so that it was barred after two years.

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by the Phœnix Insurance Company of Brooklyn, N. Y., against the Pacific Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

H. L. Ford and Coonan & Easley, for appellant. E. Sevier and D. Sevier, for respondent.

McLAUGHLIN, J. On October 28, 1901, the plaintiff filed its complaint in proper form, alleging, in apt and sufficient terms, that certain property of one Hazleton was insured by plaintiff against loss by fire; that on May 11, 1899, while said insurance was still in force, the defendant willfully and carelessly kindled a fire on its own land, and negligently suffered the said fire to extend beyond its own land to and upon the land of Hazleton, and that said fire destroyed the property insured, all of said negligent acts being "contrary to statutory provision under section 3344 of the Political Code of this state"; that thereafter said Hazleton proved his loss, and the same, amounting to $786.77, was paid to him by plaintiff. It is then alleged that by virtue of a written assignment from Hazleton, as well as by subrogation, such rights of action as accrued to Hazleton by reason of such negligent acts passed to plaintiff. The prayer is for "judgment in the sum of $786.77 as actual damages, and costs of suit." The defendant demurred to the complaint, on the ground, among others, that the causes of action set forth therein, were barred by sections 339 and 340 of the Code of Civil Procedure. The demurrer was sustained, and the plaintiff appealed.

Appellant contends that the causes of action stated rest upon section 3344 of the Political Code, which reads as follows: "Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages." This, he contends, brings this cause within section 338, Code Civ. Proc., which provides that "an action upon a liability created by statute, other than a penalty or forfeiture, must be brought within three years. Respondent answers that, if the action is upon a statute, it is upon a penalty created by statute, and hence that section 340, limiting the time for commencing such actions to one year, applies. And respondent also submits that this is simply an action to recover actual damages, and therefore falls within the provision of section 338, making the limitation of two years apply to all actions upon a liability not founded upon an instrument in writing. It cannot be doubted that an action for actual damages in cases such as the one at bar would lie, regardless of the provisions of section 3344 supra. The very idea of treble damages involves the concurrent idea of actual damages trebled, and hence, in the section itself, the pre-existence of the right to actual damages is recognized. The section simply gives the further right to treble damages under proper pleadings. In this case, all that is asked is $786.77 actual damages," and it is elementary that relief cannot exceed the demand. The written assignment from Hazleton to appellant carefully limits the transfer to the indemnifying sum here sought to be recovered, and expressly states that such sum is the actual value of the property destroyed. Subrogation is allowed by courts of equity solely to insure reimbursements and secure justice. The party subrogated will not be allowed to make a speculation out of this equitable right to be indemnified against unjust loss. Liverpool, etc., Insurance Co. v. S. P. Co., 125 Cal. 440, 58 Pac. 55; Randall v. Duff, 107 Cal. 34, 40 Pac. 20; Am. & Eng. Ency. Law, vol. 27, p. 207. It follows that neither under the complaint, the written assignment, or the doctrine of subrogation could the appellant recover the treble damages allowed by section 3344 supra. Therefore, this action having been commenced more than two years after the cause of action accrued, it was barred by the statute.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

147 Cal. 337

CURTIN v. ARROYO DITCH & WATER CO. (L. A. 1,399.)

(Supreme Court of California. July 17, 1905.)

WATERS AND WATER COURSES — IRRIGATION COMPANIES — WITHHOLDING WATER FROM STOCKHOLDER — NONPAYMENT OF ASSESSMENTS—EQUITABLE RELIEF.

Owners of an irrigation ditch formed a corporation, which received from each person his right to the water, and which issued to each a share of stock for each acre of land subject to irrigation from the ditch. By-laws of the corporation authorized the sale of stock for nonpayment of assessments, in conformity with the laws of the state, and provided that water might be withheld from any person failing to pay any assessment. A person failed to pay assessments levied on his stock, and the same was sold, and the corporation bought it. The sale was void, because not held in conformity to law. Subsequent assessments were levied on the stock, but he received no notice thereof. *Held*, that he was not entitled to a decree enjoining the corporation from withholding water from his land without paying the assessments levied; it being inequitable to permit him to use the water without paying his share of the expenses.

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by Andrew Curtin against the Arroyo Ditch & Water Company. Judgment for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

Anderson & Anderson and Burrell D. Neighbors, for appellant. J. H. Ardis and Kendrick & Knott, for respondent.

McFARLAND, J. This is an action to quiet plaintiff's title, as against defendant, to alleged interests of plaintiff in certain water running in, and appropriated by means of, a ditch known as the "Arroyo Ditch," and in the ditch itself, and to enjoin defendant from interfering in any way with the use by plaintiff of his said interest in said water and ditch. In its answer the defendant denies plaintiff's title to his said alleged interest in the water and ditch, or any part thereof. The court made a good many findings, and concluded that the plaintiff was not entitled to the equitable relief demanded in the complaint, and rendered judgment "that plaintiff take nothing in this action and that defendant recover its costs." Plaintiff made a motion for a new trial as to certain enumerated issues. The motion was denied, and from the order denying it plaintiff appeals. There is no appeal from the judgment.

The evidence presents the said Arroyo ditch as a completed ditch, with the water here involved running in it, at about the year 1870. The water and ditch were then owned by a large number of farmers, each of whom owned a tract of land, or several tracts, adjacent to the ditch and irrigable therefrom; each landowner being entitled to shares of the water proportionate to the number of acres of his land. The water was turned into each owner's land in rotation as he was entitled by the number of acres of his land. From 1870 to the spring of 1885, the ditch was managed by three commissioners, who employed a superintendent, or zanjero, to look after the details, and keep it in running order, and properly distribute the water to those entitled. This condition continued until April, 1885. At the last-named date all of the owners, except about 15, who were designated by counsel as "outsiders," executed a written instrument, by which they agreed to organize a corporation; and they adopted articles of incorporation then submitted to them, by which a corporation called the "Arroyo Ditch & Water Company" was organized; the said corporation being the defendant in this action. The corporation was to receive from each of the incorporators his right or interest in and to the water, and the corporation was to issue to each incorporator "one share of stock for each acre of land owned by him and heretofore subject to irrigation from said ditch," which was accordingly done. The plaintiff herein signed said instrument, and became one of the incorporators. He was at that time the owner of one of the three tracts of land which he now owns; and the instrument was also signed by his predecessor in interest of the other two tracts which he subsequently acquired.

It was found by the court, and the findings are not assailed, that the purpose of said written instrument and the formation of the corporation was to make the corporation "the agent and trustee of said irrigators, owners as aforesaid of said canal or ditch, and of said water and water rights, for the management of said canal or ditch, and the handling and distribution of said water to the lands of said irrigators entitled thereto, in the same manner, and in the same proportion, and in the same quantity, and for the same purposes as the same had theretofore been handled and distributed by the commissioners and zanjeros selected for that purpose by the said irrigators as aforesaid, and not otherwise." After its organization the said corporation (the defendant herein) took possession of the ditch and water, and for several years managed the same and distributed the water in accordance with the purpose for which it was created. About 1888 or 1889 the said "outsiders" became dissatisfied with the management, and a loose, irregular arrangement was made by some of the incorporators with said outsiders, by which the latter appointed one commissioner, and the incorporators two; and these three commissioners, with zanjeros whom they appointed, managed the ditch and the distribution of the water until the year 1896. The corporation seemed to have acquiesced in this arrangement, and did not exercise any control over the ditch or water during the time last above mentioned; but in 1896 the corporation again took possession of the property, and since then has had exclusive management of the same. The ditch was then in bad condition, and needed extensive and costly repairs and additions; and these improvements were made by defendant at a cost of about $30,000. To raise part of this money the defendant levied several assessments. Plaintiff paid one or two of these assessments, and then refused to pay any more. The defendant sold plaintiff's shares in the water and ditch for delinquent assessments, and at the sale it became the purchaser, and since then has claimed to own plaintiff's said shares, and to have title thereto by prescription. Since then respondent has not allowed appellant to take any water from the ditch. Several assessments were made after such sale, but plaintiff was not notified of such assessments, and was treated as no longer owning any shares. There is a provision in the by-laws of the defendant that "the assessments on the stock of the company shall be in accordance with the laws of the state of California," and that "all sales for assessments must be made in conformity with the laws of this state." But the court found that the said attempted sale of plaintiff's shares for the assessments was void, and conveyed no title thereunder to defendant, and that defendant is not the owner of said shares by virtue of said sale, or otherwise; and, as these findings were favorable and not prejudicial to plaintiff, we need not consider them. The court also found that the plaintiff is the owner in fee of the undivided interest in the water and ditch described in the complaint; but it declined to give judgment for plaintiff in this action for the reasons hereinafter noticed. There is a provision in the by-laws as follows: "It shall be in the discretion of the board of directors to withhold the water from any person failing to pay any assessment after the same has become delinquent according to law, until said assessment is paid." And the court decided that under this provision, and upon general equitable principles, the plaintiff is not entitled to the equitable relief of a decree quieting his title and enjoining defendant from interfering with his asserted right to take water from the ditch, while refusing to pay his just proportionate share of the expenses necessarily incurred for the maintenance of the ditch and the enjoyment of the water. The finding that the said expenses were properly and necessarily incurred is clearly sustained by the evidence, and we think that the conclusion of the court that under these circumstances plaintiff is not entitled to the equitable relief prayed for was right.

The strongest position taken by appellant is that because the respondent, after the said sale of appellant's shares, assumed a hostile attitude to appellant and claimed adverse ownership of the property, therefore it repaired and improved the ditch at its own peril, and appellant cannot be held for any part of the cost of the repairs. But this position is not tenable. Appellant cites Mahoney v. Bostwick, 96 Cal. 54, 30 Pac. 1020, 31 Am. St. Rep. 175, as sustaining his contention; but in that case the defendant, a natural person, was simply a naked trespasser, who, without any right, had ousted plaintiff of the possession of his land, and afterwards sought to be credited with improvements which he had made while thus wrongfully in possession, and the court held that he was not entitled to such credit. There the rights of the plaintiff and defendant were alone involved. No trust relation existed, and there were no other parties interested. In the case at bar, as found by the court, the respondent corporation had no beneficial interest in the property, but was a mere agent or trustee for the landowners, who had an interest in the water and ditch, for the purpose of taking care of the ditch and distributing the water. The parties really interested in this case, and whose rights would be affected by a judgment for appellant as prayed for, are the other water owners. Such a judgment would permit appellant to fully and continuously enjoy the use of all his proportionate share in the water, without paying any part of the expenses of maintaining the property, while each of the other owners had paid his proportionate share thereof. Such a judgment would be unjust and inequitable, and we do not think that it should be allowed merely because the agent or trustee took an improper or illegal course in trying to enforce the payment of appellant's share of the expenses. The fact still remains that appellant refuses to pay his just part of the necessary expenses incurred in preserving the common property, and as long as this condition exists he is not entitled to the equitable remedy here demanded.

In form, the attacks of the appellant on the findings are mainly that the evidence does not support the findings that "defendant has not unlawfully deprived plaintiff of his water," and that "defendant is entitled to withhold the same from plaintiff until plaintiff has paid his share of the expenses of maintaining," etc. Respondent contends that these are findings of law, and not of fact, and cannot, therefore, be reviewed on a motion for a new trial upon specifications which go only to the sufficiency of the evidence to support the findings; but for the purposes of this decision we have treated them as findings of fact, and what we have hereinbefore said shows that in our opinion these findings are right. Appellant also attacks the findings that certain things were done by respondent with the "knowledge" or the "acquiescence" of appellant; but we will not discuss the sufficiency of the evidence to support these findings, for we think them immaterial.

The order appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

147 Cal. 280

PON v. WITTMAN et al. (S. F. 3,969.)

(Supreme Court of California. July 10, 1905.)

1. Equity—Injunction—Good Faith.

Where complainant maintained a restaurant in a court surrounded by cribs used for disorderly purposes, and complainant's business was derived almost exclusively from the patronage of persons residing in and frequenting such cribs, it appearing that he furnished them with meals served both in his restaurant and carried into the cribs, for whom he also performed janitor service, complainant was not entitled to equitable relief to restrain police officers from using the common entrance to the court for the purpose of obtaining evidence, etc., against persons occupying and frequenting the cribs, though the property occupied by complainant had no connection whatever therewith.

2. Same—Issues—Failure to Find.

Where, in a suit to restrain police officers from picketing complainant's premises and interfering with his patrons, it appeared that complainant's restaurant was located in a court also occupied by certain cribs, resorted to and frequented by persons of ill repute, to which approach was had from a common entrance from the street, it was error for the court to fail to find whether complainant's premises, described in the complaint generally by the street number, was the entrance to the court in the rear, and whether such court itself, prior to a date specified in the answer, and continuously up to the time when the alleged interference by police officers occurred, contained houses of prostitution, consisting of numerous small rooms designated as "cribs," and resorted to nightly by persons of disrepute, as alleged in the answer and made an issue in the case.

3. SAME—POLICE OFFICERS—AUTHORITY.

Where a court entered from the street by a single entrance was surrounded by certain disorderly houses, together with complainant's restaurant, police officers were entitled to patrol such entrance for the purpose of obtaining evidence against the keepers and frequenters of the houses, to accost persons approaching them, and to take their names, if freely given, and to notify them of the character of the place, etc.; such resorts, and the frequenting thereof being prohibited by Pen. Code, §§ 315, 316, 647, and by San Francisco City Ordinance No. 1587.

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Suit by Jean Pon against George W. Wittman and others. From a decree in favor of complainant, defendants appeal. Reversed.

Davis Louderback and Lewis F. Byington, Dist. Atty., for appellants. George D. Collins, for respondent.

LORIGAN, J. This action was brought to obtain an injunction. The complaint, which was filed February 18, 1903, alleges (in the essential particulars necessary for consideration upon this appeal) that on February 1st of that year plaintiff was, and at the time of filing the complaint continued to be, the owner of a certain public restaurant and cigar stand, dependent for their existence upon public patronage, and situated at No. 1129 Dupont street, in the city and county of San Francisco; that ever since February 1, 1903, the defendants George W. Wittman, chief of police of said city and county, and James T. Donovan, sergeant of police thereof, have had stationed and located upon said premises, where plaintiff's said business is situated, at No. 1129 Dupont street, in relays by day and night, a large number of uniformed police officers, for the purpose of intercepting, intimidating, and preventing, and said officers, at the direction of defendants, have intercepted, intimidated, and prevented, all persons desiring to patronize the business of plaintiff from entering said premises for that purpose, and from patronizing said business; that said defendants threaten to continue to keep said police officers on said premises, and to maintain a blockade thereof, and of said business; that plaintiff has already sustained damages by said acts in the sum of $5,000; and that, if permitted to continue, said acts will entirely destroy said business, to the great and irreparable injury of plaintiff. The prayer of the complaint is that the defendants, and all persons acting under their direction or authority, be perpetually enjoined from entering into or upon, and from interfering with the plaintiff's quiet and peaceable possession and enjoyment of, said premises, and from interfering in any manner not authorized by law with, or intimidating or preventing persons from patronizing, said restaurant and cigar business, and from picketing and blockading the same, by means of police officers or otherwise. The answer denies, among other things, that defendants intercepted, intimidated, and prevented persons from entering said premises, or that they interfered with and intimidated the customers of the plaintiff. As a separate answer it is averred, in effect, that the premises described in plaintiff's complaint, and more particularly 1129 Dupont street, is the entrance to a certain court in the rear of said 1129 Dupont street, and that the said court was on the 1st of December, 1900, and has continuously ever since been, used for the purposes of prostitution, and contains numerous small rooms, designated as "cribs," which are resorted to nightly by many women for the purposes of prostitution; that by reason of the said use of said premises a large number of lewd, vicious, idle, and vagrant characters did assemble, and now assemble, on said premises, and were a constant menace to the peace and quiet of the neighborhood of said premises; that it is absolutely necessary, for the preservation of peace and good order, that constant supervision of the aforesaid premises should be had by the police force of said city and county; and that the acts of these defendants have been done with the object of enforcing certain provisions of the Penal Code of the state, and certain ordinances of the city and county of San Francisco.

Upon the trial the court found, among other things, that the defendants Wittman, as chief of police, and Donovan, as sergeant of police, respectively, did use and employ, under color of their official authority, a large number of uniformed police officers of said city and county, to locate and station themselves upon the said premises where plaintiff's said businesses were situated, to wit, "at No. 1129 Dupont street, in the said city and county of San Francisco, and did there establish and maintain said police officers as pickets against the said premises, and said defendants did then and there by means of said police officers establish and maintain a blockade of said premises, and did intercept, and intimidate, and prevent a large number of persons desiring to patronize plaintiff's said businesses from entering upon said premises for that purpose, and did thereby prevent them from patronizing, and in consequence they did not patronize, the said businesses of plaintiff, and all of said acts were committed by them under color and pretense of their official authority as such police officers, and without right; that none of said acts of the defendants * * * or of said police officers * * * have been committed under, or in obedience to, or in execution of, any order, writ, warrant, or process of any court or judge, or of any authority known to the law, nor under the pretense or color of any such order, writ, warrant, process, or authority, nor in making any arrest of any person on a criminal charge; that the said plaintiff, Jean Pon, was never at any time interested in or concerned in any respect in the business of prostitution, nor in prostitution either upon said premises or elsewhere." Upon its findings the court concludes that the plaintiff is entitled to a writ of injunction, as prayed for in the complaint, perpetually restraining, enjoining, and prohibiting the defendants and all police officers of the said city and county, and all persons acting under the direction and control, or by the order or authority, of the defendants, from entering into or upon, and from in any manner whatever interfering with, or infringing upon, the said plaintiff's quiet and peaceable possession and enjoyment of the said premises, No. 1129 Dupont street, in the city and county of San Francisco, and from in any manner not authorized by law interfering with or intimidating or preventing any person or persons from patronizing the said restaurant business, or the said cigar business of the said plaintiff, and from in any manner whatever impairing or injuring either the said restaurant business or the said cigar business of the said plaintiff, and from in any manner whatever picketing or blockading the said premises No. 1129 Dupont street, either by means of police officers or otherwise, or at all; and from entering upon the said premises No. 1129 Dupont street, or any part thereof, unless in the execution of the order or judgment or writ or warrant or process of some court or judge of competent jurisdiction, particularly describing the place to be searched, or the persons or things to be seized, or unless entry is made upon said premises to arrest a person, or to arrest persons, then engaged in the commission or attempted commission of crime in the presence or view of the police officer or police officers making the arrest, and such crime was attempted, or was then in the course of commission, in the view or presence of such police officer, prior to and at the time of his making the entry upon said premises for said purpose, or unless in making an arrest for treason or felony, or in making an arrest for breach of the peace when committed in the view or presence of such police officer, by means of loud and tumultuous noises, or by boisterous conduct disturbing the public peace. A judgment to this effect was thereafter subsequently entered. The defendants moved for a new trial, specifying, as grounds therefor, insufficiency of the evidence to justify the findings, that the decision of the court was against the evidence, that the court failed to pass upon all the material issues of fact involved in the action and raised by the pleadings, and that the decision of the court is against law.

There is practically no conflict in the evidence in this case. Dupont street is a public street of the city and county of San Francisco, and the premises No. 1129 have their entrance on the west side thereof. These premises, in the absence of a diagram, may be described as located in the general shape of the letter T. The upper horizontal part of the letter represents a large court or area, the entrance to which from Dupont street is represented by the perpendicular portion of the letter. This entrance or passageway, some 50 feet in length and of varying width, opens on the west side of Dupont street, runs back westerly, and at the other end thereof opens into and connects with the court or area, which runs north and south; the said passageway extending from Dupont street thereto. Said passageway is for some distance off of Dupont street a covered area, but is uninclosed overhead as it approaches the main court, which is also open. This passageway was formerly a store, which was changed and altered by removing the front and rear walls, so as to connect it directly with the main court in the rear. Across this passageway, and located about 12 feet inside the entrance from Dupont street, are a pair of swinging doors, swinging outwards and inwards. The bottoms of these doors are about 2 feet from the ground, and the tops several feet from the ceiling. The restaurant and cigar stand of plaintiff, a combined business, is located on the north side or wall of said entrance, to the west thereof, and beyond and further in the said passageway than where the swinging doors are situated. The front door of said restaurant opens from said passageway. The restaurant has no entrance on Dupont street. On the south side of said passageway is located a saloon, No. 1127 Dupont street, with its entrance on that street. Formerly there was a door opening from said saloon into said passageway, and one at the rear thereof, which abuts on the court and opened into it, but both doors had been nailed and effectually closed up. There are buildings fronting all around the said main court, and extending also along Dupont street on the north and south side of said passageway. The only entrance or passageway, and the only means of access to or egress from said premises No. 1129 Dupont street to said court or restaurant or cigar stand is this entrance or passageway from Dupont street. It is the common and only entrance whereby access to the entire premises is obtained. In the court into which this passageway leads from Dupont street, in the buildings fronting thereon, are 33 cribs, each one consisting of a bedroom, with one front door and one front window; and in a two-story house, also fronting on the said court, are six additional cribs, similarly arranged. The cribs on the ground floor are numbered from 1 to 28 inclusive. Those on the second story are designated by letters from A to F, inclusive. These cribs, at the time involved and prior thereto, were occupied by 33 women, who were common prostitutes. All of the said buildings on said court are houses of common prostitution, resorted to for the purpose of prostitution. These premises are not only a place of common prostitution, but a place of unnatural and bestial practices and vices and indecent exposures.

At the time of the trial the premises within the court were occupied by these women under the same conditions and circumstances. The restaurant conducted by plaintiff has in it 2 tables and 11 chairs, with a little cigar stand within the restaurant. As to the patronage of this restaurant, the plaintiff testified that it was patronized by persons from the outside and by the inmates of the houses of prostitution. Whether these persons from the outside were persons who visited the premises No. 1129 solely to obtain their meals at his restaurant and then withdraw, or whether they were persons who visited and patronized his restaurant while visiting inmates of the houses of prostitution, is in doubt from the evidence. However, the regular meals—dinner, supper, and "short orders"—of the inmates of these houses of prostitution were furnished them from his restaurant. They were taken by himself or his employés to their rooms, though some of the inmates came to the restaurant for their meals. The cribs were cleaned out each day by the plaintiff, and he attended to the changing of the bedclothes in the rooms, as it became necessary.

When this action was commenced, February 18, 1903, a restraining order was issued. For a long time prior thereto, police officers had passed through said entrance, both in uniform and in civilian dress, for the purpose of making observations and obtaining evidence of what was going on in these premises. As the result of such observations and the knowledge acquired, arrests were made on different occasions between January 1st and the date of the restraining order. On one of these occasions 23 or 25 women were arrested, on another 4, and at another 1, and all pleaded guilty. The entrance of the officers on the premises at all times was made peaceably and quietly, and without protest or objection. During the period from February 1 to February 19, 1903, two police officers in full uniform were, in relays, stationed by the defendants on the sidewalk, away from, but near, the common entrance and passageway to all these premises, from a quarter to 3 in the afternoon to 2 o'clock in the morning, with directions to ask the names and addresses of parties who intended to enter, and, if they were voluntarily given, to make a note of them. These officers were not to enter upon the premises. The persons whose names were obtained were to be thereafter used as witnesses. Other officers than those stationed near the entrance went in and out of the premises as they saw fit, and large numbers of people were going in and coming out at all times. The stationed officers were not instructed to, nor did they, prevent any one from entering or visiting the premises, nor did they intimidate or coerce any one, or attempt to do so. What was done, was done peaceably and quietly. Some people who were asked their names walked away from the premises. The only testimony that any of these officers, who were asking the names of persons, entered upon the premises, is that of plaintiff, who testified that on two occasions he saw officers entering beyond the swinging doors, and heard them ask persons for their names and addresses. This was all they did. The only evidence that any of the persons accosted by the officers were patrons of the restaurant or cigar store of plaintiff was that two of them were. None of the officers spoke to plaintiff, nor did any of them enter the restaurant or cigar store. This was the full extent to which any "picketing" or "blockading" of the premises was done. At no time was this passageway from Dupont street used exclusively as an approach to the restaurant of plaintiff, but, on the contrary, it was at all times a common passageway between Dupont street and the restaurant, and the house of ill-fame beyond it; a passageway used by the general public at all times.

It further appears in evidence that since 1888 one P. Marsicano has been the owner in fee of the premises No. 1129 Dupont street, consisting of said court where these houses of prostitution are situated and the entrance thereto from Dupont street; that in 1891 he leased said premises, designating them as 1129 Dupont street, to one P. Vincent for a period of four years, and that one George Sellinger succeeded to such leasehold interest, which, under the general designation of 1129 Dupont street, included the court where these houses of prostitution are located, and the passageway was designated to be and is the only approach to the area where these houses of prostitution are. While in the complaint the business of plaintiff is referred to as generally "situated at No. 1129 Dupont Street," and the injunction runs against the appellants to restrain them, not only from interfering with the business of plaintiff, but also "from entering upon the said premises No. 1129 Dupont street," etc., the evidence clearly shows that the premises No. 1129 Dupont street does not consist alone of plaintiff's restaurant and cigar business, but includes the common passageway between Dupont street and these houses of prostitution in the rear, the court in which they are located, and plaintiff's business. They all constitute one premises, under the designation of 1129 Dupont street. There is some evidence of suits brought by Vincent, by Sellinger, and by one Lair against the defendants, similar to this one, for the purpose of enjoining the action of defendants relative to these premises generally. But this evidence attempted to be introduced on the part of appellants is so vague, uncertain, and indefinite that it is of no value in the consideration of this appeal, and no further reference will be made to it. Lair is the owner of the saloon, heretofore referred to, situated on the south of this passageway, and is the one where the entrances therefrom, both into the passageway and into the court, were effectually closed up so as to prevent entry into either from the saloon. It is from him that the plaintiff rents the restaurant and cigar store, but whether Lair is the lessee under the original lease to Vincent or its assignment to Sellinger the evidence fails to disclose. These facts which we have recited are the main facts proven in the case, and with these before us we will approach the consideration of the points made for a reversal on this appeal.

It is a very serious question in this case whether the evidence does not show such a relation between the plaintiff and his business and the existence of these houses of prostitution, and such a material interest on his part in their protection from all efforts toward suppression and abatement upon the part of the police department of the city of San Francisco, as should have precluded the lower court from granting him the injunction prayed for. It could, under the evidence, have been insisted with great force that on account of the peculiar situation of plaintiff's restaurant, and its seclusion from the main public thoroughfare; its location on a passageway within swinging doors, which constituted it, with the court in which these houses of prostitution were situate, one general premises; the fact that it had no direct entrance for public patronage from Dupont street; its meager facilities for the accommodation of patrons; all means of communication with these houses of prostitution closed up save through this common entrance; the only definite and clear evidence of patronage showing that it was derived from inmates of these houses, and the personal duties of the plaintiff relative to these houses—all the circumstances, we say, would have furnished reasonable and satisfactory grounds for holding that this business of plaintiff is, in effect, whether in fact held under separate lease from the other premises and under the exclusive control of the plaintiff, still intimately connected with, directly contributory to, and supported and sustained by, the business of prostitution maintained in the court adjoining it. And while plaintiff insists that he is not interested in said houses of prostitution, yet, under the evidence, this could amount to nothing more than that it shows he has no interest in them as lessee or proprietor, which would make him legally responsible for their existence. His business relations to them, however, were such, and the success of his business was so dependent upon their maintenance there, and he is so directly benefited by their perpetuation, that the good faith of his application in this case might well be questioned, as it might be equally questioned whether he came into court with such clean hands and a clear conscience as entitled him to invoke the equitable powers of the court to interfere by injunction with the execution or enforcement of the criminal laws of the state or the municipality, or to restrain an executive branch of the city, the police department, in an endeavor to discharge their duties. Weiss v. Herlihy, 23 App. Div. 608, 49 N. Y. Supp. 81. This was a matter, however, primarily for determination by the lower court, and, as it did not feel warranted in taking this view of the case, we will discuss this feature no further, preferring to dispose of the appeal upon the merits, and upon considerations which will, to some extent, serve for future guidance.

Among other grounds urged for a reversal, it is insisted by appellants that it was made an issue in the case by them, and the court failed to find, whether the premises, described in plaintiff's complaint generally as No. 1129 Dupont street, was the entrance to that certain court in the rear of the premises No. 1129 Dupont street, and whether said court itself, prior to December 1, 1901, and continuously up to the time when the alleged interference by the police officers occurred, contained houses of prostitution, consisting of numerous small rooms, designated as "cribs," resorted to nightly by many prostitutes for the purpose of prostitution. The court did not find upon this issue, and it should have done so. It was one of the main issues in the case—the crucial issue, from the finding upon which was to be determined whether the conduct of the defendants, complained of by plaintiff, was legal or illegal. Upon this issue the evidence was abundant, and all one way, sustaining the claims of appellants that the entrance to No. 1129 was the common and public entrance, both to the restaurant and the court at the rear thereof, and that said court consisted exclusively of houses of prostitution. Under such a finding, and the evidence which would have justified it, there was nothing in the conduct of the appellants in the case at bar of which the plaintiff could be heard to complain here, or which would have warranted the granting of the injunction. Under the Penal Code of this state, keeping or knowingly letting any tenement for the purposes of prostitution, keeping a house of ill-fame resorted to for the purposes of prostitution or lewdness, or residing therein, are criminal offenses, and every person who lives in or about such houses, and any common prostitute, is a vagrant. Pen. Code, §§ 315, 316, 647. Ordinance No. 1587 of the board of supervisors of the city and county of San Francisco also makes it a public offense to maintain such houses, or become an inmate thereof, or visitor thereto, or in any manner contribute to their support. These laws have for their object the prohibition and suppression of prostitution, and that duty devolves, within the city and county of San Francisco, upon its police department. These houses are common or public nuisances. Their maintenance directly tends to corrupt and debase public morals, to promote vice, and to encourage dissolute and idle habits; and the suppression of nuisances of this character and having this tendency is one of the important duties of government. The suppression of such houses, as evidenced by the stringent laws concerning them, is the public policy of the state, and their abatement is to be accomplished by any reasonable and effective means which the government shall adopt, and which does not involve a breach of the peace or the invasion of private rights.

It would appear from the trend of the argument by counsel for respondent in this case that there is a measure of seclusion about the premises where such houses are located, when they are off the main or public thoroughfare, which would preclude entrance upon them by the officers of the law. But this is not so. Houses of common prostitution are public places. They are places to which all men may resort without invitation, and any house maintained for the indulgence of vice, and to which all may resort day or night for indulgence therein, is a public place, and the approaches which are furnished, and which are generally used in order to reach such places, are public ways. These approaches, be they one or many, are public approaches, to the extent that all who desire to visit these places must take them to enter the premises upon which they are situated. The fact that there may be a swinging door across the passageway does not make the approach the less a public one. It only tends to give an appearance of privacy to the premises, which, as far as the public is concerned, has no existence in fact, and to make the allurement to the vice within more effectual by the apparent seclusion of the premises within which it is practiced. The area within which the 33 cribs in question are located is unquestionably a public place. These cribs face upon the inner court, which is a large area, and within that court there are main and lateral passageways affording public access to all of them, and the passageway thereto from Dupont street, upon which plaintiff's restaurant faces, is the only entrance used by the public to approach these premises. It is the common and exclusive entrance. And, these premises being public, the police officers had the same right to enter upon and traverse the passageways within the main court, and the entrance thereto, as had any other member of the public. In fact, in the enforcement of the law, which was being persistently violated through the existence of these houses of prostitution, these officers had the legal right to be there. It would be preposterous to say that, where the public may freely enter to violate the law, a police officer is excluded from entering to prevent it. He may patrol these passageways to deter by his presence the commission of crime, as he may patrol any other public thoroughfare, and while he does so peaceably and quietly, and in the discharge of his duty, no exception can be taken. He may remain there to make observations, and may make inquiries to obtain evidence. He may ask the names and addresses of those he finds there with that object in view, and, if his presence has the effect of driving visitors away or deterring them from coming, it has a proper and legitimate effect. So, too, he may warn those who are about to enter such places of their character, and the provisions of the ordinance against visiting them. He can be there, either for the purpose of enforcing the law by the apprehension of its violators and securing evidence to punish them, or to prevent infractions of the law by timely warning to those who are disposed to violate it. The maintenance of houses of this character is a continuous offense. They are public nuisances, as localities to which the public are invited to commit crime, and where it is constantly committed, save when the presence of an officer in the locality has a deterrent effect. No public place whose existence is devoted exclusively to vice can claim immunity from the peaceful presence of the officer upon its public passageways and approaches, with a view of suppressing it. This right of surveillance upon the part of the officers as to the premises unquestionably devoted to prostitution applies, not only to the premises themselves, but equally to the public approaches to them, and in the case at bar applied, not only to the premises within the main court, but to the general passageway upon which the plaintiff's restaurant is situated, and which constitutes the public and only thoroughfare for communication between Dupont street and these houses of ill-fame. The police had a right to be anywhere on these common public passageways, and they violated no right of plaintiff in placing themselves near the entrance of Dupont street, or in making the inquiries of persons about to enter thereon, of which plaintiff complains. Their action was aimed solely at these houses of prostitution. Their object was to procure evidence, and their inquiries in that direction were legitimate and proper; and if the presence of these officers, and such inquiries, had the further effect of deterring persons from entering the premises where these houses were situate, this was only a legitimate result. No effort was made to prevent any one from entering upon the public passageway. No intimidation or coercion of any kind was attempted. All were at liberty to go in, if they saw fit. In fact, the evidence shows that persons were going upon this passageway at all times, notwithstanding the presence of the officers and their inquiries. If any did not enter, because they were accosted, it was a matter of their own volition. No one was prevented from entering the restaurant or cigar store of plaintiff. His name or place was not mentioned. If the presence of the officers near the common entrance of these houses of ill-fame and the restaurant of plaintiff, and their inquiries of persons, deterred some of plaintiff's customary patrons from patronizing his business, it was but an incident following the unfortunate location of his business upon the public passageway. If he could complain because the officers were in front of the Dupont street entrance, he could equally complain that they were within the passageway on the other side of his restaurant entrance and near the main court, or at the direct point of entrance into the main court, or within the main court itself. The observation by his patrons of officers constantly at any of these points would probably affect some of his patrons, unduly sensitive to the presence of officers, or justly apprehensive of arrests to be made within the court, and unwilling to be disturbed or annoyed by the excitement which might follow. If his loss of patronage followed under these circumstances, it could hardly be insisted by him that the officers must be prevented from remaining at these points.

But we are satisfied that he could not complain if there were officers at any point upon or near this public thoroughfare. If his business were not located there, no one else could complain. Certainly not the lessors or inmates or habitués of the premises, who then alone would be interested in maintaining this public passageway to the houses of ill-fame free from the presence of the officers. As evil resorts devoted exclusively to the persistent violation of the law, they could claim no immunity from interference by the police, whose duty it is to take all proper means to suppress them. And the presence of plaintiff's business upon such public thoroughfare, particularly under the circumstances of this case, cannot be permitted to interfere with what must be conceded to be the right of the officers to act as they did, but for its presence. If a man sees fit to establish a business which would be otherwise legal within a general inclosure devoted to crime, and which relies in a large measure for its support from the maintenance upon such premises of houses of crime, he must suffer the consequences of his temerity. Particularly is this true when the main business conducted within these general premises is an unlawful business, and the business claimed to be unlawfully conducted is but of small character, and appears to be incident to the main or illegal business and dependent upon it for its support. And if one suffers the premises in his control to be used as a general passageway from a main thoroughfare to houses of prostitution within the general inclosure in which his business is established, or locates his business upon a passageway which is in general use as a means of entrance to his business, or to houses of prostitution situated within a common inclosure, he is, in the first instance, morally, if not legally, responsible as an encourager and promoter of crime, and in either event the location of his business upon such passageway does not entitle him to have a court hamper or restrain by injunction the action of the police authorities, peaceably taken, in their endeavor to suppress houses of ill-fame within such inclosure, and to which this passageway is the sole public entrance.

This is the situation and surroundings of the business of the plaintiff. He has voluntarily located his business upon a common public passageway, the sole means of travel to and from these houses of prostitution; the whole premises constituting one inclosure, the front entrance thereto consisting of the swinging doors. It was not necessary to have had the entrance to his business upon this passageway, except to bring the business exclusively within the general inclosure. He could have had an entrance upon Dupont street, and one certainly more accessible to the public, to whose patronage he claims he principally catered, than as now situated, and which entrance would have relieved him from the injury to his business from the conduct of the officers, of which he complains, and would have left the passageway entirely devoted to communication from Dupont street to the houses of prostitution, against whose existence the efforts of the police were solely directed, and of which efforts, then, no one could complain. The door, however, on Dupont street, formerly used as an entrance to this part of the court where the restaurant is situated, had been closed up. Of course, it was matter of choice with plaintiff whether he should have the entrance to his restaurant in one place rather than the other; but, having fixed it on the public passageway, he made this selection subject to the right of the officers to make the same use of it as the public. The passageway was, notwithstanding his choice, a public one. It remained the common entrance to houses of prostitution, whose existence the police had a right to suppress, which they were taking lawful means to do; and the fact that plaintiff's business was located upon the common entrance to these houses did not affect the right of the officers to pursue, upon this public passageway, the course complained of. The location of his business under the circumstances of this case could not protect this public passageway from entrance thereon by the police, or entitle these houses of prostitution to become inviolate from interference by the police officers, which would be the effect of the injunction granted by the lower court, if it were authorized. For the reasons given, we think it was not.

We have discussed this matter solely with relation to the issues made by the answer (and upon which the court failed to find) concerning the existence of these houses of prostitution, their situation, and the character of the passageway leading from Dupont street to them, and the legal effect which would have to be given to findings thereon in favor of appellants, had they been made in their favor, as the uncontradicted evidence in the case warranted they should have been. And we have confined our consideration of the law solely to the rights of police officers, as exercised upon a common thoroughfare or in public places, in an endeavor to suppress the existence of houses of prostitution. This is all that is materially involved in this appeal. There are other points made, but from the views we have expressed they have now become either unimportant, or are disposed of by the conclusions we have reached.

The judgment and order are reversed.

ANGELLOTTI, J. I concur in the judgment, for the reason that the injunction should have been denied upon the first ground suggested in the opinion, viz., that there can be no doubt under the evidence that the sole object of the application for an injunction in this proceeding was the protection of the houses of prostitution maintained in violation of the laws of the state, and that plaintiff's claim that his cigar and restaurant business, established and maintained by him within the gates of a place otherwise devoted wholly to the open and notorious carrying on of an unlawful occupation, is being injured by the acts of the police, is a mere pretense in furtherance of the object of protecting such unlawful occupation against the officers of the law—a pretense with no other foundation in fact than that his business will be injured by the suppression of the places maintained in violation of law. Under such circumstances, he can have no standing in a court of equity. It would not be claimed that the keepers or inmates of these houses of prostitution could obtain an injunction restraining the doing of acts designed to impede them in accomplishing violations of the penal laws of this state. It needs no citation of authorities to substantiate the elementary proposition that equity will not stretch forth a helping hand for the purpose of aiding one in committing a crime. The plaintiff here stands in no better position than would the keepers and inmates of these houses. He is simply their representative. While avowedly seeking to protect himself in the carrying on of a lawful business, he is in reality simply asking a court of equity to prevent the suppression of places maintained in violation of law. That his business will be injured by the suppression of these places is, of course, no ground of complaint of which a court of equity will take cognizance. It would hardly be claimed that one is entitled to have criminal conduct continued in order that he may profit thereby.

I concur: HENSHAW, J.

BEATTY, C. J. I concur in the judgment upon the grounds stated in the opinion of Justice LORIGAN, and also upon the ground stated in the opinion of Justice ANGELLOTTI.

We concur: SHAW, J.; VAN DYKE, J.

McFARLAND, J. I concur in the judgment of reversal, but not in all that is said in the leading opinion. I particularly think that the opinion sanctions too much power in policemen to stop people indiscriminately on a public street and demand their names; and I also think that other expressions in the opinion upon other questions arising in the case are, perhaps, not sufficiently guarded. I concur in the judgment on the ground stated in the opinion of Mr. Justice ANGELLOTTI, which is, in substance, that under the peculiar facts clearly shown in this case respondent stands upon the same footing as the occupants of the places of prostitution, which are substantially a part of the same premises and within the same inclosure. It will not be contended that the persons there carrying on prostitution could successfully invoke the aid of a court of equity for the remedy here asked by respondent; and, under the facts here appearing, respondent has no greater right than the prostitutes to invoke that remedy. This case is very different from that of a person carrying on a legitimate business in the immediate vicinity of a house of prostitution, but occupying premises entirely different and separate from the former place.

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1 Cal. App. 141

In re CASNER'S ESTATE.

(Court of Appeal, Second District, California. June 7, 1905.)

1. Executors—Accounting—Right of Beneficiaries to Object.

Where a will provided that testator's widow should receive the interest in certain money, other beneficiaries could not object to the executor's account on the ground that it showed that the widow had received less interest than she was entitled to.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2158.]

2. Same—Compound Interest.

There is no ground for charging an executor with compound interest, in the absence of any showing that he received compound interest on any of the moneys of the estate, or was guilty of some misappropriation of the funds or property of the estate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 432.]

3. Same.

Beneficiaries under a will have no standing to object to the executor's account on the ground that they received some part of the estate which should have gone to another beneficiary.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2158.]

4. Contracts—Consideration.

Where a mother deeded land to her daughter and son-in-law in consideration of an agreement to support her for life, a subsequent assignment of her right to receive certain interest under the will of the deceased husband and father in consideration of support for life was without consideration.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Judicial settlement of the accounts of the executor of the will of Martin Casner, deceased. From an order settling the account and directing distribution, certain beneficiaries under the will appeal. Affirmed.

Rehearing denied by Court of Appeal July 7, 1905.

W. R. Andrews, Cassius Carter, and Carter & O'Farrell, for appellants. Hendrick, Wright & Schoonover, for respondent.

GRAY, P. J. This is an appeal from orders and judgments of the superior court settling the executor's account and directing distribution in the above-entitled estate. It is objected, first, that the account does not show whence or how certain items with which the executor charges himself were obtained. As we understand it, about the only material objection to an item charged against the executor in his account that can be made by a person interested in the estate is that the item is not large enough. No objection of this character seems to be urged, and the other objection—as to uncertainty regarding the source of these items—is met by the evidence taken upon the hearing of the account and the findings of the court. The evidence and findings, taken together, satisfactorily explain the source of all those items with which the executor charges himself.

The amounts paid to Jane Casner, or appropriated by her, as stated in the account, were properly accounted for, and no vouchers for the sums received by her were necessary. Jane Casner was the surviving wife of the deceased, and was coexecutrix with her son of decedent's will. She was also a beneficiary under the will, and by the terms thereof she was entitled to all the money appropriated by her. The will provided that the money of decedent loaned out was to be kept loaned out, and the surviving wife was to receive the interest as fast as it accrued. Under this provision of the will the executor was fully warranted in paying this interest to his mother as fast as it accrued, because it belonged to her from the beginning, and the contestants, who are other beneficiaries under the will, had no interest in it whatever. It is not contended that Jane Casner received anything out of the estate except this interest. Nor is it a material objection to the account that it shows that Jane Casner received less of this interest than she was entitled to. That, again, is no affair of the other beneficiaries, and does not tend to show that the executor has failed to account for anything in which the contestants here have any interest.

The fee of $100 allowed attorneys for preparation of account and for services in connection with the distribution of the estate was reasonable and proper, and appellants have no just cause for complaint thereat.

We can see no just ground for charging the executor with compound interest, in the absence of any showing that he received compound interest on any of the moneys of the estate, or was guilty of some misappropriation of the funds or other property of the estate. Besides, as we have already seen, all the interest, compound or simple, belonged to Jane Casner, and her legal representatives are the only persons that can be heard to complain as to the disposition of such interest. The appellants here have no commission to represent the deceased, Jane Casner, and the decree of the court below will not be disturbed unless the appellants show that their interests in the estate have suffered in some way by reason of the findings or decree of the court. Neither Jane Casner nor her legal representatives are before the court on this appeal. Neither can the appellants here be heard to complain because they received some part of the estate that should have gone to Jane Casner or her legal representatives.

There was evidence tending to show that the assignment of her "claim to interest money" from Jane Casner to appellants was procured by undue influence and without consideration. It was for the trial judge to determine the weight and value of this evidence; and we see no good reason for interfering with his conclusions in the premises, and can see no error in his rejecting the offered assignment as evidence. The consideration recited for this assignment of right to "interest money" in the estate of her deceased husband by Jane Casner was that she should be supported thereafter by the assignees. Those same assignees had, some years before this, accepted a deed, and gone into possession of certain land from Jane Casner. One of the conditions of this deed, and part of the consideration therefor, was that Jane Casner should live in the family of said assignees (who were her daughter and son-in-law), and should be supported out of said land during her "natural life." Support which they were already bound to give her could hardly form a consideration for the further assignment of property by Jane Casner to the appellants.

Many other reasons are urged or hinted at in appellants' brief for the reversal of the orders and judgments of the court. We have carefully examined them all, and deem them not of sufficient importance to require special discussion.

The orders and judgments appealed from are affirmed.

We concur: SMITH, J.; ALLEN, J.

1 Cal. App. 136

GREENE v. MURDOCK.

(Court of Appeal, Third District, California. June 6, 1905.)

1. Slander—Words Slanderous Per Se—Criminal Charge.

Under Pen. Code, § 618, declaring every person who "willfully" opens or reads any sealed letter, not addressed to himself, without being authorized so to do, guilty of a misdemeanor, a statement falsely charging plaintiff with having opened and read a letter addressed to defendant, without charging the same to have been willfully done, does not charge plaintiff with a crime, and is not slanderous per se.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 39.]

2. Appeal—Harmless Error—Error in Instructions.

Erroneous instructions were not prejudicial to plaintiff where, under the pleadings and evidence, he was not entitled to a verdict, but should have been nonsuited.

Appeal from Superior Court, Lake County; R. W. Crump, Judge.

Action by W. W. Greene against G. G. Murdock. From an order denying a motion for a new trial after verdict for plaintiff, defendant appeals. Affirmed.

T. J. Sheridan and Thomas B. Bond, for appellant. Crawford & Crawford and M. S. Sayre, for respondent.

BUCKLES, J. This was an action for slander. The case was tried with a jury. At the trial the plaintiff called and examined the defendant as to his property and rested. Defendant moved a nonsuit, which was denied. The defendant then produced witnesses who gave testimony tending to prove the defense of justification pleaded in his answer, and testimony also in mitigation of damages, and to disprove malice on the part of defendant in uttering the words complained of, and rested. Plaintiff, in rebuttal, then produced witnesses who gave testimony tending to disprove the defense of justification pleaded in the answer. The case was then submitted to the jury, and the jury found a verdict for the defendant, and the court rendered judgment for the defendant for his costs, to wit, $268.81. A motion was made for a new trial, which motion was denied.

Appeal is taken from the judgment and the order denying a new trial. Briefly, the complaint charges that defendant accused plaintiff of opening a sealed letter from Richard Bayne, his attorney, to his damage in the sum of $5,000. The charge is as follows, to wit: "The plaintiff is informed and believes that on or about the 15th day of December, A. D. 1900, at the residence of the defendant aforesaid, in the county of Lake, the defendant, in a certain discourse which he then and there had, addressing the said Frank Greene, and in the presence and hearing of the said Frank A. Greene and the said Andrew Jones and the said Zeno Jones, falsely, slanderously, and maliciously spoke, published, and uttered of and concerning the plaintiff the false, slanderous, and malicious words following: 'Your father (meaning the plaintiff) damaged me hundreds of dollars. Your father (meaning plaintiff) opened a letter of mine of great importance to me from my attorney, Mr. Bayne, of San Francisco (meaning the said Richard Bayne, Esq.);' and the defendant meant by such words, and desired and intended to be understood to mean by them, and was in fact by the said Frank A. Greene and Andrew Jones and Zeno Jones understood to mean by them, that this plaintiff willfully and unlawfully opened and read a sealed letter not addressed to himself, without being authorized so to do either by the writer of such a letter or by the person to whom it was addressed, and he did so with the design to pry into the business and secrets of defendant, and did secrete, embezzle, and destroy the said letter." The answer admits the defendant uttered the words complained of, "but denies that said words, or any of them, were false, slanderous, or malicious, or that they, or any of them, were falsely, slanderously, or maliciously spoken, published, or uttered, but avers upon his information and belief that said words were and are true." The answer also denied all other material allegations of the complaint. The appellant contends that the words spoken were actionable per se, or at least made so by the admissions in the answer. In this state the law does not make the mere opening and reading of a sealed letter of another a crime. See section 618, Pen. Code. It must have been willfully done; and to simply say, "You opened and read a letter addressed to me," is not charging or imputing to such person a crime. To open and read a sealed letter of another is a crime when done without authority and willfully. It is not alleged that defendant charged plaintiff with willfully opening a letter, and therefore the words spoken, standing alone, are not actionable as imputing to the plaintiff a crime. Plaintiff evidently took this view of the question when he drew his complaint, for he alleges that the words were actionable, and the defendant meant by the words spoken that he (plaintiff) had willfully and unlawfully opened and read a sealed letter addressed to himself without having been authorized to do so by either the writer or by the one addressed, and that he did so with the design to pry into the business and secrets of defendant, and that it was so understood by the persons who heard the words spoken. Nidever v. Hall, 67 Cal. 79, 7 Pac. 136. The nonsuit should have been granted. As has been seen, the words spoken were not actionable per se. Any other verdict than the one rendered would have been clearly against law, being without evidence to warrant it.

It is said in Green v. Ophir C. S. & G. M. Co., 45 Cal. 527 (522): "And it is the settled rule of this court not to reverse judgments for errors in instructions when it is apparent that the verdict would have been the same with correct instructions." If the instructions given were erroneous—and some of them were—the appellant was not injured thereby, because under the pleadings and the evidence he was not entitled to a verdict. "Where the court lays down an erroneous principle of law, but it appears that nevertheless the verdict of the jury is necessarily correct upon the evidençe before them, or where, as in this case, a new trial should have been granted if the jury had not returned the special verdict, the error is harmless." Hughes v. Wheeler, 76 Cal. 233, 18 Pac. 386; Robinson v. W. P. R. R., 48 Cal. 424; In re Spencer, 96 Cal. 450, 31 Pac. 453; In re Briswalter, 72 Cal. 109, 13 Pac. 164; Edwards v. Wagner, 121 Cal. 378, 53 Pac. 821; Mitchell v. Donohue, 100 Cal. 211, 34 Pac. 614, 38 Am. St. Rep. 279.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

7 Cal. Unrep. 217

HARRISON, Judge, v. COLGAN, State Controller. (S. F. 4,375.)

(Supreme Court of California. July 21, 1905.)

1. Courts—Justices of the District Courts of Appeal—Salary—Jurisdiction.

The Supreme Court is the only tribunal empowered to determine the amount of the salary of the justices of the District Court of Appeals.

2. Salary of Justices of Supreme Court—Amendatory Act—Effect.

St. 1905, p. 224, c. 249, amending a statute fixing the salary of the justices of the Supreme Court at $6,000 a year, by providing that the annual salary of each justice of the Supreme Court shall be $8,000, and the annual salary of each justice of the District Courts of Appeal $7,000, has no application to any justice of the Supreme Court in office at the time of the adoption of the amendment; but such justices during their term are entitled only to the salary fixed by the earlier statute.

In Bank. Petition for a writ of mandamus by Ralph C. Harrison against E. P. Colgan, to compel respondent, as State Controller, to draw his warrant on the state treasury in favor of petitioner. Alternative writ issued.

Charles W. Slack, for petitioner.

PER CURIAM. While in form this is an application by Ralph C. Harrison, Presiding Justice of the District Court of Appeals for the First Judicial District, for a writ of mandate to the Controller, requiring him to draw his warrant upon the state treasury in favor of the petitioner for the sum of $666.66, in effect it is an effort by all of the justices of the District Courts of Appeal to have determined the amount of salary which they are entitled to draw. This tribunal is the only tribunal under the law to which they can appeal for the determination of this question. The statute under which it is contended that they are entitled to their salary reads as follows: "The annual salary of each justice of the Supreme Court is $8,000, and the annual salary of each justice of the several District Courts of Appeal is $7,000." St. 1905, p. 224, c. 249. This statute is an amendment to the earlier provision of the law which declared: "The annual salary of each justice of the Supreme Court is $6,000 a year." Our conviction is absolutely fixed that the amendment above quoted has no application to any justice of this Supreme Court now in office, during the term for which he has been elected, and that the salary of each of such justices is, and must continue to be, in the absence of a constitutional amendment, during his term of office, the sum of $6,000 a year. With this expression of our conviction upon this subject, in view of the fact that this is the only tribunal to which the District Courts of Appeal can turn, we believe an alternative writ should be granted for the hearing and determination of such other questions as may be presented.

Let the alternative writ issue as prayed for, returnable before this court on Monday, September 4, 1905, at 10 o'clock a. m.

McFARLAND, J. I concur in the order directing an alternative writ to issue; but I think that all of the questions involved in the petition for the writ should be left open until after full argument on the final hearing.

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147 Cal. 343

In re ALDRICH'S ESTATE. (L. A. 1,613.)

(Supreme Court of California. July 21, 1905.)

1. ADMINISTRATORS — APPOINTMENT — PROCEEDINGS—ORDER—CONCLUSIVENESS.

Where letters of administration were issued on the written request and nomination of one whom the administrator alleged to be the surviving wife of the deceased, and after notice and hearing as provided by statute, on a finding that the nominee was the only surviving wife of the deceased and that she had duly requested the appointment of the applicant, such order was conclusive against the subsequent application of another, alleging that she was the surviving wife of the intestate.

2. SAME—STATUTES.

Code Civ. Proc. § 1383, providing that when letters have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of such persons may obtain the revocation of such letters and be entitled to the administration, deals only with classes respectively given statutory priority, and does not entitle one claiming to be decedent's widow to the revocation of letters granted on the nomination of another, alleged and found to be decedent's widow after due notice and hearing.

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Application by Sarah Olive Aldrich for the revocation of letters on the estate of Ellerton W. Aldrich, deceased, issued to W. S. Allen, and for the issuance of letters to her. From an order denying the application, petitioner appeals. Affirmed.

Powers & Holland, Works, Lee & Works, Elizabeth L. Kinney, John D. Pope, and William H. Livingood, for appellant. Henry J. Stevens, for respondent. Leon F. Moss, for public administrator.

McFARLAND, J. Letters of administration in the above estate were issued to W. S. Allen on the nomination of Lenora Aldrich, who claimed to be the surviving wife of the deceased. Several months afterwards Sarah Olive Aldrich, also claiming to be the surviving wife of the deceased, filed a petition asking that the letters of administration to Allen be revoked and that letters issue to her. The court below denied this petition, and from the order denying it, and from an order denying her motion for a new trial, the said Sarah Olive Aldrich appeals.

Many questions are raised in the case, which we do not consider it necessary to discuss, because, in our opinion, the first order of the probate court appointing Allen administrator was final and conclusive as to the right to the administration of the estate. An order appointing an administrator is a proceeding in rem, and binds all persons, except where statutory requirements as to notices, etc., have not been complied with, and except as to persons who are expressly excepted by statute from the conclusiveness of the order. In the case at bar Allen based his petition for letters on the written request and nomination of Lenora Aldrich, whom he alleged to be the surviving wife of the deceased. The public administrator also filed a petition to be appointed administrator of said estate. Both petitions were heard at the same time, and notice of the hearing, as provided by the statute, was duly given, and all of the provisions of the statute touching the matter of the appointment of an administrator were complied with. The court found that said Lenora was the only surviving wife of the deceased, and that she had duly requested the appointment of Allen, and ordered and decreed that letters issue to said Allen. This order was made October 17, 1902. The petition of the appellant for the revocation of the letters to Allen was filed February 20, 1903.

Appellant asserts her right to revoke the letters to Allen under section 1383, Code Civ. Proc., which provides that when letters have been granted "to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate," any one of such persons may obtain the revocation of the letters and be entitled to the administration. But this section evidently deals with classes of persons who are given, respectively, statutory priority in their rights to letters of administration. It does not allow the former decree to be reviewed or assailed, but merely permits it to be superseded by a person of another and superior class. It refers to a case where letters have been granted to one not claiming, or having been adjudicated, to be one of the persons mentioned in section 1383, as, for instance, where the public administrator, or a creditor, or some other person legally competent, but not enumerated in said section, has been appointed. It does not embrace a case where the one appointed had applied as one of the persons enumerated in the said section, and had been adjudicated by the court to be the surviving husband or wife, or one of the other persons enumerated therein. The decree appointing Allen is conclusive as to the things therein adjudicated, one of which was that Lenora was the surviving wife. The fact that appellant did not personally appear in the proceeding which resulted in the appointment of Allen, or had not actual notice of such proceeding, makes no difference. In proceedings in rem no notice is necessary, except such notice as the statute expressly prescribes. We hold, therefore, that the appointment of Allen conclusively determined that Lenora was the surviving wife, so far, at least, as the question of the right of administration as between her and the appellant is involved; and the right to letters of administration is the only one arising in this appeal.

The judgment and orders appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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147 Cal. 351

WADMAN et al. v. BURKE et al. (S. F. 2,935.)

(Supreme Court of California. July 25, 1905.)

1. Appeal—Order Denying New Trial—Review.

Where an appeal is only taken from an order denying a motion for a new trial, and not from the judgment, the sufficiency of the complaint or findings to support the judgment or conclusions of law cannot be reviewed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3476, 3480.]

2. Landlord and Tenant—Leases—Renewal—Trade Fixtures—Removal.

A lease for five years contained a covenant for renewal for the further term of five years at an advanced rental. Before the lease was renewed, however, plaintiff's testatrix, a grantee of the premises, agreed with defendant to renew the lease for five years at the same rent, to prevent defendant moving out and removing trade fixtures, which had been annexed to the freehold, whereupon defendant executed a new lease, containing no reservation of the fixtures and providing that he should keep the premises in repair and at the expiration of the term surrender the premises in as good condition as reasonable wear and tear would permit. *Held* that, on termination of the second lease, defendant was not entitled to remove such fixtures.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, §§ 23-29.]

Shaw and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Mary Ellen Wadman and others, as executrices of the estate of Ellen Kelly, deceased, against W. J. Burke and others. From an order denying defendants' motion for a new trial, they appeal. Affirmed.

J. D. Sullivan and Herbert Choynski (C. E. Nougues, of counsel), for appellants. William B. Bosley and John S. Drum, for respondents.

VAN DYKE, J. This is an appeal from an order denying defendants' motion for a new trial. The action was instituted April 28, 1897, to obtain an injunction restraining the defendants from selling and removing certain saloon fixtures from a building belonging to the estate of the plaintiffs' testatrix. On the 26th of March, 1888, defendant Burke leased from Lawrence Kelly, then the owner, the premises at the northeast corner of Valencia and Twenty-Sixth streets, in the city and county of San Francisco, for the term of five years from the 1st day of September following, at the monthly rental of $75 per month, payable in advance on the 1st day of each and every month during said term. Said lease also contained a covenant for the renewal for the further term of five years at the monthly rental of $100 per month. Before the expiration of the term created by this lease said Lawrence Kelly granted and transferred the premises described therein to Ellen Kelly, the testatrix of these plaintiffs. The court found that after the said defendant Burke was let into possession of the premises in question under and in pursuance of said lease, and during the autumn of 1888, he caused to be permanently and securely attached, annexed, and affixed to said building, by physical connection, certain doors, front and back bars, and lunch counters, glass cupboards, chandeliers, and gas fixtures, etc. Shortly before the expiration of this lease negotiations were entered into between him and the then owner of the said premises, Ellen Kelly, for a new lease for the term of five years from September 1, 1893, at the monthly rental of $75 per month. This new lease, however, was not executed until November 1, 1893, although the possession of said Burke was not interrupted. Ellen Kelly died testate June 21, 1896, and thereafter, March 1, 1897, plaintiffs were appointed executrices of her will. There being no appeal from the judgment—which was entered some four years before the appeal from the order denying defendants' motion for a new trial was taken—the sufficiency of the complaint or findings to support the judgment or conclusions of law cannot be considered. The only question demanding consideration on this appeal is whether the evidence is sufficient to support the findings.

The appellants contend that the articles in controversy were affixed for the purposes of trade; that is to say, were trade fixtures, and were removable by the tenant, Burke, as belonging to him. The reply of respondents to this is that, conceding them to be trade fixtures, they must be removed before the expiration of the lease during the term of which the fixtures were annexed to the freehold. The evidence shows and the courts finds that these fixtures were put in, or annexed to the building in question, before the expiration of the first lease, and it would seem that the matter of the fixtures was in the minds of the parties to the second lease at the time it was entered into. The defendant Burke, in his testimony in reference to the negotiations with Mrs. Kelly, says: "She said she would consider the matter, and after a time said to me, 'So far as I am concerned, you are a very good tenant, and I have not anything to object to in you;' and she said, 'in order to have you not leave and move the fixtures out, you can stay there at the old rental, $75 a month.' And thereupon we entered into the lease set forth in paragraph 4 of plaintiffs' complaint." The fact that defendant Burke did not exercise his right under the old lease of having a renewal at the rental of $100 per month, with the privilege of removing his fixtures, but entered into the lease under consideration at the reduced rate of $75 per month, without any reservation whatever of the right to remove the fixtures, would seem to show that the rent was reduced in view of having the fixtures remain as a part of the premises. Unless there is some understanding, express or implied, between the lessor and the lessee in the second lease, at the time it was executed, as to the fixtures, the rule of law is, as contended by the respondents, that the tenant, entitled to remove trade fixtures, must avail himself of that right before the expiration of the term of the lease during which they are affixed. In Watriss v. Nat. Bank, 124 Mass. 571, 26 Am. Rep. 694, the court says: "When the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term, and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition, this is not the extension of or holding over under an existing lease. It is the creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate, and the fixtures annexed, which have become part of it." This case is cited with approval in Marks v. Ryan, 63 Cal. 107. In Marks v. Ryan this court, after referring to the cases of Merritt v. Judd, 14 Cal. 60, and Jungerman v. Bovee, 19 Cal. 355, said: "According to the doctrine of those cases, upon the execution of a new lease, the lessee 'is in the same situation as if the landlord, being seised of the land, had leased both land and fixtures to him.' In that case we do not think that any one would claim that the lessee could remove the buildings, or that they were not fixtures annexed to the land."

Under the evidence and findings of the court the fixtures attached by the lessee to the leasehold property became a part of the realty, and remain so until severed. San Francisco Breweries v. Schurtz, 104 Cal. 427, 38 Pac. 92; Commercial Bank v. Pritchard, 126 Cal. 605, 59 Pac. 130, and cases there cited; Civ. Code, §§ 658, 660. At the time the said lease between Ellen Kelly and defendant Burke was entered into, the fixtures sought to be removed in this case, and to prevent which the injunction was granted, were part of the realty, and when Burke accepted said lease, as lessee, he covenanted to "well and sufficiently keep in repair the said premises, with their appurtenances, when and as often as the same shall require, damages by fire alone excepted, and that at the expiration of said term the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit [damages by the elements excepted]." And the lease, as already stated, contained no covenant or agreement permitting the lessee to sever and remove the fixtures from said premises.

The order appealed from is affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; HENSHAW, J.; ANGELLOTTI, J.

SHAW, J. I dissent. I think, in substance, the new contract was a renewal of the old lease, and was so understood and intended.

LORIGAN, J. I concur in the dissent of Justice SHAW, for the reason given by him.

147 Cal. 355

GREY v. BRENNAN et al. (S. F. 4,358.)

(Supreme Court of California. July 27, 1905.)

1. APPEAL — INTERLOCUTORY ORDERS — ACCOUNTING.

In an action to recover certain money deposited with defendants under fraudulent representations with reference to medical services to be performed by defendant, payment for which was to be deducted from the deposit, an interlocutory decree sustaining the allegations of fraud and directing an accounting was not appealable, under Code Civ. Proc. § 963, authorizing an appeal from an interlocutory order or decree for an accounting in an action to redeem real or personal property from a mortgage or other lien.

2. SAME—MOTION TO DISMISS.

Where a motion to dismiss an appeal is made on the ground that the order appealed from is not appealable, the court in its discretion will consider the motion, though it requires an examination of the record.

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by P. J. Grey against Thomas F. Brennan and others. From an interlocutory decree for an accounting, defendants appeal. On motion to dismiss. Motion granted.

William M. Cannon, for appellants. M. C. Hassett, for respondent.

BEATTY, C. J. This is a motion by the plaintiff to dismiss an appeal taken by the defendant from an interlocutory decree for an accounting, upon the ground that such decree is not appealable. It is alleged in the complaint that the defendant, while acting as attendant physician of the plaintiff, by various false representations, and by abuse of the confidence reposed in him, induced the plaintiff to place in his hands a large sum of money for the purpose of safe-keeping, and upon a promise that he would deposit the money in plaintiff's name; that in violation of his promise he made the deposit in his own name, and afterwards withdrew the money, and conceals the disposition he has made of it; that he is without means, etc. The answer of the defendant denies all the allegations of misrepresentation, and alleges that the plaintiff by an instrument in writing had sold, assigned, transferred, and set over to him said sum of money, whereby he became the owner of the same in his individual right, free and clear of any claim thereon by plaintiff. Upon these issues the case came to trial, and the evidence on the part of the plaintiff, relating to the allegations of fraud, was heard. When the plaintiff offered evidence touching the disposition of the money, the defendant objected to proceeding with the accounting until his evidence in rebuttal of the allegations of fraud should be first heard, and until it should first be determined whether the plaintiff was entitled to an accounting. The judge of the superior court sustained this objection, and heard the defendant's evidence on the issue of fraud, which he found against him, and thereupon made and entered the following interlocutory decree: "It is ordered that the defendant Thomas F. Brennan holds the money in controversy in this action, amounting to the sum of $37,524.13, in trust for the plaintiff, subject to the restoration by the plaintiff to the defendant of the reasonable value of the medical, surgical, and other services rendered by the defendant to the plaintiff since the 13th day of September, A. D. 1899, and for all reasonable expenses and disbursements incurred by defendant for and on behalf of the plaintiff from and after the 13th day of September, 1899. And it is further ordered that from the amount to be restored to the defendant, as aforesaid, there be deducted therefrom any other sums of money which the defendant may have received from the plaintiff from and after the 13th day of September, A. D. 1899. Ordered, further, that an account be taken and testimony heard before this court to determine the amount of said expenses and disbursements, and the reasonable value of said services and the amount of any other moneys so received by the said defendant from the plaintiff, and that said defendant account for the same, and exhibit and show to this court what disposition he has made of said sum of $37,524.13, and each and every part thereof."

The only basis for that part of the decree subjecting the trust fund to the claim of defendant for medical, surgical, and other services, and for expenses and disbursements, is a finding that medical and surgical services were rendered, and that defendant attended to some business for plaintiff. The question is whether this decree is appealable. It is not a final decree, and is not appealable unless it is one of those interlocutory orders or decrees which are made appealable by the statute. Code Civ. Proc. § 963. Appellant contends that it is covered by that provision of the section which authorizes an appeal from an interlocutory order or decree for an accounting in an action to redeem real or personal property from a mortgage or other lien. We do not think the case comes within that provision. Judged by the pleadings, the action is not one to redeem property from a lien. There is nothing in the complaint or answer indicating the existence of a lien in favor of defendant upon the money in his hands. He has no lien for his professional services or for other services in matters disconnected with the trust, and, as an involuntary trustee of money found to have been wrongfully obtained by undue influence and abuse of confidence, he can have no right to compensation for his services as trustee, and it is difficult to imagine how he can have made any legitimate disbursements on account of the mere custody of a sum of money entrusted to him for safe-keeping. There is, in short, neither allegation nor finding of the existence of any claim for which defendant has a lien, and the provision in the decree upon which appellant relies shows nothing more than this: that the judge of the superior court thought that it would be equitable to allow the defendant to set off the value of his professional and other services, as well as any disbursements he may have made in a legitimate way for the benefit of plaintiff, against the $37,524.13 with which he is charged. The decree allows a set-off. It does not establish a lien.

Objection is made to consideration of the motion to dismiss on the ground that it requires an examination of the record, and that it is not the practice of the court to look into the record for the purpose of determining motions to dismiss. This is an objection which the court, in the exercise of its discretion, sometimes makes to the consideration of a motion to dismiss, where a determination of the motion practically involves the merits of the appeal; but where the motion is made upon the ground that an order is not appealable, the order itself and the pleadings—as in this case—are all that ordinarily require to be considered in disposing of the motion. Here we think the motion ought to be considered and promptly decided, for the reason that the pendency of the appeal necessarily delays an accounting, which by delay may cease to be a remedy for the wrong complained of.

The appeal is dismissed. Remittitur forthwith.

We concur: ANGELLOTTI, J.; SHAW, J.; VAN DYKE, J.; McFARLAND, J.; LORIGAN, J.

1 Cal. App. 159

HILL v. McCOY.

(Court of Appeal, Third District, California. June 10, 1905.)

1. Contracts — Pleading—Legal Effect — In Hæc Verba.

In an action on a contract, plaintiff may declare on it either by pleading its legal effect, or in hæc verba.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1652; vol. 39, Cent. Dig. Pleading, § 54.]

2. Same—Pleading—In Hæc Verba.

To enable one to plead a contract in hæc verba, the instrument must show on its face all the facts which it would have been necessary to allege in pleading the legal effect.

3. Statute of Frauds—Memorandum—Sufficiency.

A writing, "I hereby authorize H., as broker, to bargain for the sale of 47 acres (known as the Abbey ranch) * * * valued at $10,000—for which I agree to pay H. 5 per cent. on the above mentioned sum or any less amount I may accept," was sufficient as a note or memorandum under the Statute of Frauds, Civ. Code, § 1624, subd. 6.

4. Contract—Pleading—Variance.

Where a complaint in an action by a broker to recover commissions set out in hæc verba the written contract, which spoke of the land as the "Abbey Ranch," the fact that the complaint showed where the land was situated did not create a variance between the contract set out and the one pleaded, in its legal effect.

5. Same—Construction — Parol Explanation.

Where a contract for the sale of land referred to it as the "Abbey Ranch," parol evidence was admissible to identify it, Code Civ. Proc. § 1860, providing that in construing an instrument the situation of the subject of the instrument may be shown.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2117.]

6. Appeal—Witnesses—Harmless Error.

Any error in sustaining objections to questions to a witness was cured by the witness subsequently testifying to the matters so sought to be brought out.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4201.]

7. Brokers—Right to Compensation.

The commission of a broker is earned by finding a sufficient purchaser ready and willing to enter into a valid contract on the terms fixed by the owner, and, having introduced such a one to the owner, the broker is not deprived of his right to commissions by direct negotiations between the parties.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 86, 89.]

8. Same—Right to Commissions.

Where a broker's authorization to sell land was in force when the sale took place, his rights were not affected by the fact that the deed did not pass until later.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 68.]

9. Same—Service of Broker—Evidence.

In an action by a broker to recover commissions for finding a purchaser for defendant's land, *held*, that the evidence warranted a finding that the sale was effected through the broker as the procuring cause.

Appeal from Superior Court, Sonoma County; S. K. Dougherty, Judge.

Action by R. Hill against C. L. McCoy. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. T. Carey, for appellant. C. F. Lee, for respondent.

CHIPMAN, P. J. Plaintiff brought the action to recover commission as broker for the sale of defendant's land. The cause was tried by the court without a jury, and plaintiff had judgment, from which defendant appeals on bill of exceptions.

The court found: That plaintiff and defendant on September 22, 1900, entered into a contract by which plaintiff was "authorized to and agreed to act as broker to bargain for and procure a purchaser for 47 acres of land with the improvements thereon at that time owned by said defendant," known as the "Abbey Ranch"; that it was further agreed "that if said ranch was sold to a purchaser procured by said Hill [plaintiff], or through his agency, that said defendant would pay to said plaintiff 5 per cent. on $10,000, or any less amount that said defendant might accept for said ranch"; that "at the time said contract was entered into a memorandum thereof, in writing, was made and executed and subscribed by said defendant, the party to be charged thereby, and delivered to the plaintiff by him, * * * as follows, to wit: 'I hereby authorize R.

Hill of Windsor, Cal., as broker, to bargain for the sale of 47 acres (known as the Abbey ranch) with the improvements thereon—valued at $10,000—for which service I agree to pay to said Hill 5 per cent. on the above mentioned sum or any less amount I may accept for said ranch. Provided said ranch is sold to a purchaser procured by said Hill or through his agency. Sept. 22nd, 1900. C. L. McCoy;'" that "in pursuance of said contract and agreement plaintiff procured a purchaser, John Fopiana, who purchased said ranch from defendant" at the price of $7,500, accepted by defendant, and to said Fopiana a good and sufficient deed was made by defendant November 22, 1900, and possession delivered. As conclusion of law, the court found that plaintiff was entitled to judgment for $375, "commission for the sale of said ranch and improvements thereon," and interest from November 22, 1900, and judgment passed accordingly.

1. Defendant demurred generally to the complaint, and also specifically, alleging ambiguity and uncertainty, because, as is claimed, the contract pleaded, in its legal effect, is at variance with and is different from the contract set out in hæc verba. It is claimed that the demurrer should have been sustained. It is permissible to declare on a contract either by pleading its legal effect or in hæc verba (Stoddard v. Treadwell, 26 Cal. 294), and where the contract is in writing, the latter is regarded as the better mode. "But," as was pointed out in Joseph v. Holt, 37 Cal. 250, "to enable the pleader to adopt this latter mode, the instrument which is thus adopted as a part of the complaint must show upon its face in direct terms, and not by implication, all the facts which the pleader would have to allege under the former mode of pleading by averment. For example, a note or memorandum in writing of a contract may be sufficient to take it out of the statute of frauds, but prove insufficient as a pleading when put to use for that purpose." In the present case we think the contract signed by defendant was sufficient as a "note or memorandum thereof," under subdivision 6, § 1624, of the Civil Code, and was valid within the meaning of the section; but it failed to state with fullness and precision sufficient to permit its use alone as a pleading, and hence it became necessary, and it was entirely within the rules of pleading, to set forth, in aid of the memorandum, the facts essential to make the pleading complete. The complaint does not set forth facts at variance with the memorandum, nor does it set forth more than one cause of action, nor is it ambiguous or uncertain. In stating where the so-called "Abbey Ranch" is situated, where the memorandum failed to do so, the pleader merely supplied a fact which it was competent to prove at the trial. Where the contract is set out, if it is uncertain, "the pleader must put some definite construction on it by averment." Durkee v. Cota, 74 Cal. 313, 16 Pac. 5; Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327. The only material fact set out in the complaint and not substantially appearing in the memorandum is the fact as to the location of the land with a view to identification. We do not think the complaint was obnoxious to the objections raised by the demurrer.

2. Against the objection of defendant, the land in question was identified and proved at the trial as the land referred to in the contract. From what has already been said it would follow that proof by parol to identify the land referred to as the "Abbey Ranch" was permissible. Such proof is always allowed for the purpose of identifying land described as in the contract before us. Section 1860, Code Civ. Proc. It is sufficient to describe the land by its general designation, as "The Norris Ranch" (section 1092, Civ. Code), in a grant deed; and, undoubtedly, parol evidence is admissible to show what ranch is meant by such a designation. In Toomy v. Dunphy, 86 Cal. 639, 25 Pac. 130, it was held that where the contract was silent as to the commission to be paid or the character of the services precisely stated, they could be shown by parol; and in Preble v. Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. Rep. 301, evidence was admitted to show what land was meant by the phrase "forty acres of the eighty-acre tract at Biggs." See Pomeroy on Contracts, § 227, note; Reamer v. Nesmith, 34 Cal. 624.

Upon his cross-examination as a witness plaintiff was asked certain questions to which plaintiff's objections were sustained. If there was error, it was cured by the fact that the witness testified thereafter fully to the matters thus sought to be brought out.

3. It is urged that the evidence is insufficient to support the findings. We do not feel called upon to recite the evidence tending to show to what extent plaintiff was instrumental in effecting a sale of the property to Fopiana, or that it was "sold to a purchaser procured by said Hill, or through his agency," as the agreement provides. He was authorized "to bargain for the sale of 47 acres" of the Abbey Ranch, and, if sold to a purchaser procured by him or through his efforts, he earned his commission. We think there is sufficient evidence to support the findings upon these provisions of the agreement. The rule laid down in Dolan v. Scanlan, 57 Cal. 261, has been frequently referred to with approval, and expresses the true rule as we understand it, namely: "The commission of a broker is earned by finding a sufficient purchaser ready and willing to enter into a valid contract for the purchase upon the terms fixed by the owner, and, having introduced such a one to the owner as a purchaser, he is not deprived of his right to a commission by the owner negotiating the contract himself." See the rule considered in Phelan v. Gardner, 43 Cal. 306; Oul-

lahan v. Baldwin, 100 Cal. 648, 35 Pac. 310; Crawford v. Stone Pipe Works, 83 Cal. 629, 24 Pac. 836; Ayres v. Thomas, 116 Cal. 140, 47 Pac. 1013; Gregory v. Bonney, 135 Cal. 589, 67 Pac. 1038. Cases cited by the appellant where the time was limited within which the sale was to be made, or where the authority had been seasonably revoked, do not apply. Here there was no limit as to time, and the sale was made within 50 days after his authority was given, during all which time plaintiff was more or less active in endeavoring to complete the sale to Fopiana, whom plaintiff introduced to defendant as a possible purchaser.

It is urged that because plaintiff admits that he did not finally negotiate the sale in person, and did not know, until after it was finally completed, that a sale had been perfected, he therefore failed to earn his commission; citing Zeimer v. Antisell, 75 Cal. 512, 17 Pac. 642, and Ayers v. Thomas, 116 Cal. 144, 47 Pac. 1013. The first of these cases went off on the fact that the agent did not effect a sale within the time limit. In the second, the decision hinged upon certain instructions. But the rule was approved that commissions are earned when the evidence shows that the broker was the moving or procuring cause of the consummation of the transaction. Appellant cites Wylie v. Marine Nat'l Bank, 61 N. Y. 415, as very similar to the case at bar. This case enunciates no different rule from that claimed by respondent. It was held, however, that where the broker opens negotiations, but, failing to bring the customer to the specified terms, abandons further negotiation, and the employer sells to the same person, at the price fixed, he is not liable to the broker for his commissions. We do not think the evidence warrants appellant's claim that plaintiff had abandoned his efforts to make a sale; the case in its facts differs materially from the Wylie Case, supra. Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441, is relied on by appellant, and is a case often cited approvingly as a correct exposition of the principles upon which brokers may claim commissions. That case, however, differs from this in the very essential fact that after a reasonable time, (some four months) within which to make the sale, and being unsuccessful, the employer terminated the broker's agency, which the court held he could do, the commissions not having been earned, "unless upon the sole and only ground that the defendant terminated the agency in bad faith, and as a device to get the benefit of plaintiff's labors without paying for them." That case is inapplicable, and in no wise supports appellant's contention. See the principles here involved, somewhat discussed, in Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 Pac. 354, where the time limit having expired before sale made was the principal ground on which the employer successfully resisted payment of commissions to the broker.

There was evidence tending to show that defendant, some time in the summer of 1900, placed the property in the hands of one Scott as agent for its sale, and that, through one Foerstler, the sale to Fopiana was finally consummated. Scott's authority preceded that given plaintiff, but it was not until after plaintiff had brought Fopiana and defendant together for the purpose of effecting a purchase and sale that Scott had anything to do with the sale to Fopiana. Indeed, he supposed he was making the sale to Foerstler, until later, when a deposit was made, he learned that the purchaser was Fopiana, and he then recognized Foerstler as his coagent in the transaction. Plaintiff testified: "At the time Mr. McCoy signed the authorization to me he told me that he had an exclusive contract with Mr. Scott of Healdsburg, and he asked me to divide the commission with him if I made a sale. I told him I was not working for Mr. Scott." Defendant at no time revoked his authority given to plaintiff. It appears that Fopiana was seeking a farm for his two sons, and was looking at what was called the "Prouse Place," at plaintiff's suggestion, while considering defendant's place. As late as November 10, 1900, he employed plaintiff to attend the auction sale of the Prouse place and bid for him. It was sold at a price too high for Fopiana, and, failing to get it, plaintiff again took up with him the purchase of defendant's place; and plaintiff testified that Fopiana then told plaintiff he would give $8,000 for defendant's place, and it was arranged, according to plaintiff's testimony, that Fopiana's two boys should go and look at the place the next day (Sunday), which they did, and Fopiana was to notify plaintiff "if he could take it." It appears that about this time Fopiana fell in with Foerstler, and thenceforward conducted the business of purchase with him, without plaintiff's knowledge, and on Monday, November 12, 1900, made a deposit with Scott of $1,000 on account of the purchase. There is some evidence tending to show that Scott and Foerstler were working together in the matter some little time before November 10th, but plaintiff was not informed of the fact (if that would make any difference, which we doubt) by either defendant or his agents, Scott and Foerstler, or by the Fopianas, and plaintiff first learned of the sale about November 15th, as he testified. Not having been revoked, his authorization was in full force when the sale took place, November 12th, though the deed did not pass until later.

There may be some doubt as to the precise meaning of the language "to bargain for the sale," used in the agreement. But no doubt can surround the meaning of the language: "Provided said ranch is sold to a purchaser procured by said Hill, or through his agency." Defendant thus agreed to pay the commission if the ranch was sold to a purchaser brought to defendant by plaintiff directly "or" through his efforts.

The fact that the sale was made for less than $10,000 does not affect the question, for the agreement provided that defendant would pay the commission on any less amount that he might accept for the ranch. It was held in Lloyd v. Matthews, 51 N. Y. 124, that, where the owner has placed his property in the hands of two or more brokers to sell, notice to one of a change of purpose does not affect another; and if the broker's communciations with the purchaser are the means of bringing him and the owner together, and the sale results in consequence, the compensation is earned, although the broker does not negotiate and is not present at the sale. Dolan v. Scanlan, supra. See, also, Sussdorff v. Schmidt, 55 N. Y. 319.

In cases like the present one it is not always entirely obvious that the sale was effected through the broker's agency, as its procuring cause. There is always a possibility that, had the broker not brought the seller and buyer together, some other broker might have done so, or the parties might have met by chance and through no agency of any broker, and hence it might be said the employed broker was not the procuring cause of the sale. But where it appears, as here, that the seller and buyer were for the first time brought together by the broker duly authorized to act for the seller, and the sale was subsequently consummated by the same seller and buyer acting independently of the broker, the broker not having abandoned his agency, and the seller not having revoked the broker's authorization or done any act from which a revocation may be implied, we think the inference is a reasonable one, and may be drawn by the jury, that a sale, under such circumstances, is effected through the broker's agency as its procuring cause. Especially may this inference be drawn where both seller and buyer have negotiated with knowledge of the broker's previous employment.

It is true that there was sharp conflict in some of the testimony, but upon the trial court alone devolved the duty, as well as the power, to finally reconcile controverted questions of fact, and with its determination, where a conflict in the evidence arose, we cannot concern ourselves.

The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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1 Cal. App. 169

PEOPLE v. HEART.

(Court of Appeal, Second District, California. June 12, 1905.)

1. COURT OF APPEAL—JURISDICTION.

Under the Constitution, giving the Court of Appeal jurisdiction in criminal cases on questions of law alone, the sufficiency of the evidence is not reviewable when there is some evidence to support the verdict.

2. MURDER—EVIDENCE—SUFFICIENCY.

On a prosecution for murder, *held* a question for the jury whether defendant returned to the scene of a quarrel between himself and deceased in order to distrain deceased's goods, or whether, knowing that deceased was disposed to fight, he intended to renew the quarrel with a view to killing his antagonist.

3. SAME—EVIDENCE—SUFFICIENCY.

On a prosecution for murder, evidence *held* sufficient to sustain a conviction of murder in the second degree.

4. ATTORNEY AND CLIENT — CONFIDENTIAL COMMUNICATIONS.

Code Civ. Proc. § 1881, subd. 2, provides that an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment. *Held*, that on a prosecution for murder it was proper to permit the state, for the purpose of impeachment, to interrogate defendant's wife as to statements made by her to an attorney at a time when she was endeavoring to retain him as counsel for her husband, and to permit the attorney to state what was said to him, the attorney not having been retained, and the statements not purporting to have been conveyed from defendant.

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

J. W. Heart was convicted of murder in the second degree, and he appeals. Affirmed.

L. C. Hester, Hester & Ladd, A. Groves, and James D. Reymert, for appellant. J. C. Daly, Dep. Atty. Gen., U. S. Webb, Atty. Gen., and W. C. Van Fleet, for respondent.

ALLEN, J. The defendant, under an information charging him with murder, pleaded not guilty. Upon a trial he was found guilty of murder in the second degree, and sentenced to the state prison for the term of 20 years. He appeals from the judgment, and from the order denying a new trial.

Appellant relies for the reversal of the order and judgment upon the grounds that the evidence is not sufficient to justify a verdict in the second degree, and for errors in admission of certain testimony and in instructions to the jury. The record discloses that there was some testimony tending to show defendant's guilt in the degree as found by the verdict. By the Constitution appellate jurisdiction is conferred upon this court in criminal prosecutions by indictment or information in a court of record on questions of law alone. When there is evidence, therefore, to sustain the verdict, a question of law cannot arise. People v. Fitzgerald, 138 Cal. 40, 70 Pac. 1014.

It was shown that a heated quarrel was had between defendant and his roomer, Kearns, concerning a balance of 50 cents due for rent, as claimed by defendant and denied by Kearns. Kearns was about to leave defendant's house, and had packed his things for that purpose, when defendant appeared and demanded the 50 cents. The deceased presented a receipt for rent to July 8th; this was July 2d. Defendant charged deceased with changing the receipt. Kearns thereupon becoming loud and violent in his language, defendant left the scene of the quarrel, declaring that he would call the police. Some 15 or 20 minutes later he returned without the police, but with a pistol in his right-hand coat pocket. He advanced across the room and locked the back door of one of the rooms that deceased was getting ready to leave. He did this, he says, as a preliminary step to distraining the goods of his roomer for the delinquent 50 cents. Kearns thereupon assaulted him with his fists, and in the scuffle which ensued the defendant shot Kearns in the stomach. There was evidence tending to show that Kearns was unarmed. In this state of the evidence it was for the jury to determine whether defendant returned to the scene of the quarrel simply to lock the door and distrain the goods, or whether, knowing that Kearns was disposed to fight, the defendant armed himself for the purpose of returning and renewing the quarrel with a view of precipitating a final struggle, and killing his antagonist. It must have been plain to defendant from the previous conduct of his roomer that any attempt to wrest from his possession either the rooms or the goods would result in a fight. His taking the pistol with him shows that it was his purpose to bring that fight to a conclusion in his favor, even if he had to kill his antagonist. On this statement of the case we are not prepared to say that the killing was done "upon a sudden quarrel or heat of passion." Nor can we say, as a matter of law, that there was no evidence of the "abandoned and malignant heart" constituting one of the elements of murder in the second degree. See People v. Emerson, 130 Cal. 563, 62 Pac. 1069.

The wife of the defendant was called as a witness by the defense, and the court permitted the district attorney to interrogate her as to statements made by her to H. H. Appel, Esq., an attorney, at a time when she was endeavoring to retain him as counsel for her husband; this for the purpose of laying grounds for impeachment. The court further permitted Appel to state what was said by the witness to him upon that occasion. There is no claim that Appel was ever employed or retained; on the contrary, the testimony shows that he declined to accept employment. Section 1881, Code Civ. Proc., subd. 2, provides that "an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." The court committed no error in admitting this testimony. The inhibition does not extend to communications between the attorney and persons having social or business relations with the client, certainly not when the statement did not purport to be conveyed to the attorney from the client, but, on the contrary, was the representation of a witness as to her knowledge of the transaction.

The charge of the court excepted to correctly states the law upon the subject to which it relates. Reading the whole charge, it is manifest that the word "may," and not "must," was employed, which is emphasized when we consider that the word "must" appears in brackets, with the notation following that "words in brackets were stricken out by the court."

Judgment and order affirmed.

We concur: GRAY, P. J.; SMITH, J.

7 Cal. Unrep. 203

In re HOVEY.

(Court of Appeal, Second District, California. June 2, 1905.)

1. Attorneys—Admission to Bar—Referee—Finding—Conclusiveness.

The finding of a referee appointed to ascertain and report as to moral character of applicant for admission to the bar that the applicant was of good moral character prior to his arrival in the state, and that he was then guiltless of crime or improper conduct as an attorney, is conclusive.

2. Same—Pendency of Disbarment Proceedings—Effect.

The failure of an attorney, in making application for admission to the bar, to disclose to the court, and the attorney through whom his application is made, the pendency of disbarment proceedings against him in the state of his former domicile, does not materially affect his moral character or his admissibility to the bar.

3. Same.

The mere fact of pendency of disbarment proceedings in the state of the former domicile of an applicant for admission to the bar does not disqualify him.

In the matter of the application of Frank W. Hovey for admission to the bar. Transferred from Supreme Court, 80 Pac. 234. Application granted.

SMITH, J. This matter came before us under an order of the Supreme Court of the state of date March 6, 1905, which is as follows: "By the Court: Whereas, heretofore, at a session of this court held on June 17, 1904, Frank W. Hovey made application to this court for an order admitting him to practice as an attorney and counselor in all the courts of this state, and was thereupon duly examined by this court as to his qualifications, and upon said examination was by this court found qualified, and there being opposition to his said application for admission to practice, this court thereupon proceeded to make inquiry as to the good moral character of said Frank W. Hovey, and, to that end, made an order referring that question to Hon. M. T. Allen, judge of the superior court of Los Angeles county, as referee, to take testimony, and therefrom report to this court his findings concerning the character of said applicant, and said referee having thereafter made and filed in this court his report and finding in regard to the moral character of said applicant, and the matter having been thereupon continued for argument and determination upon said report; and whereas, there has been no hearing or determination thereon, and by an act approved February 15, 1905, it has been provided that power to make orders admitting persons to practice as attorneys and counselors in all the courts of this state is now lodged exclusively in the several District Courts of Appeal created by the amendment adopted November 8, 1904, to article 6 of the Constitution; Now, therefore, it is ordered by this court that the aforesaid application of Frank W. Hovey be transferred to the District Court of Appeal for the Second District for hearing and determination upon the report of said referee, and that the clerk of this court, when said District Court of Appeal is organized, do forthwith send to said court all the papers on file in said proceeding, together with a copy of this order and all other orders made by this court therein."

The report of the referee mentioned in the order is as follows:

"The undersigned, one of the superior judges of the state of California, in and for Los Angeles county, who was by your honorable court authorized and directed to take testimony and determine therefrom and to report as to the moral character of the applicant, would respectfully report that, after due notice to all parties interested, he gave a full and patient hearing touching all such matters as might be offered affecting the personal character of the applicant, and finds:

"That the applicant was born in the Dominion of Canada. That when a child his father removed with the family to the state of Maine. That the father, after his arrival in the state of Maine, exercised the right of franchise; claimed to be, and was recognized as, a citizen of the United States; represented to applicant, and applicant believed, that the father had been regularly and properly admitted to citizenship while the applicant was a minor under the age of 18 years. That in truth the father never became a citizen of the United States. That applicant, assuming in good faith that he was a citizen, after he attained his majority was admitted to the bar of that state, was elected to and discharged the duties of various public offices of trust and profit, and had no information until shortly before April 14, 1902, of the fact that the father was not a citizen, at which date applicant made application to the proper court, and was admitted to citizenship. That in the early part of 1898, by reason of financial disasters, overwork, and because of the death of a favorite daughter, the applicant became and was for a long time insane. That he so far recovered his reason that in the latter part of that year he took up his residence at Biddeford, in the state of Maine, and in some degree the practice of his profession. That in spring of 1902 certain parties maliciously presented to the bar of York county (the same being the county in which Biddeford is situated) charges against the applicant, of unprofessional conduct, lack of good faith to clients, perjury, subornation of perjury, forgery, and extortion, which charges I find to have been untrue. A committee was appointed by the York bar, which, acting in good faith, and believing these charges to have some foundation, on the 21st of April, 1902, formulated and presented to the justices of the Supreme Judicial Court of York county, Maine, formal charges of such criminal and unprofessional acts, and on the 22d of April, 1902, filed the same in said court; and on the same day, said court issued a citation requiring the applicant to appear and show cause why he should not be removed from the office of attorney at law.

"The threat to file these charges, and their nature and character, was known by applicant for some weeks before the same were filed, and while he was still a resident of Biddeford. At this time, however, and for a long time prior, he was suffering physically, and was not strong mentally. Applicant's wife and her father, with a view of preventing the immediate filing of those charges, an investigation of which they felt assured would have the effect to occasion a return of previous insanity, retained as counsel for applicant, to prevent the filing of such charges, the lawyer who was their principal author in the first instance. This employment applicant acquiesced in, and advanced the money to pay this lawyer's fee of a hundred dollars, and was led to believe, not only by this lawyer, but by others, who were his friends, and interested in protecting his health and good name, that no charges would be formally presented; and thereupon applicant and his wife, shortly before the filing of such charges, left the state of Maine, and went to the city of Boston, Massachusetts, that applicant might undergo a surgical operation. Shortly after this surgical operation was performed, and while applicant was weak physically, and in such condition of mind that, in my opinion, he was not capable of managing his affairs or protecting himself in anywise, the citation above referred to was served upon his brother, in the city of Boston; but the contents thereof, in a general way, were made known to him. Applicant's wife retained other counsel, by letter, to appear and resist such charges, and brought applicant to the state of California; intending to take up their residence in Eureka, in this state. Their route of travel carrying them through Los Angeles, they stopped off in this city about the 2d of May, 1902. The day subsequent to their arrival in Los Angeles, having letters of introduction to Judge Waldo M. York, one of the superior judges of this county, applicant and his wife called upon Judge York, and the latter insisted that applicant should be admitted to the bar of Los Angeles county; and Judge York introduced a member of the bar to Mr. Hovey, and, upon the motion of said member of the bar, Judge York entered an order admitting him to practice. Judge York, being advised of applicant's intention to go to Eureka, advised applicant to stop on his way, and be admitted by the Supreme Court of the state, and, to that end, he gave him a letter of introduction to Shurtleff, a former partner of Judge York; and applicant did, upon his arrival in San Francisco, present such letter to Shurtleff, and, upon his motion, and upon production of his certificate theretofore issued by the Supreme Court of Maine, he was admitted to practice by your honorable court. I find that what might appear to be undue haste in relation to admission to practice should not be charged against applicant, in view of the insistence of those in whom he had confidence in relation thereto, and his weak mental and physical condition at the time. Your honors are familiar with all the proceedings leading up to and including the striking of applicant's name from the roster by your honorable court, and no further reference is necessary to be made thereto.

"Notwithstanding the employment by applicant of counsel in connection with the charges brought against him in the state of Maine, the attorneys who should have represented him permitted his default to be entered, and his name to be stricken from the rolls in the state of Maine. In 1903 applicant returned to the state of Maine, procured the order striking his name from the rolls to be vacated, and made complete and perfect arrangements, at a large expenditure, looking toward a defense against the charges so presented. After employing counsel and making such expenditure, and while applicant was present with his witnesses to refute and disprove the charges made against him, the bar association filed certain specifications in relation to such charges, and, among others, for the first time, presented the question of his alienage, which, being true and admitted, deprived the court in that state of jurisdiction to hear and determine the truth of the other charges; and on account of such alienage, and for no other reason, applicant's name was again stricken from the rolls of that state.

"Your honors are in possession of the record, which shows that on the 19th of October, 1903, applicant filed an answer in response to a petition for his disbarment in your honorable court, in which he denied under oath that he knew that such disbarment proceedings were pending in the Supreme Judicial Court of Maine on the 12th day of May, 1902, when he requested Shurtleff, an attorney, to move his admission to practice in your court, and in which answer he alleged that there had been withheld from him all information with respect to said charges. In view of the fact that the service of the citation was not personally made upon applicant, that he had been advised and believed that these charges would not be filed, and considering his weak mental condition, I find that he had no actual notice that the charges had been filed and were in fact pending at the time when in the answer he alleged such want of notice of filing; but I find that it is not true, as stated in that answer, that all information with relation to these charges and their character was withheld from him, but, on the contrary, that information as to their general nature and character was given him in the city of Boston shortly after the service of the citation upon the brother, and before his arrival in California. In addition, when called upon by the grievance committee of the bar association of Los Angeles county, early in 1903, to make explanation concerning these various charges, he was not frank and candid with such committee in his answers to their inquiries, and he did not state to Mr. Shurtleff or to your honorable court any fact in relation to the knowledge he did possess as to the threatened charges in the state of Maine. I further find that, pending the examination before your referee, certain of the testimony which applicant desired to submit to such referee was in the nature of affidavits; that, the bar committee being unwilling to permit such affidavits to be read, applicant caused questions and answers thereto (all, however, in perfect accord with such affidavits and written statements in his possession, signed by the parties whose depositions were intended to be taken) to be prepared here, and forwarded to the officers in Maine, that they might be read and subscribed by such witnesses. In each instance, however, such prepared questions and answers were accompanied by a letter of applicant, requesting them, if such answers were not in accord with their remembrance, to make changes and interlineations so that they might conform to the truth.

"As a summary, then, your referee would report to your honorable court that upon arrival of applicant, Frank W. Hovey, in the state of California on the 1st of May, 1902, he was a man of good moral character; that he was guiltless of crime or improper conduct as an attorney prior thereto. His subsequent conduct in relation to the answer filed in your honorable court, his want of frankness with the attorney moving his admission, his want of frankness with the grievance committee of the Los Angeles bar, are matters which I deem it purely within the province of your honorable court to consider, without recommendation or finding on my part as to their effect on his moral character and fitness.

"An apology is due for the length of this instrument. The great volume of testimony, the long years through which the matter progressed, renders it impossible for me to present in a more brief way the facts elicited upon the hearing. I retain in my possession a transcript of the oral testimony offered, together with all exhibits, depositions, and papers, which, if desired by your honors, I will cause to be forwarded."

The report of the referee disposes of the charges against Mr. Hovey as to the matters occurring prior to his arrival in California on May 1, 1902, at which time, it is found, "he was a man of good moral character, [and] * * * was guiltless of crime or improper conduct as an attorney prior thereto." We have, therefore, to consider only the subsequent conduct of Mr. Hovey, as affecting the question of his moral character and his admissibility to the bar. This, as reported by the referee, was, in effect, that he did not disclose to the attorney moving his admission or to the court that proceedings for his disbarment were pending in the state of Maine, and that in his answer to the petition filed in the Supreme Court for his disbarment, which was verified, he denied that he knew that such disbarment proceedings were pending at the time of his application, and further alleged that all information of such proceedings had been withheld from him by his friends on account of the severe illness under which he was suffering at the time of the service of notice of the proceedings on his brother.

The force of these charges obviously depends upon the assumption that, at the times referred to, Mr. Hovey in fact did know of the pendency of the disbarment proceedings, and that this knowledge was then present to his mind. On this point the referee finds, in effect, that Mr. Hovey had been informed of the pendency and general nature of the proceedings in Boston shortly after the service of notice upon his brother, but that, on account of his physical and mental condition, this information was not present to his mind when he filed his answer. The latter finding, we gather from the report, was not based upon specific evidence as to the fact, but upon the physical and mental condition of Mr. Hovey, and the presumption of good character always existing until the contrary appears, which in this case was supported by the very high certificates of character given to him by lawyers, judges, and others in the state of Maine, attached to his answer; and, at all events, as the case is presented to us, the finding cannot be questioned. It may be added that it would be only in a clear case of conscious and intentional perjury that we would be justified in regarding the character of a defendant, especially in a criminal or quasi criminal proceeding, as affected by the denials and allegations of his answer.

With regard to the failure of Mr. Hovey to disclose to the attorney moving his admission to the bar and to the court that proceedings for his disbarment were pending in the state of Maine, though there is no express finding upon the point, it may be presumed that the same considerations will apply; otherwise, while we think Mr. Hovey would have done better to have disclosed the pendency of proceedings against him, we are not prepared to say that his failure to do so can be regarded as materially affecting his moral character or his admissibility to the bar. If the matter suppressed had been a conviction of gross misconduct, or, as in case of Lowenthal, 61 Cal. 122, an actual disbarment, the case would be otherwise. But the mere fact of the pendency of proceedings against him would not have the effect of disqualifying him; nor would the court, perhaps, be justified in refusing his admission on account of the charges against him, without inquiry into and proof of the facts charged. In this case the order of disbarment which had been rendered by the Maine court at the time the petition for disbarment was filed in the Supreme Court here has been set aside, and the case finally disposed of, on grounds not affecting the character of Mr. Hovey, and without passing upon the charges made against him; nor in the present proceedings is any attempt made to establish the truth of those charges.

We do not think it necessary to consider the charge that Mr. Hovey was not frank and candid in his answers to questions put to him by the grievance committee, as, in view of the adverse relations of the parties, we do not deem it material.

We are of the opinion that Mr. Hovey is entitled to admission to the bar, and it will be so ordered.

We concur: GRAY, P. J.; ALLEN, J.

(1 Cal. App. 140)

HARNISS et al. v. BULPITT.

(Court of Appeal, Second District, California. June 6, 1905.)

1. PUBLIC NUISANCE—OBSTRUCTION OF PUBLIC ALLEY.

The obstruction of a public alley is a public nuisance.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1493.]

2. SAME—PRIVATE ACTION TO ABATE—REQUISITES OF COMPLAINT.

Under Civ. Code, § 3493, providing that a private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise, the complaint must show that plaintiff will suffer some injury therefrom in its nature special and peculiar to him, and different in kind from that to which the public is subjected.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 164-169, 181.]

3. SAME—SUFFICIENCY OF COMPLAINT — INGRESS AND EGRESS TO AND FROM ABUTTING PROPERTY.

Under said section, a complaint alleging the obstruction by fences at both ends of a public alley, preventing ingress and egress to and from the abutting property owned by plaintiff on and through the alley, sufficiently alleged a private wrong.

4. SAME.

The allegation in the complaint that the strip of ground was a public alley, and had been so used for 25 years as a means of ingress and egress to and from plaintiff's property, was sufficient as against the objection that the same was an insufficient statement of fact, in that the manner by which it became such alley was not averred.

5. Pleading—Motion for Judgment on the Pleadings.

Where the complaint states a cause of action, a motion for judgment on the pleadings is properly denied.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1055.]

Appeal from Superior Court, Inyo County; Walter A. Lamar, Judge.

Action by T. C. Harniss and another against F. H. Bulpitt. Judgment for plaintiffs, and defendant appeals. Affirmed.

P. W. Forbes and White Smith, for appellant. S. E. Vermilyea and Ben H. Yandell, for respondents.

ALLEN, J. This is an action for damages and to procure an order for the abatement of a nuisance alleged to exist by reason of obstruction by fences at both ends of a public alley in the town of Bishop, Inyo county, this state, upon which alley plaintiffs' property abuts, by which plaintiffs are deprived of the free use of their property, and from going from their property out upon said alley, or through the same to Church street, a public street in said town. The damages were claimed on account of the depreciation in value and by reason of being deprived of the use of said alley. To the complaint a demurrer was interposed upon the grounds, first, that plaintiffs had no legal capacity to sue; and, second, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer being overruled, defendant answered, denying all the material averments of the complaint other than the construction of the fences at the places designated in the complaint. The defendant further alleges that the strip of ground denominated a public alley in plaintiffs' complaint was not an alley, but the private property of defendant. Findings and judgment went for plaintiffs, and a decree was entered enjoining the defendant from maintaining such fences or obstructing said alley. From the judgment defendant appeals.

There being nothing apparent upon the face of the complaint as indicating plaintiffs' want of capacity to sue, the demurrer upon that ground was properly overruled. The principal contention of defendant presented in his points and authorities is that the complaint does not state a cause of action, because no injury is alleged different in kind from that sustained by the public at large. The nuisance complained of, being the obstruction of a public alley, is a public one. That plaintiff may have redress in a private action, it must appear by proper averment that the plaintiff will suffer some injury therefrom in its nature special and peculiar to him, and different in kind from that to which the public is subjected. Civ. Code, § 493; Siskiyou Lumber Co. v. Rostel, 121 Cal. 513, 53 Pac. 1118. Applying this test to the complaint, we regard it as sufficient. The allegations that ingress and egress to and from the abutting property owned by plaintiffs upon or through the alley is prevented by the obstruction is an allegation of an injury to a private right incidental to private property. The owner of property abutting upon a street or alley owns the incidental rights to ingress and egress as completely as he does the property to which the rights are an incident. Brown v. Board of Supervisors, 124 Cal. 280, 57 Pac. 82. An infringement upon these rights is, therefore, a private wrong. "When the alleged nuisance would constitute a private wrong by injuring property or creating personal inconvenience and annoyance for which an action might be maintained in favor of the party injured, the same is none the less actionable because the wrong is committed in a manner which would render the party liable to indictment for a common nuisance." Wesson v. Washburn Printing Co., 13 Allen, 95, 90 Am. Dec. 181; Lind v. City of San Luis Obispo, 109 Cal. 344, 42 Pac. 437.

Appellant assigns as error the action of the court in denying defendant's motion for a judgment on the pleadings. The complaint stating a cause of action, there was no error in this judgment.

Appellant's final contention is that the complaint alleging that the strip of ground was a public alley, and had been so used for 25 years as a means of ingress and egress to and from plaintiffs' property, was an insufficient statement of fact, in that the manner by which it became such alley was not averred; and the finding was challenged in the same regard. There is no merit in this contention. The allegation was sufficient, and the findings support the judgment.

Judgment affirmed.

We concur: GRAY, P. J.; SMITH, J.

1 Cal. App. 152

YOUREE v. YOUREE.

(Court of Appeal, Third District, California. June 7, 1905.)

1. Divorce — Alimony — Affidavits — Filing—Time—Discretion.

On an application of a wife for alimony and counsel fees, etc., in an action for divorce, it was within the discretion of the court to permit her attorney to file an affidavit at the hearing, notwithstanding court rule 2, requiring a copy of such affidavits, in order to be filed, to be served on the opposite party one day before the hearing.

2. Same.

Where the court, on a wife's application for alimony and suit money in an action against her for divorce, permitted her attorney to file an affidavit at the hearing, in which it was averred that two days before plaintiff conveyed certain real estate, a part of his property, alleged in the original affidavit to be worth $10,000, to one of his attorneys, and on the same day also conveyed to him a note secured by mortgage, and alleged, on information and belief, that such transfers were not real, and that plaintiff was the owner in fact of the property conveyed, it was not an abuse of the court's discretion to refuse to permit plaintiff to file an affidavit in reply merely for the purpose of averring that such transfers were bona fide, in which it was not proposed to show what plaintiff did with the consideration received, or to dispute that his former property holdings were of the value of $10,000.

3. SAME—ALLOWANCE — AMOUNT — DISCRETION—REVIEW.

Under Civ. Code, § 137, providing that the court may, in its discretion, in an action for divorce against the wife, require the husband to pay as alimony any money necessary to enable her to support herself or her children, or to prosecute or defend the action, the taking of evidence for the purpose of finding the amount to be allowed and the amount ultimately allowed is within the trial court's discretion, which will not be reviewed unless abused.

Appeal from Superior Court, Mendocino County; J. W. Mannon, Judge.

Action by F. W. Youree against R. J. Youree for divorce. From a judgment awarding defendant alimony, counsel fees, and suit money, plaintiff appeals. Affirmed.

Weldon & Held, for appellant. T. L. Carothers, for respondent.

CHIPMAN, P. J. Divorce. Judgment in favor of defendant for $200 "for personal expenses and alimony pending suit," and $100 "for expenses of trial, taking depositions, and procuring attendance of witnesses," and "$200 as counsel fees, and that said sums be so paid in 30 days from said 10th day of June, 1902." Plaintiff appeals from the judgment, on bill of exceptions.

Plaintiff seeks a divorce from his wife, the defendant, on the alleged ground of desertion. Defendant denies the allegations of the complaint, and, by way of cross-complaint, herself seeks a divorce on the grounds of desertion, failure to provide the common necessaries of life, and the adultery of plaintiff. The pleadings are verified. The complaint was filed March 27, 1902, and the answer and cross-complaint filed May 23, 1902. On May 24, 1902, defendant filed an affidavit and notice of motion for alimony and expenses of suit. In her affidavit she averred that she "has no money or property whatever, and is wholly dependent upon her labor and the charity of her friends for support." In her cross-complaint, to which no answer appears, she describes certain land, of which she avers that plaintiff is the owner, and which is of the value of $6,000; also personal property, consisting of certain enumerated articles and securities, of the aggregate value of $5,000. In her affidavit she states that said property, real and personal, is of the value of $10,000. On June 7, 1902, plaintiff filed an affidavit in which, among other things, he avers that he "is not possessed or the owner of any real estate or personal property or securities or money whatever, and his sole property consists of his right to a government homestead, the title to which is as yet vested in the United States," which said homestead he avers is of no greater value than $100, and that he has no income except the produce of this homestead, which he avers "is only sufficient to enable him to support himself, and consists principally of foodstuffs, and said income of said homestead claim consists of small or any portion thereof of cash." The motion was noticed for hearing June 9th, and on that day, at the hearing, defendant's attorney was permitted, over plaintiff's objection, to file an affidavit, copy of which had not been served one day before the hearing as required by rule 2 of the court. In this affidavit it was averred that, at the time defendant filed her answer and cross-complaint, plaintiff was the owner of the property described therein, and the title remained in him until June 7, 1902 (two days before the hearing of the motion), and on that day plaintiff conveyed the said real estate to one T. J. Weldon (one of plaintiff's attorneys in the action), and on the same day also conveyed to him a note secured by mortgage owned by plaintiff, for the sum of $1,250, to said Weldon, for the consideration of $1,000, as expressed in the assignment of said note and mortgage. It is further averred on information and belief that said transfers "were and are not real, and plaintiff is now the owner in fact of said real estate and said note and mortgage," and that said transfer was made "for the purpose, fraudulently and designedly, of hindering and obstructing the defendant in procuring alimony, counsel fees, and costs of this action, and that no consideration whatever was paid to plaintiff for said conveyance and assignment," etc. Counsel for plaintiff asked leave at the hearing for time to prepare and file the affidavit of said Weldon in reply to the said affidavit of defendant's attorney, and to show that said transfers were bona fide, and not in fraud of defendant's rights. The court "stated that it would permit plaintiff to file an affidavit denying said transfer by plaintiff to said T. J. Weldon * * * if said transfer had in fact not been made, and counsel for plaintiff thereupon stated that they did not wish to controvert the fact of said transfer," but desired to show "that a bona fide sale of the property of said plaintiff had been made to said T. J. Weldon." The court refused "to permit plaintiff or his counsel to file said affidavit," to which ruling plaintiff excepted.

1. It was within the discretion of the court to permit defendant's counsel to file his affidavit at the hearing, although in violation of a rule of the court. Pickett v. Wallace, 54 Cal. 147. And we do not think this discretion was abused in ruling as it did.

2. It will be observed that plaintiff did not deny having owned the property in question, nor did he deny having made the alleged transfers, but proposed only to show a bona fide sale of certain of the property. He does not show or offer to show what he did with the consideration received, nor how it came about, in so short a time, that he was reduced in his property holdings, which were of the undisputed value of $10,000, to his unproductive homestead. There was certain personal property mentioned in defendant's

cross-complaint, other than the real estate described, and the note and mortgage transferred to Weldon. No account is given of this, and no denial of its possession, except as it may be inferred that when he made his affidavit he then had nothing but his homestead. We think the facts and circumstances disclosed called for something more than the offer as made by plaintiff's counsel, and that the court did not err in passing upon the motion without giving plaintiff the permission he asked. The offer was not sufficient to introduce any fact which, if admitted, would have required the court to deny the motion for alimony. We do not think plaintiff was deprived of any substantial right in view of the facts disclosed.

3. The court "may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." Civ. Code, § 137. It was said in Rose v. Rose, 109 Cal. 544, 42 Pac. 452: "In taking the evidence for the purpose of finding the amount of the allowance, the court is not trying an issue in the case, but is seeking for information as the basis of its order, and is not bound by the technical rules of evidence applicable to controversies between contesting litigants." The amount to be allowed by the court is as much within its discretion as is the power to make the allowance, and in neither case will the appellate court set aside its action unless this discretion has been abused; and we do not think abuse of discretion has been shown in the present case. Rose v. Rose, supra. See, also, Anderson v. Anderson, 137 Cal. 225, 69 Pac. 1061.

The judgment and order are affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

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1 Cal. App. 186

LORING et al. v. DUTCHESS INS. CO. OF POUGHKEEPSIE, N. Y.

(Court of Appeal, Second District, California. June 16, 1905.)

1. Insurance—Interest.

Where a purchaser of property on which insured buildings were situated paid the consideration, but took the title in the name of the mortgagee, and received a policy in the mortgagee's name, with the loss, if any, payable to the purchaser as his interest might appear, both the purchaser and the mortgagee had an insurable interest, as defined by Civ. Code, § 2546, providing that every interest in property of such a nature that the contemplated peril might directly damnify the insured is an insurable interest.

2. Same—Conditions—Waiver.

Where the purchaser of property paid the consideration, but took the title in the name of a mortgagee, and applied for insurance thereon in the mortgagee's name, with the loss, if any, payable to himself as his interest might appear, the condition of the title being made known at the time the insurance was taken out, a condition of the policy, stipulating that it should be void if the interest of the assured should be other than unconditional and sole ownership, was waived.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 986, 989.]

3. Same—Action—Pleading.

Where, in an action on a policy taken in the name of a holder of the title as security for a loan, the complaint averred that the interest of such mortgagee was fully disclosed in the proof of loss, the complaint was not ambiguous nor uncertain with reference to such mortgagee's interest.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by E. W. Loring and others against the Dutchess Insurance Company of Poughkeepsie, N. Y. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Mills & Hizar, for appellants. H. S. Utley and Utley & Sprigg, for respondent.

ALLEN, J. Action upon a policy of insurance. Defendant demurred to the second amended complaint on the grounds: First, that it did not state facts sufficient to constitute a cause of action; second, that there was a misjoinder of parties plaintiff; and, third, that the complaint was ambiguous in various particulars, among which was that it could not be ascertained therefrom what were the interests of plaintiffs in the property insured. The demurrer was sustained, and, upon plaintiffs' refusal to amend, judgment was entered for defendant. This appeal is from the judgment.

The facts stated in the second amended complaint, so far as material, are: That plaintiff Bunch, having paid the consideration price for certain premises upon which the insured buildings were situated, caused legal title to be taken in his coplaintiff, Loring, as security for a loan of $500 and interest. Thereafter Bunch made application (a copy of which application appears in the complaint) to the agent of the defendant company for a policy of insurance to the amount of $800 upon such buildings, and in such application made known the state of title and the relation of the parties thereto, and directed the policy to be written in Loring's name, with the loss, if any, payable to Bunch as his interest may appear; all of which was done, Bunch paying to defendant the premium. In the policy, as appears by the copy made a part of the complaint, it was stipulated that it should be void if the interest of the insured should be other than unconditional and sole ownership. Loss, due proof thereof, and interests of plaintiffs were averred.

It is insisted by defendant in support of its general demurrer that the actual condition of title as averred, when taken in connection with the averment that Bunch was the sole owner in fee of the property destroyed, precludes recovery. With this contention we do not agree. The issue of a policy upon known facts waives all conditions inconsistent therewith. Sharp v. Scottish Union & National Ins. Co., 136 Cal. 542, 69 Pac. 253, 615; Allen v. Insurance Co., 133 Cal. 29, 65 Pac. 138. Plaintiffs each had an insurable interest in the property. Civ. Code, § 2546; Davis v. Phœnix Ins. Co., 111 Cal. 414, 43 Pac. 1115. The defendant, having been apprised of the fact that Loring's interest was small, and upon such information issuing a policy for $800 and accepting a premium based on that amount, with a proviso that the loss should be payable to Bunch, can only lead to the conclusion that the interests of Bunch and Loring were both insured, and the policy ran to both. To construe the contract as insuring only Loring would be to say that Bunch was paying a premium and the company accepting the same upon an amount, which, in the very nature of things, was far in excess of possible loss. It follows that plaintiffs, both being beneficiaries, could join in the action. Even in cases where a part is payable to the assured and part to others, all of the beneficiaries may unite as plaintiffs in the action. West Coast Lumber Co. v. State, etc., Co., 98 Cal. 513, 33 Pac. 258.

The complaint was neither ambiguous nor uncertain in its allegation with reference to Loring's interest. It avers that in the proof of loss this interest was disclosed. From this it appears that defendant was advised, therefore, of the respective interests. "Faults consisting in ambiguities and uncertainties should be viewed, to a certain extent, in the light of the situation of the parties as to their knowledge of the facts." Schaake v. Eagle, etc., Can Co., 135 Cal. 485, 63 Pac. 1025, 67 Pac. 759. And the rule is proper in cases where it affirmatively appears that the facts are equally in possession of both parties. We do not regard the complaint as ambiguous or uncertain in any of the other respects claimed. Enough appears in the complaint to render it easy of comprehension and free from reasonable doubt. Salmon v. Wilson, 41 Cal. 602.

Judgment is reversed, with directions to the court below to overrule the demurrer to the second amended complaint.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 148

SMITH v. ROBERTS (HICKS, Intervener).

(Court of Appeal, Third District, California. June 7, 1905.)

1. Public Lands—Contests—Intervention.

Under Code Civ. Proc. § 387, providing that any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both, one alleging that he was at the time of making his application to purchase state lands, and for a year previous thereto had been, a settler on the lands, and that the same were suitable for cultivation, was entitled, before judgment, to intervene in an action under Pol. Code, § 3414, to decide conflicting claims to purchase the lands.

2. Same—Intervention After Judgment.

Code Civ. Proc. § 473, providing that "the court may, in furtherance of justice, * * * relieve a party or his legal representative, from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect," does not entitle one neither a party nor the legal representative of a party to an action to decide conflicting claims to purchase state lands under Pol. Code, § 3414, to have the judgment set aside for the purpose of allowing him to intervene, though he is a settler on the lands.

3. Same—Laches.

On tender by a settler on state lands of an application to purchase, it was returned to him by the Surveyor General, who stated that the lands were covered by prior applications, and that a contest thereon had been referred to the court for adjudication. The matter was on July 9th again referred, and suit was not commenced thereon until August 31st, judgment being rendered September 16th. It did not appear that the settler was kept in ignorance of his rights by fraud on the part of any one. *Held*, that though, as a settler on the lands, which had become fit for cultivation, he had a right, under Const. art. 17, §§ 2, 3, providing that state lands suitable for cultivation shall be granted to actual settlers only, to purchase, superior to other claimants, he lost his right by neglecting at the proper time to contest the adverse claims.

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by John Smith against M. P. Roberts. From the judgment and from an order denying his motion to vacate and set aside the same and denying him permission to intervene, Edward S. Hicks appeals. Judgment and order affirmed.

Ernest & Denver Sevier, for appellant. George Murray, for respondent.

BUCKLES, J. The appeal is from the judgment and from the order denying the motion of Hicks to vacate and set aside the judgment and denying to said Hicks permission to intervene. The action is one brought under section 3414, Pol. Code, for the purpose of deciding conflicting claims of the plaintiff and the defendant to purchase from the state certain swamp and overflowed lands near the town of Arcata, in Humboldt county. The judgment was rendered September 16, 1901. Motion to set aside judgment and to permit the said Edward S. Hicks to intervene was made on December 5, 1901, and denied on the 11th day of January, 1902. Said Hicks was a settler on the land, and claims he tried to file an application with the Surveyor General of California to purchase said land, but was prevented from doing so by the Surveyor General informing him that there was then a contest pending. The plaintiff had filed an application prior to the attempt of the said Hicks to file. One or two other parties had also filed prior to the time when Hicks forwarded his application.

There is no question that appellant might have intervened before judgment, under the provisions of section 387, Code Civ. Proc., as he alleges he was at the time of, and for a year previous to the time of, making his application to purchase, a settler on said land, and the land was suitable for cultivation. Fulton v. Brannan, 88 Cal. 454, 26 Pac. 506; McNee v. Lynch, 88 Cal. 519, 26 Pac. 508. But unless there is some way by which the judgment can be set aside there is now no way for appellant to intervene. He claims that under the provisions of section 473, Code Civ. Proc., he should have the judgment set aside for the purpose of allowing him to intervene. The provision is: "The court may, in furtherance of justice * * * also upon such terms as may be just, relieve a party or his legal representative from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect." But appellant was neither a party nor the legal representative of a party to the action. His contention is, however, that, being a settler on the land which has become fit for cultivation, and thereby having a right to purchase superior to other claimants under sections 2 and 3 of article 17 of the Constitution, he has such right in the subject of the litigation as will permit him to have the judgment set aside for the purpose of allowing him to intervene to test his right, and cites the following authorities to sustain that contention:

Brettell v. Deffebach et al., 6 S. D. 21, 60 N. W. 167. In this case Milliken, the mover, was not a party to the action, but was assignee of one of the defendants of the lands which furnished the subject of the action. The judgment was taken by default against his assignor, and he was permitted to have the judgment set aside. But it will be observed that he had succeeded to the interests of the defendant in the action.

Kellogg v. Howell, 62 Barb. 280. Defendant, Howell, was adjudged a bankrupt on August 23, 1871. There was an existing mortgage on his land, and the land sold by the sheriff on foreclosure decree to the plaintiff, Kellogg, on January 20, 1872, for the sum of $2,107. The assignee of the bankrupt, under an order in the bankrupt proceedings, had sold the land the day before, or the equity of redemption, for the sum of $1,410, to Easton. In February Easton conveyed by deed to O'Donnell, and O'Donnell then moved to set aside the mortgage sale of January 20, 1872. No order had been made confirming the mortgage sale. It will thus be seen that O'Donnell was the holder of the equity of redemption of the land, for which he had paid $1,410, and had, therefore, such a right, or such a standing, the court held, as to the equity of redemption, as would enable him to invoke the equity power of the court over the judgment and sale. In Gould v. Mortimer, 26 How. Prac. 167, the action was a foreclosure of mortgage, and the moving party, not a party to the action, was the owner of the equity of redemption by purchase from the mortgagor, and sought to have set aside a sale of the premises made pursuant to a decree of foreclosure of said mortgage. The court heard his motion, and set aside the sale, remarking that "every person whose rights are injuriously affected by the judgment or proceedings under it has the right to move the court to set aside or amend them, although he is not a party to the suit."

Freeman on Judgments is also cited as authority on the proposition that any one who is interested in the subject-matter of the suit can move to have the judgment set aside; but the instances given by that author are all in a line with the ones just quoted, and we think none of the authorities apply to a case like the one under consideration. Whatever right the appellant had to the land in this suit he had before and when the suit was commenced, and he had his remedy. His first duty was to prepare and file with the Surveyor General an application to purchase. This he claims to have done, but the Surveyor General refused to receive or file his application, and returned it to him, assigning his reasons for not filing it that the lands applied for were covered by application No. 3,556, filed June 14, 1901, by M. P. Roberts, and stating also that the same had been referred to the superior court of Humboldt county for adjudication. The matter was on July 9th again referred to the superior court of Humboldt county, and suit was not commenced thereon until August 31st. It thus appears that long prior to the action being brought appellant knew there were other claimants to purchase said land, and that they were moving to perfect their claims, and was notified by the Surveyor General that the whole matter had been referred to the court for adjudication. The action, when commenced, was of some notoriety, comments being made in the public press concerning it. With the knowledge he had, it was his business and his duty to look after his rights. He took no steps to contest the claims of the others, and it surely does not appear that he was kept in ignorance of his rights by any act of fraud on the part of any one. It is true the plaintiff exercised all the haste he could in filing, and thereafter went about in a somewhat deliberate way in perfecting his claim. The victory is not always to the strong, but sometimes to the vigilant as well. It is true, as counsel say, there is never a wrong without its remedy, but a remedy, to be available, must be pursued within its lifetime. Time and neglect often destroy the right to pursue a sufficient and proper remedy. So, in this case, the appellant neglected to take advantage of this particular remedy open to him when it was proper to do so.

We know of no rule in the state of California which will permit a person not a party to the action nor the successor in interest of a party to the action to come in after judgment and have the judgment set aside for the sole purpose of allowing him to intervene that he may contest a right to the property which was the subject of the action.

The judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; McLAUGHLIN, J.

(1 Cal. App. 183)

VALLE v. SHAFFER, Auditor.

(Court of Appeal, Second District, California. June 15, 1905.)

HEALTH OFFICER—APPOINTMENT—POWER OF COUNTY BOARD—STATUTES—CONSTRUCTION.

Const. art. 11, § 11, authorizes any county to make and enforce all police and sanitary regulations not in conflict with general laws. St. 1897, p. 452, c. 277, provides that the powers of a county can only be exercised by the board of supervisors, or agents and officers acting under their authority or authority of law. Page 464 declares that such board shall adopt orders and ordinances necessary for the preservation of public health not in conflict with the general laws, and provides for the payment of all expenses incurred in enforcing the same. Page 452 declares that counties are bodies corporate and politic, with all powers specified and such other powers as are necessarily implied, and page 467, § 25, subsec. 40, declares that the board has power to do and perform all other acts and things required by law, not enumerated, but necessary to the full discharge of the legislative authority of the county government. *Held*, that the board of supervisors had implied power thereunder to appoint a health officer and provide for the payment of his salary, regardless of the validity of St. 1897, p. 464, c. 277, § 25, subd. 20, conferring express authority therefor.

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Petition by C. C. Valle for writ of mandamus against E. E. Shaffer, as auditor of San Diego county. From a judgment denying the writ, petitioner appeals. Reversed.

Rehearing denied by Supreme Court August 14, 1905.

G. H. P. Shaw and Kirby & Shaw, for appellant. Cassius Carter and W. R. Andrews, for respondent.

GRAY, P. J. The petitioner applied to the superior court for a writ of mandate to compel the auditor of San Diego county to draw his warrant in favor of petitioner on the county treasurer for $50 claimed to be due petitioner for one month's salary as health officer of said county. A demurrer to the petition was sustained, and from the judgment following the petitioner appeals.

The board of supervisors of said county appointed petitioner health officer of said county, and fixed his compensation at $600 a year, or $50 a month. The question for solution relates to the validity of the orders of the said board in that behalf.

Section 11 of article 11 of our Constitution reads as follows: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." The powers of a county "can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law." St. 1897, p. 452, c. 277. "The board of supervisors shall adopt orders and ordinances necessary for the preservation of the public health of the county, not in conflict with the general laws, and provide for the payment of all expense incurred in enforcing the same." St. 1897, p. 464, c. 277. Counties "are bodies corporate and politic, and as such have the powers specified in this act, and such other powers as are necessarily implied." St. 1897, p. 452, c. 277. The board also has power "to do and perform all other acts and things required by law not in this act enumerated, or which may be necessary to the full discharge of the duties of the legislative authority of the county government." St. 1897, p. 467, c. 277, § 25, subsec. 40.

The foregoing provisions of the Constitution and of the county government act of 1897, by necessary implication, if not by express words, give to the board of supervisors of San Diego county the authority to do just what they have done in appointing and fixing the compensation of petitioner herein. How is the board to look after the sanitary condition of the county and the health of its people, except through the assistance of paid expert agents? They have the implied power to adopt any adequate and appropriate means to carry out their express powers. "Power to accomplish a certain result, which evidently cannot be accomplished by the person or body to whom the power is granted without the employment of other agencies, includes the implied power to employ such agencies; and in such case, when the law does not prescribe the means by which the result is to be accomplished, any reasonable and suitable means may be adopted." Harris v. Gibbins, 114 Cal. 418, 46 Pac. 292.

There can be no doubt about the constitutionality or propriety of any of the above-quoted provisions of the county government act of 1897, defining the powers of the board of supervisors. Indeed, as the legislative body of the county, they would, under the constitutional provision quoted, have by implication all the powers given, even if there was no express statute in relation thereto. It is, then, immaterial whether the Legislature transcended its powers under the Constitution when it provided in subdivision 20 of section 25 of the county government act of 1897 (St. 1897, p. 464, c. 277) for the appointment of a health officer in each of the counties and left it to the board to fix his compensation, without classifying the counties. If their effort in that behalf was constitutional, then, of course, the board had a right to follow it. If, on the other hand, it was unconstitutional and void, still the board might adopt it as the most reasonable method of exercising the implied power which we have already held them to possess under the provision of the Constitution. The board had the power to appoint an expert medical employé, just as in Harris v. Gibbins, supra, it was held to have the inherent or implied power to employ an expert to examine books, or as it would have to employ a janitor or other necessary assistant. And this power is in no way affected by any abortive attempt of the Legislature to expressly give them the same power by a method contravening some provision of our Constitution. Again, to put it in another way, if the act of the Legislature is void because it fails to fix the compensation of the health officer, but leaves that matter to the board, or is void for any other cause, we can only say that the board is left without any express authority to appoint a suitable medical assistant, which throws them back again upon their implied power to do that very thing. The board should not renounce so important a function as that of looking after the sanitary condition of the county because the Legislature has failed in its duty to provide them with the necessary machinery to that end, when they possess the power to supply their own machinery. Of course, their appointee is not a county officer, because he does not hold his position by the authority necessary to make him such. He is, however, if we assume the unconstitutionality of the act expressly providing for his appointment, the employé of the board, and they have at the same time the implied power to say what his compensation shall be, and to order it paid out of the county treasury. Without the power to pay him, they could not secure his services, and would be helpless to perform the duties enjoined upon them.

The judgment is reversed, and the court below directed to overrule the demurrer to the petition.

We concur: SMITH, J.; ALLEN, J.

1 Cal. App. 189

PEOPLE'S HOME SAVINGS BANK v. SADLER et al.

(Court of Appeal, First District, California. June 19, 1905.)

1. Appeal—Liability of Executors—Dismissal—Subsequent Proceedings.

Where pending an appeal appellant died, and, on proof that the executors of his will had been substituted by the superior court as defendants, an order was made continuing the appeal against him, the court would not remand the cause without either affirming or reversing the judgment on the ground that, because of respondent's failure to make proper presentation of its claim to appellant's executors, the judgment appealed from was unenforceable.

2. Judgment—Enforcement—Jurisdiction.

Where pending appeal the appellant died, the enforcement of the judgment appealed from in case of affirmance was primarily within the jurisdiction of the court having charge of the administration of appellant's estate, to which any defense to its payment out of the assets thereof must be presented.

3. Corporate Stock—Assignment—Liability of Assignee—Novation.

Where corporate stock was transferred to defendant, and the certificates recited on the face that they were only one-third paid, and also contained a by-law declaring that the remaining two-thirds should be subject to the call of the board of directors, to be made at any time, whereupon it should be immediately paid by the stockholders, etc., defendant, by accepting such certificates, assumed the liability of his assignors to the corporation for the amount unpaid, under Civ. Code, § 1531, subd. 2, providing that a novation is made by the substitution of a new debtor in place of the old one with intent to release the latter.

4. Corporations—By-Laws.

In the absence of any restriction by the Legislature, the propriety and character of the by-laws of a corporation are to be determined by the corporation itself, subject to the condition that they must be reasonable and not contravene or be inconsistent with the corporation's charter or any existing law of the state.

5. Same—Statutes.

The power of a corporation to make by-laws not inconsistent with any law for the management of its property, the regulation of its affairs, and for the transfer of its stock, conferred by section 354, Civ. Code, was not restricted by section 303, enumerating certain matters on which corporations might enact by-laws.

6. Same—Contract—Enforcement.

A by-law of a corporation providing for a call of one-third of the value of capital stock, and authorizing the balance to be called as required by the board of directors when the amount unpaid shall constitute a debt due to the corporation and a lien on the stock, etc., on being assented to by stockholders, constituted not only a by-law for the regulation of the affairs of the corporation, but a contract enforceable as such by the corporation.

7. Same—Assignment—Consideration.

Where an assignee of certain corporate stock took with notice of a by-law requiring payment of the balance of the subscription at the call of the directors, and that the certificates were not fully paid, and thereafter signed his name to the back of by-laws, and was admitted to the privileges of a member of the corporation, participating in its proceedings and receiving dividends therefrom, such participation, etc., constituted a sufficient consideration for his agreement to pay the balance due on the shares.

8. Same—Lien—Enforcement.

The lien of a corporation on its stock for the unpaid portion of the stockholders' subscription, as provided by a by-law, does not constitute a mortgage, within Code Civ. Proc. § 726, declaring that there can be but one action for the recovery of any debt or the enforcement of any rights secured by mortgage on real or personal property, and hence the existence of such lien does not preclude the recovery of a personal judgment against the shareholder.

Appeal from Superior Court, City and County of San Francisco; George H. Bahrs, Judge.

Action by the People's Home Savings Bank against H. J. Sadler, revived after his death in the name of Minnie C. Sadler and others, his executors. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

F. H. Hood, Farquar & Hood, and T. C. Coogan, for appellants. F. S. Stratton and W. W. Kaufman, for respondent.

HARRISON, C. J. The plaintiff is a corporation organized under the laws of this state, and the appellant is a stockholder therein, holding 40 shares of its capital stock, of the par value of $100, on each of which there has been paid to the plaintiff the sum of $33⅓, and no more. The present action was brought to recover from him the sum of $66⅔ remaining unpaid upon each of said shares. Judgment was rendered in favor of the plaintiff for $2,666.67 and interest, from which the defendant has appealed, bringing the appeal here upon the judgment roll, including a bill of exceptions.

The articles of incorporation of the plaintiff, in which five directors were named, were signed and acknowledged May 11, 1888, setting forth the amount of its capital stock to be $300,000, divided into 3,000 shares, of the par value of $100 each, and showing that all of it had been subscribed, and that each of the said directors had subscribed for 600 shares. The certificate of incorporation was issued by the Secretary of State May 14, 1888. On May 17, 1888, the aforesaid subscribers for the capital stock, without a meeting having been called for that purpose, assented to in writing and adopted a code of by-laws for the corporation, and on the same day an entry of that fact was made in the minutes of the directors' meeting. On May 18th these by-laws, duly certified by a majority of the directors and the secretary of the corporation, were copied into a book kept by the corporation, and thereafter known as the "Book of By-Laws." Following them there was written in the book and signed by the stockholders the following: "We the undersigned stockholders of the People's Home Savings Bank, a corporation, do hereby agree to the provisions contained in the foregoing by-laws and in such amendments to the said by-laws as may hereafter be adopted, and we agree to obey all the provisions contained therein as aforesaid in every respect." Article 9 of these by-laws is as follows: "The board of directors of said corporation shall, at their first meeting, after the adoption of these by-laws, call in thirty-three and one-third per cent. of the capital stock thereof, and may issue certificates for such stock under such restrictions as are provided in these by-laws, signed by the secretary and president, or in his absence by the vice-president, and the remaining sixty-six and two-thirds per cent. of said capital stock shall be subject to the call of the board of directors to be made at any time; whenever the remaining sixty-six and two-thirds per cent. of said capital stock, or any part thereof, shall be called by the board of directors it shall be immediately paid by the stockholders, and any amount not so paid by any stockholder shall be a debt due to the corporation, and the corporation shall have the right to immediately commence suit therefor in any of the courts of this state, and shall have a lien on the stock owned by any stockholder for the amount so due." On May 18, 1888, 5 certificates, for 600 shares each, of said capital stock, were issued to the aforesaid subscribers, upon the back of each of which the aforesaid article 9 was printed at length and in full, and the said by-law has since been printed on the back of each certificate of stock issued by the plaintiff. April 3, 1889, the defendant became the owner, by transfer from J. K. Wilson, one of the aforesaid subscribers, of 10 shares of the said capital stock, and on that day the plaintiff issued to him a certificate for said 10 shares, for which he gave and signed the following receipt, "Received the above certificate subject to the articles of incorporation and by-laws of the corporation," and at the same time subscribed his name to the by-laws copied in the aforesaid book. The capital stock of the plaintiff was thereafter increased from $300,000 to $1,000,000, divided into 10,000 shares, of the par value of $100 each, and certificates issued to the subscribers therefor; and on June 13, 1890, the defendant became the owner by transfer of 30 of said shares, for which certificates were issued to him by the plaintiff, upon the face of each of which was printed the words, "This stock is one-third paid up." After receiving these certificates the defendant attended the stockholders' meetings of the plaintiff, and at said meetings voted the said 40 shares, and from time to time received dividends thereon—six in all. In 1894 the plaintiff became insolvent, and on January 20, 1895, went into liquidation under the provisions of section 11 of the bank commissioners' act, as amended in 1887 (St. 1887, p. 91, c. 80); and on August 28, 1895, the bank commissioners directed the directors of plaintiff to levy an assessment for the full amount of its unpaid capital stock. In obedience to this direction the said directors passed a resolution September 30, 1895, calling in the unpaid two-thirds of the capital stock, and requiring each stockholder to immediately pay to the corporation at its office the sum of $66⅔ upon each share of its stock held by such stockholder. Notice of this resolution was published as directed by the board of directors, and a copy thereof, together with a demand in accordance therewith for the full amount due from them, respectively, was duly served upon the several stockholders. The defendant not having complied with this demand, the plaintiff brought the present action.

1. The judgment against the defendant was entered in the superior court March 21, 1899, and the appeal therefrom was taken May 20, 1899. The appellant died April 14, 1901; and, upon proof that the executors of his will had been substituted by the superior court as defendants in his place, an order was made herein continuing the appeal against them. When the appeal came on for hearing, counsel therefor objected to any further proceedings upon the ground that the judgment is incalpable of enforcement, by

reason of the failure of the respondent to make proper presentation to the said executors of his claim against the estate of the appellant, and asked to introduce evidence establishing these facts, and also asked that upon such showing the court, without either affirming or reversing the judgment, would make an order remanding the cause to the superior court, with directions to take such course as would be proper in view of such facts. This motion must be denied. The function of an appellate court is to review the action of the inferior court in rendering the judgment or making the order from which the appeal is taken. For this purpose a record of the proceedings before the inferior court and of the matters presented for its action is brought to the appellate court, and, in determining the correctness of the judgment or order appealed from, it is limited to a consideration of that record. If the judgment is affirmed, such affirmance is as of the date at which it was rendered. If it is reversed, the case stands as if no judgment had been rendered by the inferior court. It is therefore manifest that error on the part of the inferior court cannot be predicated by reason of any matter occurring subsequent to its rendition of the judgment, and it is equally evident that it would be irrelevant for the appellate court to entertain any evidence of such subsequent matters. The principle upon which this rule rests is not impaired by the fact that in certain exceptional instances the appellate court, upon a showing of matters occurring subsequent to the entry of the judgment, will decline to entertain the appeal or to consider its merits—as, for example, where the judgment has been satisfied of record by the voluntary act of the appellant (People v. Burns, 78 Cal. 645, 21 Pac. 540; Moore v. Morrison, 130 Cal. 80, 62 Pac. 268); or where the judgment was rendered upon a cause of action which did not survive, and by reason of the death of the appellant the cause of action has abated pending the appeal (Estate of Bachelder, 123 Cal. 466, 56 Pac. 97); or where the statute by virtue of which the judgment was rendered has been repealed pending the appeal, without any saving clause (First National Bank v. Henderson, 101 Cal. 307, 35 Pac. 899); or where the inferior court has granted a new trial after the appeal from the judgment was taken, whereby the judgment was vacated (Id.); or where the parties to the appeal have entered into a stipulation which has the effect to render the appeal a mere moot question (Illinois, etc., Bank v. Pacific Railway Co., 115 Cal. 285, 47 Pac. 60); or where, by reason of such subsequent occurrences, there would be no matter pending for action before the inferior court (San Diego School Dist. v. Board of Supervisors, 97 Cal. 438, 32 Pac. 517; Foster v. Smith, 115 Cal. 611, 47 Pac. 591). In all these cases the judgment appealed from had become inherently inoperative, and neither its affirmance nor reversal would affect the rights of the parties, or give to the lower court any function to perform in reference thereto. The enforcement of a judgment, or the right to withhold its enforcement, is a matter primarily within the jurisdiction of the court by which it was rendered; and if the judgment appealed from herein should be affirmed, and there should be any reasons why the superior court should not enforce it, they must be presented to that court, and its action thereon can then be reviewed by the appellate tribunal. Upon the death of the defendant the power of that court to enforce its judgment by execution terminated, and the respondent was remitted for its collection to the probate jurisdiction of the court having charge of the administration of his estate, and to that court the appellant must present any defense there may be to its payment out of the assets of that estate.

2. Under the facts set forth in the record, it must be held that by the transfer to the appellant of the 40 shares of the capital stock of the plaintiff, and his acceptance of the certificates issued to him therefor, he assumed the same liability to the corporation for the unpaid amount thereof that his assignors were under (Civ. Code, § 1531 [2]; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Visalia, etc., Bank v. Hyde, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136; Walter v. Merced Academy Ass'n, 126 Cal. 582, 59 Pac. 136). It is, however, contended by him that the plaintiff is not entitled to maintain the present action, for the reason that the above-quoted by-law is invalid; and in support thereof he relies upon the proposition that a corporation has only such power as is given it by the Legislature, and that as in section 303, Civ. Code, the Legislature has enumerated the subjects upon which a corporation may make by-laws, it has impliedly declared that it cannot make a by-law upon any other subject. A by-law of a private corporation is a rule or law adopted by it for its internal government, and to regulate the conduct and prescribe the rights and duties of its members towards itself and among themselves in reference to the management of its affairs. Although the authority to enact such by-laws is frequently declared in the charter of the corporation or by some general law, yet the authority to enact them does not depend upon such declaration, but is an inherent right, which, in the absence of some positive legislative restriction, is incident to every corporation. The Legislature may prescribe the formalities to be observed in their enactment, and may limit the scope and subjects for which they may be enacted; but, in the absence of any restriction by the Legislature, the propriety and character of the by-laws are to be determined by the corporation itself, subject, however, to the condition that it must be reasonable, and not contravene or be inconsistent with its charter or any existing law of the state. Accordingly the Legislature of this state, in defining the

inherent powers of a corporation in section 354, Civ. Code, has declared that "every corporation as such has power * * * (6) To make by-laws not inconsistent with any existing law, for the management of its property, the regulation of its affairs and for the transfer of its stock." This declaration is general in its terms, and sufficiently comprehensive to include the right to enact the above-quoted by-law. By enumerating in section 303, Civ. Code, certain matters upon which corporations may enact by-laws, the Legislature has not limited the authority to make such by-laws which they would have as an incident inherent in their creation, and irrespective of such legislation. See State v. Mayor, etc., 33 N. J. Law, 57. Similar provisions in the statutes of Massachusetts (Rev. St. [Ed. 1836], c. 44, §§ 1, 2) were held by the Supreme Court of that state to be "not restrictive, but directory." Davis v. Proprietors, 8 Metc. 321. The case of Child v. Hudson Bay Company, 2 P. Wms. 207, cited by the appellant, is not inconsistent with this rule. The statement of Lord Macclesfield quoted therefrom—that, "where the charter gives the company a power to make by-laws, they can only make them in such cases as they are enabled to do by the charter"—is to be construed in connection with the facts in reference to which it was made. The company was empowered to make by-laws for its government, and for the management and direction of its trade to Hudson Bay, and it was held that it could not under this authority make by-laws in relation to insurance and other projects which Parliament had declared to be illegal. That portion of the by-law, however, which declared that the company should have a first lien upon the stock of any member who should become indebted to it was declared valid, provided such debt was incurred in reference to the business for which the company was incorporated. See A. & A. on Corp. §§ 326, 356. In the other case cited by the appellant (Ireland v. Globe Milling Co., 19 R. I. 180, 32 Atl. 921, 29 L. R. A. 429, 61 Am. St. Rep. 756) the court cited this case as authority for holding that a statute of Maine similar to section 303, Civ. Code, did not authorize the defendant to make the by-law therein involved; but in its opinion upon a subsequent hearing of the same case (21 R. I. 9, 41 Atl. 258, 79 Am. St. Rep. 769) that court said that it did not question the proposition that a corporation could pass by-laws relative to the regulation of its affairs, although the statute gave no special authority therefor, but held that the by-law in question was invalid for the reason that it attempted to interfere with private right in matters not pertaining to the business of the corporation. Article 9 aforesaid is, moreover, not only a by-law for the regulation of the affairs of the corporation, but it is also a contract between the parties signing the same, on the one part, and the corporation, on the other, and may be enforced as such by the corporation. While provisions for regulating the rights of the members of a corporation as between themselves, duly adopted by a majority of the stockholders, may not be enforceable as a by-law upon nonconsenting stockholders, yet, if assented to by all, they may be enforced as a contract. New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; A. & A. on Corp. § 342; Clarke & Marshall on Corp., § 642. Subscribers for the stock of a corporation may agree among themselves to pay the amount of their subscription either in a single installment, or in such sums and at such times as the same may be called for. Such a contract will be a waiver of their right to insist that the corporation shall levy assessments therefor as provided in the Civil Code, and may be enforced against them by the corporation according to its terms. West v. Crawford, 80 Cal. 19, 21 Pac. 1123; Marysville Electric Light Co. v. Johnson, 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741. Upon the transfer to the appellant from the original subscribers of his 40 shares of stock, and the issuance to him by the plaintiff of certificates therefor, on the back of each of which the above by-law was printed, he was informed of the condition upon which he became a stockholder, and of the extent and character of his liability for the unpaid portion of the capital stock. With full notice of the by-law, he acknowledged in writing that he had received the certificate subject thereto; and by also subscribing his name to the book of by-laws he thereby agreed to the provisions contained in them, and thereafter held the stock on the same conditions and subject to the same obligations as did his assignors. Visalia, etc., R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136. His admission to the privileges of a member of the corporation, with the right to participate in its proceedings and to receive dividends upon his shares of stock, was a sufficient consideration for the agreement thus made by him with the corporation.

3. The appellant further contends that, assuming that he is under this liability to the plaintiff, the present action for a personal judgment against him cannot be maintained, but that under the provisions of section 726, Code Civ. Proc., the only remedy of the plaintiff is for a foreclosure of its lien upon his shares of stock. The limitation upon the form of action which is declared in section 726 extends only to mortgages, but the provision in the aforesaid by-law giving the corporation a lien upon the shares of a stockholder for the amount of the par value thereof which may be unpaid does not constitute a mortgage. A lien on personal property may exist in many forms other than by way of mortgage, and, although every mortgage is a lien, it is not every lien that is a mortgage. The essential element of a mortgage is a transfer or conveyance of the mortgaged

property from the mortgagor to the mortgagee, but the stockholder does not by virtue of this by-law transfer or convey any property to the corporation, but merely agrees that the corporation may have a lien upon his interest in its property as collateral security for his indebtedness to it. The corporation may enforce the payment of that indebtedness without any foreclosure of this lien. Sonoma Valley Bank v. Hill, 59 Cal. 107.

The judgment is affirmed.

We concur: COOPER, J.; HALL, J.

1 Cal. App. 130

ARMANTAGE v. SUPERIOR COURT OF LOS ANGELES COUNTY.

(Court of Appeal, Second District, California. June 5, 1905.)

Justices of the Peace—Appeals—Jurisdiction of Superior Court—Certiorari.

Under Code Civ. Proc. § 976, providing that when a party appeals to the superior court on questions of fact or on questions of both law and fact, no statement need be made, but the action must be tried anew in the superior court, where an appeal is taken to the superior court in a case in which judgment was rendered by the justice without having given the notice of the trial as required by section 850, the superior court nevertheless obtains jurisdiction of the case, and certiorari will not lie to compel the return of the case to the justice for trial pursuant to notice under section 850.

Petition by W. L. Armantage against the superior court of Los Angeles county for writ of certiorari. Petition denied.

Rehearing denied by Supreme Court August 4, 1905.

J. E. Light, for petitioner. J. D. Bethune, for respondent.

GRAY, P. J. This is an application for a writ of certiorari, otherwise called the writ of review. The facts are that E. B. Multer commenced an action in the justice's court against Armantage, the plaintiff herein. Summons was duly served on Armantage, who thereafter demurred to the complaint, and, on said demurrer being overruled, answered. The case was thereafter set down for trial. The notice that the case had been set for trial was not served like a summons, as is required by section 850 of the Code of Civil Procedure, but was served by mail only. Armantage did not appear at the time fixed for trial, and the justice at said time tried the case in the absence of Armantage, and rendered judgment against him. Thereafter Armantage duly appealed to the defendant superior court on questions of both law and fact. The case was set for trial in the superior court. The appellant appeared, and objected to a trial, and asked that the judgment of the justice be reversed, and the cause remanded to the justice's court. The superior court refused to make such order, but proceeded, against the objections and exceptions of the appellant, Armantage, to try the issues of fact, and rendered judgment against Armantage for $250 and costs.

It is contended that the superior court had no jurisdiction on the appeal to do anything in the case except reverse the judgment and order the case back to the justice's court in accordance with the demand of the appellant. "When a party appeals to the superior court on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the superior court." Code Civ. Proc. § 976. The above section is perfectly intelligible, and if it were to have a literal construction it would seem that, the appeal having been taken on questions of both law and fact, the court in trying the case anew pursued the only course lèft open to it under the statute. But it is said that the Supreme Court has held that, where no trial of the case has been had in the justice's court, it is the duty of the superior court to reverse the case for error of law, and order the case back to the justice's court for further proceedings. Such seems to be the rule laid down by the Supreme Court where the appeal was taken on both questions of law and fact. Myrick v. Superior Court, 68 Cal. 98, 8 Pac. 648. In that case, however, nothing in the shape of a trial had been had in the justice's court, and no question as to the proper office of the writ of certiorari is made or discussed.

The above-quoted section of the Code of Civil Procedure was adopted for the purpose of expediting litigation in justices' courts. It was recognized that, if the same procedure was to be followed on appeals to the superior court that is pursued on appeals to the Supreme Court, it would follow that, skillful advantage being taken of such procedure, it might be made practically impossible in some cases to secure a final judgment of any value in the justice's court. And so they gave the superior court, by this statute, what may be termed an original jurisdiction to try the case, where the appeal was taken on questions of fact, or on questions both of law and fact. Bullard v. McArdle, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176; Maxson v. Superior Court, 124 Cal. 468, 57 Pac. 379. This wise purpose of the statute must be disregarded if the judgment of the superior court is annulled, as prayed for in the petition herein. The justice's court no doubt tried the case without any jurisdiction so to do. Elder v. Justice's Court, 136 Cal. 364, 68 Pac. 1022. But how do we know that, if the case is sent back to him, he will not try it again without having acquired jurisdiction? If it is sent back to him a second and a third time, or any number of times, he may continue to try it without having obtained jurisdiction so to do. It is said that no trial has been had in the justice's court because the trial was a nullity. Let this be granted, and yet the delay is the same, and the object of the statute is as effectively defeated when the case is sent back after a trial without jurisdiction as it is when it is sent back after a trial had with jurisdiction. Moreover, it is not the question of the jurisdiction of the justice court that is involved in this case. The petition here is aimed at the judgment of the superior court rendered on the appeal, and the question is, was that judgment rendered without jurisdiction? The petitioner appealed the case, and by virtue thereof gave the superior court jurisdiction of the cause, as well as of the persons of all the parties to the suit. It was not required that notice of the trial should be served "the same as a summons" before trial could be had in the superior court. All the jurisdictional steps leading to a trial of the case de novo in the superior court had been taken when the appeal on questions of both law and fact had been perfected (unless, possibly, it might be held that the five-days notice of the trial required by section 594, Code Civ. Proc., was jurisdictional; but it is not here contended or shown that such notice was not given, and it will be presumed that it was given). The very first thing that the court was called upon to do in the exercise of the jurisdiction thus conferred upon it by the appeal was to construe said section 976 of the Code of Civil Procedure, and determine whether he would try the case or send it back. Let it be conceded, without deciding the question, that under the statute, as heretofore construed by the Supreme Court, the superior court should have sustained the objection of the appellant to trying the case, and should have granted his request to reverse the judgment of the justice and send the case back, yet the refusal was only error. If these objections had not been made, or if the appellant had failed entirely to appear after his appeal was perfected, and a trial, after the five-days notice, had been had in his absence in the superior court, there could have been no question as to the validity of the judgment following such trial. The court had the same jurisdiction to overrule appellant's objections that it had to sustain them, or to proceed to judgment in the appellant's absence. Jurisdiction is the power to decide—wrong, as well as right. The fact is, the petitioner here, having no appeal from the decision of the superior court, is endeavoring to substitute certiorari for an appeal, and thereby have reviewed the objections made and the exceptions taken in the superior court that he is prohibited from having reviewed upon appeal. This he may not do. It has been held in every late case in our Supreme Court, where the question has been squarely raised, that certiorari goes only to the jurisdiction or power of the court to act, and can never be substituted for an appeal to review the mere errors of a judicial tribunal. Borchard v. Supervisors, 144 Cal. 10, 77 Pac. 708; Valentine v. Police Court, 141 Cal. 615, 75 Pac. 336; Wittman v. Police Court, 145 Cal. 474, 78 Pac. 1052; Code Civ. Proc. § 1068.

The petition for the writ is therefore denied.

I concur: ALLEN, J.

SMITH, J. I concur, with some hesitation, in the conclusion reached by the majority of the court. By the provisions of the Code of Civil Procedure bearing upon the subject the party appealing from the judgment of the justice's court is allowed 30 days after the rendition of judgment to perfect his appeal. Section 974. In the following section two methods of appeal are provided, namely: (1) Within 10 days on a statement of the case, on questions of law alone; (2) within 30 days without a statement on questions of fact or of law and fact. In the latter case the proceeding is not, properly speaking, an appeal; nor is the judgment said to be appealed from reversed, as it would be, if found erroneous, on appeal. But the judgment is vacated by the mere act of the so-called appellant, in the exercise of his option, and the cause transferred for all purposes to the superior court, which thereupon acquires original or quasi original jurisdiction of the case. Bullard v. McArdle, 98 Cal. 358, 33 Pac. 193, 35 Am. St. Rep. 176; Holbrook v. Superior Court, 106 Cal. 593, 39 Pac. 936. The plain meaning of these provisions therefore seems to be that the losing party shall have the option either of appealing from the judgment (in the ordinary sense of the term appeal) on questions of law only, or of vacating the judgment, and transferring the case for trial of all issues, whether of law or fact, to the superior court; and that the latter course is equally open to him whether the case has been disposed of in the justice's court either before or after a trial of the issues of fact in that court. Nor is the language of the act inapplicable to cases where there has been no trial of issues of fact, or even where no issue of fact has been joined; for the expression "questions of fact" may be taken to refer to the issues of fact in the case generally—that is to say, not only to the issues actually made in the justice's court, but also to those thereafter arising either in that or the superior court; otherwise—as was once supposed—the pleadings could not be amended in the superior court. Kitts v. Superior Court, 62 Cal. 203; Ketchum v. Sup. Court, 65 Cal. 494, 4 Pac. 492; Baker v. So. Cal. Ry. Co., 114 Cal. 506, 46 Pac. 604. Indeed, "there is * * * some reason for the suggestion that the Legislature intended this to be the result of all appeals, and that on an appeal on questions of law alone the cause should be considered as in the superior court for all purposes; and, if the trial of issues of fact should be found necessary, it should be had in the superior court." Maxson v. Superior Court, 124 Cal. 470, 57 Pac. 379. But, however this may be, it seems at least to be clear that, where the appeal is taken "on questions of fact" or "on questions both of law and fact," such was the effect intended. Bullard v. McArdle, supra. And see, also, Sanborn v. Contra Costa Co., 60 Cal. 426, 427; Curtis v. Superior Court, 63 Cal. 436. Nor is there anything inconsistent with this view in the provision of section 976, Code Civ. Proc., that in such case "the action must be tried anew in the superior court." For the expression here used will apply equally to trials of issues of law as of fact. Code Civ. Proc. §§ 591, 592. It is, indeed, difficult to reconcile this conclusion with the decisions holding that on appeal from a judgment in a justice's court on questions of fact the superior court has jurisdiction only to "retry the issues tried in the court below"; or, as otherwise expressed, that "the issues of fact cannot be tried anew in the superior court until after they have been tried in the justice's court." People ex rel. Jones v. County Court, 10 Cal. 19; Funkenstein v. Elgutter, 11 Cal. 328; Rickey v. Superior Court, 59 Cal. 661; S. P. R. R. Co. v. Superior Court, 59 Cal. 471; Myrick v. Superior Court, 68 Cal. 98, 8 Pac. 648; Fabretti v. Superior Court, 77 Cal. 305, 19 Pac. 481. But, leaving out of view the objection that this reasoning seems to come within the application of the maxim, "Qui hæret in litera, hæret in cortice," these cases have, in effect, been overruled by the cases cited supra, holding that amendments of the pleadings may be allowed in the superior court; thus creating new issues that have never been tried, and which, therefore, according to the reasoning of these cases, cannot be tried anew. The leading case has also been overruled on every point involved in it. That case was the dismissal of an appeal from a judgment by default in the justice's court "on questions both of law and fact," and mandamus to compel a trial in the superior court, which was denied on the grounds that the appeal on questions of law was unavailable, because there was no statement, and the appeal "on questions of fact" equally so, because there were no issues of fact in the justice's court, and therefore "no questions of fact to try." Ketchum v. Superior Court, 65 Cal. 495, 4 Pac. 492. But the latter point was, in effect, overruled by the case cited, and other cases cited, supra, in holding that the pleadings might be amended in the superior court, and the former expressly by the case of S. P. R. R. Co. v. Superior Court, 59 Cal. 474. And in the case of Lewis v. Barclay, 35 Cal. 214, which was similar, it was held that the dismissal of the appeal was an exercise of jurisdiction, and could not be reviewed "by mandamus, nor, indeed, by any other means"; and it was said, in effect, that in the principal case this point had not been made, and hence the case could not be regarded as authority upon the question as to the remedy, or, in other words, upon the question of jurisdiction. The case was therefore not authority for the decision in Rickey v. Superior Court and Myrick v. Superior Court, or for what is said in Fabretti v. Superior Court and in Maxson v. Superior Court, 124 Cal. 471, 57 Pac. 379. The remaining case (S. P. R. R. Co. v. Superior Court) is based upon the special ground that no jurisdiction had been obtained of the person of the defendant.

It is also to be observed that neither in the principal case nor in the cases affirming it was the question considered whether the action complained of was mere error or in excess of jurisdiction, though the former view seems to be affirmed in Lewis v. Barclay, supra, and in Holbrook v. Superior Court, 106 Cal. 593, 39 Pac. 936.

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1 Cal. App. 225

HANNAH v. CANTY et ux.

(Court of Appeal, Second District, California. June 28, 1905.)

VENUE—ACTIONS INVOLVING LAND.

Const. art. 6, § 5, provides that all actions involving real estate shall be commenced in the county in which the real estate is situated. Code Civ. Proc. § 392, provides, to the same effect, that actions for the recovery of real property, or for the determination of a right or interest therein, must be tried in the county in which the subject of the action is situated. A complaint counted on a written acknowledgment by defendant that plaintiff was entitled to one-half of the selling price, profits, etc., of certain land, after deducting therefrom certain moneys paid by defendant in the acquisition of the land, with interest, etc. The complaint alleged that defendants had received various sums of money as the rents and profits of the land, and had expended various sums, and contained an offer to pay one-half of all sums found to be due upon an accounting, and prayed for judgment establishing a trust in the land in question in plaintiff's favor. *Held*, that since the object of the action was to establish a trust in lands, and the accounting asked for was merely incidental to that object, the action was triable in the county where the land was situated.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. A. Hannah against D. J. Canty and wife. From an order denying a motion for a change of the place of trial, defendants appeal. Affirmed.

Rehearing denied by Supreme Court August 25, 1905.

Stanton L. Carter, for appellants. Hannah & Miller and Maurice E. Power, for respondent.

SMITH, J. Appeal from an order of the superior court of Tulare county denying the defendants' motion for a change of the place of trial to Alameda county, which is the place of their residence. The motion was denied, on the ground that the plaintiff was entitled to a trial in the county of Tulare, where the lands described in the complaint are situated. The suit was brought upon a written contract, set out in the complaint, signed by the defendant D. J. Canty, relating to lands therein described, which had been purchased and the title conveyed to Canty under a prior agreement, upon the terms indicated in the writing between him and the plaintiff. In the written agreement Canty acknowledges and declares that the plaintiff, his heirs and assigns, is entitled to one-half of the selling price, rents, issues, profits, and proceeds of the land in question, after first deducting therefrom certain sums of money paid by Canty in the acquisition of the land, with interest at the rate of 12 per cent. per annum, together with taxes, with interest at the same rate, which balance Canty agrees to divide and pay. The lands, it appears from the allegations of the complaint, have not been sold, and have become of largely increased value. It is further alleged that Canty executed a deed of the lands to his brother, who afterwards conveyed to the defendant Laura A. Canty, the wife of D. J. Canty, and that the interest of defendant Laura A. Canty, and that of her grantor, was acquired without consideration and with notice of the rights of the plaintiff in said lands. The defendants, it is further alleged, have received various sums of money as the rents, issues, profits, and proceeds of said land, and expended various sums of money in the payment of taxes, etc., the amounts of which are unknown to the plaintiff; and the plaintiff offers to pay one-half of all sums found to be due upon an accounting. The prayer is for judgment establishing and declaring a trust in the lands in question in plaintiff's favor, and for a conveyance of an undivided one-half interest in said lands to the plaintiff, or a sale thereof under the direction of the court, etc. There is also a prayer for an accounting for receipts and disbursement on the land, and that plaintiff be permitted to pay into court one-half of the resulting balance, etc.; and upon this is based a contention of the appellants that an action for an accounting is joined with the main action, and hence, on the authority of Smith v. Smith, 88 Cal. 572, 26 Pac. 356, and similar cases, that the order should not have been denied. But this contention is plainly untenable. The accounting prayed for was a necessary condition, without which the relief sought by plaintiff could not be granted, and hence was an essential part of his cause of action. Plaintiff does not allege that anything is due him upon an accounting, nor does he pray for any personal money judgment. In Smith v. Smith, supra, plaintiff did state facts showing that defendant received "large sums of money, which greatly exceed all that was necessary to carry on said business and pay the expenses thereof, and also to pay all the indebtedness of said D. G. Smith"; and plaintiff demanded an accounting, not only as to defendant's dealings with certain real estate, but also as to his dealings with and disposition of some 26,000 sheep and other personal property, "and that plaintiff have judgment against him for such sum as shall be found to be due upon such accounting, after satisfying such mortgage indebtedness." In the case at bar the accounting is requested only for the purpose of showing how much the plaintiff shall pay to the defendants in order to entitle him to the only relief he seeks, which is the declaration of a trust in the lands in favor of plaintiff, and a conveyance to him of an undivided one-half interest therein, or, in the alternative, the appointment of a receiver and a sale of the lands. The action is therefore to be regarded as having for its sole object to establish a trust in the lands, and the accounting asked for as merely incidental to the action, which necessarily involved the determination of the amount due from plaintiff. Green v. Brooks, 81 Cal. 328, 22 Pac. 849. We are of the opinion, therefore, that the motion was rightly denied. Const. art. 6, § 5; Code Civ. Proc. § 392; Bailey v. Cox, 102 Cal. 333, 36 Pac. 650; Baker v. Fireman's Fund Ins. Co., 73 Cal. 182, 14 Pac. 686; Booker v. Aitken, 140 Cal. 471, 74 Pac. 11; McFarland v. Martin, 144 Cal. 771, 78 Pac. 239.

The order appealed from must therefore be affirmed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 212

BRADLEY v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO.

(Court of Appeal, First District, California. June 22, 1905.)

SCHOOL TEACHERS—HOLDERS OF SPECIAL CERTIFICATES—REMOVAL—CAUSE.

Pol. Code, § 1793, provides that the holders of city certificates are eligible to teach in the cities in which such certificates are granted, and when elected shall be dismissed only for specified causes, etc. The holders of special city certificates are eligible to teach the special studies mentioned in their certificates in all the schools of the city in which the certificates were granted. *Held*, that the clause protecting holders of teachers' certificates from removal without cause applied only to holders of "general city certificates," and that a holder of a special city certificate, authorizing her to teach mechanical drawing only, was removable at the pleasure of the board.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition by Elizabeth Bradley for a writ of mandamus against the board of education of the city and county of San Francisco. From a judgment sustaining a demurrer to the petition, petitioner appeals. Affirmed.

Rehearing denied July 18, 1905.

Crandall & Bull and H. M. Barstow, for appellant. Percy V. Long, City and County Atty., and W. I. Brobeck, Asst. City and County Atty., for respondent.

HALL, J. This is an appeal from a judgment against appellant on a demurrer to her petition for a writ of mandate, to be directed to the board of education of the city and county of San Francisco, requiring said board to restore her to the position of regular teacher of industrial drawing in the public schools of said city and county. Appellant's petition alleges that, ever since the 6th day of December, 1875, she was the holder of a drawing teacher's city certificate, issued, and from time to time renewed, by said board of education, authorizing her to teach drawing in the public schools of said city and county; that on the 8th day of July, 1891, she was duly elected a regular teacher of industrial drawing in the department of schools of said city and county, and so continued until the 1st day of June, 1897, when her position was by the said board of education declared vacant, and she was by said board dismissed from her said position, without any charges or complaint being made of insubordination, unprofessional conduct, profanity, intemperance, or unfitness for teaching. Her salary as such teacher of industrial drawing at the time of her dismissal was $140 per month.

Whether or not appellant brings herself within the protection, as to tenure of office or position, of section 1793, Pol. Code, and the rule laid down in the Kennedy Case, 82 Cal. 483, 29 Pac. 1042, is the question presented for decision. The power to employ teachers is given to city boards of education by section 1617, Pol. Code, which, as was said in Kennedy v. Board of Education, 82 Cal. 483, 29 Pac. 1042, "confers upon boards of education unlimited power to employ teachers, and contains no restrictions upon their right to dismiss or remove for or without cause." It is contended, however, that by the provisions of section 1793, Pol. Code, appellant was protected from dismissal, except for causes therein specified, duly ascertained and approved by the board of education. At the time of appellant's dismissal that section read as follows: "The holders of city certificates are eligible to teach in the cities in which such certificates were granted, in schools of grades corresponding to the grades of such certificates, and when elected shall be dismissed only for insubordination or other causes, as mentioned in section seventeen hundred and ninety-one of this act, duly ascertained and approved by the board of education of said cities; and city superintendents of public schools, elected by city boards of education, shall be elected for a term of four years; and said city boards of education shall have full power to fix the salary of all employés. The holders of special city certificates are eligible to teach the special studies mentioned in their certificates in all the schools in the city in which such certificates were granted." It is perfectly obvious from an examination of this section that the eligibility to teach of holders of "general city certificates" is fixed by the first sentence of the section, while the eligibility to teach of the holders of "special city certificates" is fixed by the last sentence in the section. It seems equally obvious that the teachers whose tenure of position is fixed by the first sentence are the same teachers whose eligibility to teach is fixed by the same sentence. The language is: "The holders of city certificates are eligible to teach, in the cities in which such certificates were granted, in schools of grades corresponding to the grades of such certificates, and when elected shall be dismissed only for insubordination or other causes," etc. This language deals with the same class of teachers, both in fixing the eligibility to teach and in fixing the tenure of position. That the Legislature did not intend by this language to lay down any rule as to holders of special city certificates is evident from the subsequent portion of the section; for, after providing for the election and tenure of office of superintendents of public schools and the fixing of salaries of all employés, it takes up the matter of holders of special city certificates, and in a distinct sentence provides for their eligibility to teach, but makes no provision as to their tenure of office or position. Appellant not having shown herself the holder of a general city certificate, but of a special certificate only—that is to say, of a drawing teacher's certificate—we do not think that she is within the protection of section 1793 of the Political Code as to the tenure of her position.

The judgment is affirmed.

We concur: HARRISON, P. J.; COOPER, J.

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1 Cal. App. 215

BALDWIN v. NAPA & SONOMA WINE CO.

(Court of Appeal, First District, California. June 26, 1905.)

1. NEW TRIAL—APPEAL.

An order granting a new trial will be affirmed on appeal, if, on examination of the entire record, any error is found justifying the order on any statutory ground included in the notice and properly presented in the record.

2. SALES—CONTRACT — PRACTICAL CONSTRUCTION.

Where a contract for the sale of wines was made March 29, 1898, and required the buyer to take 17,500 gallons each year before September 1st, and the seller's manager testified that, when 10,304 gallons were taken by the buyer before September 1, 1898, he wrote the buyer, "This completes your first year's contract," and the buyer also treated the contract as only requiring a pro rata delivery for that part of the year ending September 1, 1898, such practical construction of the contract by the parties would be affirmed, and the seller would not be entitled to claim a breach of the contract by the buyer for failure to take 17,500 gallons prior to September 1, 1898.

3. SAME—CONSTRUCTION.

Where a contract for the sale of wines provided that defendant should take 17,500 gallons each year before September 1st, but did not require defendant to take any particular wine specified, nor provide that the white or red wine nor the wine of any particular year should be taken first, nor the manner in which it should be taken by defendant, the latter was entitled to take the contract amount of any of the wine sold, on reasonable notice to plaintiff; and hence plaintiff's refusal to ship white wine covered by the contract, unless defendant would agree to take its quota of red wine, constituted a breach of contract.

4. SAME—INSTRUCTIONS.

Where a contract for the sale of wines only required defendant to take a pro rata amount for that part of the first year ending September 1, 1898, an instruction, in an action for breach of the contract, that defendant was bound to take 17,500 gallons of the contract wine (the yearly amount specified in the contract) before September 1st of each year, and, if defendant failed to do so, his failure constituted a breach of contract, entitling plaintiff to consider the contract as abandoned, was erroneous.

5. SAME.

Where a contract for the sale of specified wines, to be taken at the rate of 17,500 gallons per year, did not specify the order or amounts in which the particular wines should be taken, such matter being left to the buyer's election, it was error for the court to modify a requested instruction that the buyer had until September 1, 1899, in which to take the amount of wine it had contracted to take for the second contract year, "and that before the expiration of such year * * * plaintiff had no right to refuse to deliver any of the wines mentioned to defendant, provided defendant's orders were kept within the annual amount of 17,500 gallons," by striking out the clause quoted.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Charles A. Baldwin against the Napa & Sonoma Wine Company. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

See 70 Pac. 732.

Harold Wheeler and M. F. Michael, for appellant. M. B. Kellogg, for respondent.

COOPER, J. This action was brought by plaintiff to recover damages for breach of a contract for sale of wines by plaintiff to defendant. The case was tried with a jury, and a verdict returned for plaintiff in the sum of $3,997.17, upon which judgment was entered. Defendant made a motion for a new trial upon the grounds of insufficiency of the evidence to justify the verdict, that the verdict is against law, and errors of law occurring at the trial and excepted to by the defendant. The court granted the motion in general terms.

All presumptions are in favor of the order made by the trial court, and an order granting a new trial will be affirmed here, if it is found to be justified upon any statutory ground included in the notice of intention and properly in the record. This court will examine the entire record upon which the order was based, and, if there be found in the record any error which would have justified the court in making the order, it will be affirmed. Kauffman v. Maier, 94 Cal. 276, 29 Pac. 481, 18 L. R. A. 124; Churchill v. Flournoy, 127 Cal. 362, 59 Pac. 791. One of the grounds of the motion was the insufficiency of the evidence to justify the verdict, and in such case the motion is addressed to the sound legal discretion of the court, and an order granting a new trial will not be reversed, unless it appears that there was an abuse of such discretion. Bledsoe v. Decrow, 132 Cal. 314, 64 Pac. 397; Estate of Motz, 136 Cal. 560, 69 Pac. 294.

The contract was made March 29, 1898, and its material parts, so far as necessary to be stated for the purposes of this opinion, are the following:

"This agreement, made March 29th, A. D. 1898, by and between C. A. Baldwin of Beaulieu, West Side, Santa Clara county, California, and Napa & Sonoma Wine Company of San Francisco, a corporation: C. A. Baldwin sells, and the Napa & Sonoma Wine Company buys the following wines at present in the cellar at Beaulieu:

8,500	gallons	Red	Wine	1893	at 30 cents per gallon to be taken until January 1st, '99.
9,000	gallons	Red	Wine	1894	at 35 cents per gallon.
15,000	"	"	"	1895	" " " " "
17,500	"	"	"	1896	" " " " "
2,000	"	White	"	1894	" " " " "
2,200	"	"	"	1895	" " " " "
22,000	"	Red	"	1897	
3,000	"	White	"	1897	
3,000	"	"	"	1896	at 35 cents per gallon.

"All of the above per gallon delivered f. o. b. cars San Francisco; cash, less three (3) per cent. All wines except 1897 have been accepted. The 1897 wines the purchaser will examine and finally accept at the same price before April 1st, 1889, if he finds them to be equal in quality to previous vintages. Wines to be taken in car load lots one at a time, the buyer agreeing to take seventeen thousand five hundred (17,500) gallons each year before September 1st. C. A. Baldwin during this contract turns over all his trade foreign and on Pacific Coast he has at present, and all orders that he may get, to the Napa & Sonoma Wine Co., excepting only his trade with G. S. Nichols on the Atlantic Coast, for which he will reserve fifteen hundred (1,500) cases of each vintage; Mr. Baldwin reserving further privilege to sell his common wines not mentioned above in the general market."

The complaint alleges that, although the plaintiff fully kept and performed the contract on his part, the defendant failed and refused to carry out or fulfill the contract on its part in several particulars, all of which is denied by the defendant. One of the main allegations relied upon is that defendant refused and continues to refuse to accept or pay for any further shipments of wine under the contract. The evidence upon this issue was sharply conflicting, and we think the court did not abuse its discretion in granting a new trial, for this, if for no other reason.

The important question was as to who was at fault, or who committed a breach of the contract. The contract made March 29, 1898, provides that 17,500 gallons of wine shall be taken each year before September

1st. There is some controversy, however, as to whether 17,500 gallons were to be taken before September 1, 1898, as there had then expired only about five months of the first year of the contract. But the parties themselves, by their correspondence and acts, construed the contract as calling only for a pro rata of the 17,500 gallons up to September 1, 1898. The letters of defendant to plaintiff show that defendant placed that construction on the contract. Lagarde, plaintiff's manager, who had full authority in the premises, testified that only 10,304 gallons were taken by defendant before September 1, 1898, and that he wrote to defendant, "this completes your first year's contract," and that, when the question came up as to the first year being a short one, the witness said: "I believe it was understood between Mr. Priber (president of defendant) and myself that would fill it for that year, and afterwards 17,500 gallons would have to be taken each year." The contemporaneous and practical construction of a contract by the parties is strong evidence of the meaning of equivocal terms. Keith v. Electrical Engineering Co., 136 Cal. 178, 68 Pac. 598. The rule would apply with still greater force in a case like this, where the plaintiff is claiming a breach of the contract. He will not be allowed to claim a breach as to the time up to September 1, 1898, when he agreed with defendant that the 10,304 gallons completed the first year's contract. We will, therefore, pass to a consideration of the year beginning September 1, 1898.

While the contract provides that defendant shall take 17,500 gallons of wine each year before September 1st, it does not provide that defendant shall take any particular wine first, nor does it provide that the white or red wine, nor the wine of any particular year, shall be taken first, nor the manner in which it shall be taken, by defendant. Therefore defendant had the right, up to September 1, 1899, under the terms of the contract, to take 17,500 gallons of any of the wine sold to it, provided it gave plaintiff reasonable notice so as to enable him to deliver it. The complaint alleges that up to September 1, 1899, the defendant took and paid for only 17,923 gallons, and has failed and neglected to receive or pay for any greater amount, although often requested by plaintiff to do so. The contract included 3,000 gallons of white wine of 1896 at 35 cents per gallon. On July 1, 1899, defendant wrote plaintiff a letter, caling his attention to the fact that a month before it had ordered the 1896 white wine, and that plaintiff asked delay owing to pressing work on the farm and promised it by September 1st that defendant had arranged to take the white wine, but was also preparing to take two car loads of the red. To this letter plaintiff replied, July 6th, through his manager, that he was at work on the white wine, and would have the greater part of it, if not all, ready for delivery by September 1, 1899. August 11th defendant again wrote to plaintiff, calling attention to the letter of July 1st, and again requesting the delivery of the 1896 white wine, and reaffirming the order for two car loads of red wine. To this letter plaintiff replied by letter August 14, 1899, and said: "I must decline again to ship the '96 white wine until you have carried out your agreement with respect to the previous vintage." Here is a positive statement by plaintiff during the year 1899, and before September 1st, that he will not ship the 1896 white wine until defendant has carried out his agreement with respect to previous vintages. We look in vain for any special agreement as to previous vintages. But defendant again, on August 15, 1899, in answer to plaintiff's letter of August 14th, wrote to plaintiff, and in that letter said: "We cannot see by what right you will decline to deliver us this wine, and we will insist upon the shipment as soon as same is in condition, which, as stated to us, would be before September 1st." To this letter plaintiff replied August 16, 1899, stating: "I shall gladly ship you the white wine when in condition, but I must decline to deplete my cellar of white wine unless you show a disposition to take up your quota of red." To this letter the defendant replied August 18th, stating: "We received your favor of the 16th, and in reply can only regret that you again decline to deliver us the '96 white wine, and by so doing clearly show that you do not propose to carry out literally the terms of our agreement. * * * You are the one that was dilatory in action, and now you even break your contract by refusing emphatically the shipment of those 3,000 gallons of 1896 white wine." Priber, the defendant's president, testified that he ordered the 1896 white wine, and plaintiff refused to ship it; that he "intended to, and was able and willing to, take all that the contract called for for the second contract year before the 1st of September, 1899, and would have done so, and could have done so, and paid for it. After they had refused to deliver any of the white wine I wrote to them that they had broken their contract." On September 2, 1899, plaintiff sent defendant a statement of account for breach of contract, which included 8,500 gallons of 1893 red wine at 30 cents per gallon, amounting to $2,550, and also included the difference of the first contract year up to September 1, 1898, of about 7,500 gallons at 35 cents per gallon. On September 14, 1899, plaintiff wrote to defendant, inclosing the statement last referred to as an account, and in the letter stated: "Unless you make payment within the next four days (by September 18, 1899), I shall cancel all your rights under the contract." It was stated by Lagarde, plaintiff's manager, while a witness on the stand, that 3,750 gallons of the 1893 red wine were reserved by plaintiff for

Mr. Nicholas for the trade on the Atlantic coast. Plaintiff did not have the right to demand payment for 3,750 gallons of wine from defendant when plaintiff had reserved the wine for his Eastern trade. And as to the $7,500 gallons claimed in the statement to have been included in the quantity to be taken the first year, as we have before stated, that appears to have been settled by the parties by agreement and acquiescence under the contract.

Other matters claimed to be sufficient to justify the order granting a new trial upon the insufficiency of the evidence are discussed in the briefs, but it is not necessary to discuss them in detail. What we have said is sufficient to show that the trial court had the right to grant a new trial upon the conflicting evidence. We do not mean to intimate nor express an opinion upon the weight of the evidence or the merits of the case.

The court, at plaintiff's request, gave the following instruction: "The defendant was bound by the contract to take, receive, and pay for 17,500 gallons of the contract wines before September 1st of each year; and, if defendant failed to do so, such failure, so long as it continued (unless caused by the plaintiff's default in the performance of what he was to do), constituted a breach of the contract on defendant's part, and entitled plaintiff to consider the contract as abandoned by defendant, and to recover from the latter any damages resulting from such abandonment." This instruction ignores the agreement by the parties as to the amount of wine to be taken up to September 1, 1898. If, as before stated, the plaintiff agreed to consider a less amount than 17,500 gallons as being the amount called for by the contract up to September 1, 1898, he could not afterwards consider the failure to take the 17,500 gallons as a breach of the contract. By this instruction such failure constituted a breach, if plaintiff chose to consider it so, without regard to any waiver on his part.

Defendant requested the court to give the following instruction: "The court further instructs you that, according to the terms of the contract, the defendant had until the 1st of September, 1899, in which to order and take the amount of wine it had contracted to take for the second contract year, and that before the expiration of such contract year—that is to say, before September 1, 1899—the plaintiff had no right to refuse to deliver any of the wines mentioned to the defendant, provided the orders of defendant were kept within the annual amount of 17,500 gallons." The court refused this instruction, but gave it after striking out the words, "and that before the expiration of such contract year—that is to say, before September 1, 1899—the plaintiff had no right to refuse to deliver any of the wines mentioned to the defendant." The instruction should have been given as requested. The plaintiff did not have the right to refuse to deliver any of the wines mentioned before the expiration of the contract year, provided they were within the amount called for by the contract. Under the evidence the defendant had the right to have the jury so instructed. The instruction as given did not contain all the substance of the requested instruction.

It is not necessary to discuss other alleged errors, for the reason that what has been said shows that the order must be affirmed; and it is so ordered.

We concur: HARRISON, P. J.; HALL, J.

1 Cal. App. 222

PEOPLE v. BALLARD.

(Court of Appeal, First District, California. June 27, 1905.)

1. Criminal Law—Absent Witnesses—Evidence at Preliminary Examination—Foundation—Discretion—Review.

Pen. Code, § 686, authorizes the prosecution to read the deposition of a witness in evidence, where it is clearly shown that the witness cannot, with due diligence, be found within the state. *Held*, that the court's determination of the fact that the witness could not be so found would not be set aside, unless the evidence in its support showed an abuse of discretion.

2. Same—Evidence.

A prosecuting witness having been duly subpœnaed, a second subpœna issued for him at a time to which the trial was continued was returned not found. No effort was made to find the witness until the day before the trial, when a police officer inquired at two places for the witness, but, on being informed that he had left, the officer made no inquiry as to when he left, or whither he had gone, though he testified that the witness was a laboring man, working on the railroad at another city whenever he could get work, but no effort was made to find him there. *Held*, that such facts were insufficient to sustain a finding of diligence to find the witness within the state, sufficient to permit the introduction of his testimony on a preliminary examination, as authorized by Pen. Code, § 686.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Frank Ballard was convicted of robbery, and he appeals. Reversed.

H. H. McCloskey, for appellant. U. S. Webb, Atty. Gen., for the People.

HARRISON, P. J. The appellant was convicted in the superior court for San Francisco of the crime of robbery, and has appealed from the judgment thereon, and also from an order denying him a new trial.

The prosecuting witness, Thomas Cronan, upon whom the robbery was committed, was not present at the trial, and the district attorney offered to read in evidence the transcript of his testimony given before the police court at the preliminary examination of the defendant, and, for the purpose of laying the foundation for reading the same, introduced evidence of his absence from the city and of the efforts to secure his presence at the trial. The defendant objected to the reading of this testimony upon the ground that no subpœna had been issued for his appearance at the trial on that day, and that the prosecution had not used due diligence to find him. The objection was overruled, and the deposition was read in evidence. To this ruling the defendant excepted, and relies upon the error therein in support of his appeal. The facts upon which the objection was made, as shown in the bill of exceptions, are as follows, viz.: The trial upon the information was originally set down for January 11, 1904, when it was continued to January 18th, and on that day was again continued until February 1st, and by further continuances on subsequent days to March 29th. On January 17th Cronan was duly subpœnaed to be present as a witness on the next day; and upon a subbpœna afterwards issued to the county of Solano a return was made on January 30th by the sheriff of that county that he had received it on January 19th, but had been unable to find the witness in that county. The prosecution caused no other subpœna to be issued for him, nor did it make any further effort to secure his presence at the trial until March 28th, the day prior to the one on which the trial was had, nor was it shown that the witness was informed or knew of either of the several continuances. On March 28th a police officer went to two places in San Francisco, at one of which the witness was stopping at the time of the commission of the crime, December 5, 1903, and, upon making inquiry for him at those places, was told that he had left them; but it does not appear that any inquiry was made as to when he left, or whither he had gone, nor was it shown that he had been at either of those places since the day of the crime. The officer also testified that the witness was a laboring man, working on the railroad at Richmond whenever he could get work; but it does not appear that any effort was made to find him at Richmond, although the attention of the district attorney was called to the fact that he was not in the city. Under section 686 of the Penal Code, the right of the prosecution to read the deposition of a witness in evidence upon the trial of a defendant in a criminal action is an exception to the right therein given a defendant "to be confronted with the witnesses against him"; and before a deposition can be so read the facts creating the exception must be clearly shown to the court, one of which is that the witness "cannot with due diligence be found within the state." The existence of this fact is to be determined by the trial court from the evidence thereon presented to it, and, like its decision upon any other question of fact, will not be set aside, unless there is such a want of evidence in its support as show that there was an abuse of discretion in making such decision. People v. Lewandowski, 143 Cal. 574, 77 Pac. 467. If there is no competent evidence in support of its decision, it will be disregarded. People v. Plyler, 126 Cal. 379, 58 Pac. 904. In the cases cited by the Attorney General in support of the ruling of the superior court there was an abundance of evidence showing a serious effort on the part of the prosecution to secure the presence of the absent witness; whereas in the present case the record shows such efforts to have been of a perfunctory character, although the absence of the witness was known to the district attorney, and no effort was made to find him at Richmond, where it was testified that he had been at work. It must be held, therefore, that the court erred in permitting the deposition to be read in evidence, and that for this error the judgment must be reversed.

The appellant has also urged that the deposition was itself insufficiently authenticated, and for that reason incompetent as evidence; but, as the grounds for this error may be obviated upon another trial, it is unnecessary to pass upon its sufficiency.

The judgment is reversed.

We concur: COOPER, J.; HALL, J.

1 Cal. App. 198

Ex parte FINLEY.

(Court of Appeal, Third District, California. June 20, 1905.)

1. CRIMINAL LAW — CRUEL AND UNUSUAL PUNISHMENT.
Pen. Code, § 246, providing that every person under life sentence in a state prison, who with malice aforethought commits an assault on the person of another with a deadly weapon or instrument, or by means or force likely to produce great bodily injury, is punishable with death, is not unconstitutional, as inflicting cruel and unusual punishment.

2. SAME—EQUALITY—CLASSIFICATION.
The Legislature being entitled to classify crimes and penalties according to terms of imprisonment, Pen. Code, § 246, providing a death penalty in cases of assaults with a deadly weapon, or likely to produce great bodily injury, by life convicts, was based on a valid classification, and, being equally applicable to all persons within the same class, was not unconstitutional, as denying equality to such convicts.

3. SAME—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS.
Such section was not unconstitutional, as depriving convicts to whom it applied of their life or liberty without due process of law, or of the equal protection of the law.

Application by J. W. Finley for a writ of habeas corpus. Writ denied.

Samuel T. Bush, for petitioner. A. M. Seymour, Dist. Atty., for the People. H. C. Ross and W. F. Renfo, amicus curiæ.

McLAUGHLIN, J. The petitioner, while undergoing a life sentence in the state prison at Folsom, was indicted for the crime defined in section 246 of the Penal Code, and is now confined in the county jail of Sacramento county, awaiting trial for said crime.

The section upon which the indictment is based reads as follows: "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death." It is contended that the indictment is void, and the restraint under it illegal, for the reason that section 246 contravenes sections 6, 11, and 13 of article 1, and subdivision 2 of section 25 of article 4, of the Constitution of the state, and the fifth, eighth and fourteenth amendments to the Constitution of the United States.

Rules of Construction.

Questions involving the constitutionality of statutes always invite careful consideration of the relation between the legislative and judicial departments of government. These departments are co-ordinate, and, being of equal rank, it follows necessarily that courts should never annul or impair an act of the Legislature, unless it is plainly and palpably in conflict with that supreme law which limits and controls the exercise of power by all branches of government. In a sense, the legislative is the highest department of state government. The few restrictions found in state and federal Constitutions embrace the only limitations in its power, while the powers and duties of the other departments are limited, not only by Constitutions, but by legislative enactments. These reflections admonish us that while courts should fearlessly and conscientiously interpret laws, whether found in Constitutions or statutes, such power of construction should be exercised with extreme caution when the validity of a statute is questioned. They also point to the reason for and basis of rules, which command that no statute shall be declared violative of constitutional provisions, unless the conflict is clear, substantial, and incapable of reconciliation. In this way attention is directed to the principle underlying the doctrine that every presumption and intendment aids, and that every doubt must be resolved in favor of the validity of the statute assailed. Cooley's Constitutional Limitations, pp. 233, 235, 237, 240, 252, 253; Endlich on Interpretation of Statutes, § 178; Sutherland on Statutory Construction, § 82; Gillett's Criminal Law, § 26; Brown v. Walker, 161 U. S. 596, 16 Sup. Ct. 644, 40 L. Ed. 819; Booth v. Illinois, 184 U. S. 431, 22 Sup. Ct. 425, 46 L. Ed. 623; Bourland v. Hildreth, 26 Cal. 180; University v. Bernard, 57 Cal. 613; People v. Hayne, 83 Cal. 116, 117, 23 Pac. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211; Bates v. Gregory, 89 Cal. 394, 26 Pac. 891; In re Madera Irrigation Dist., 92 Cal. 307, 308, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. These rules and principles force the conclusion that this court must be entirely satisfied and convinced that the Legislature has abused its great discretionary power, and overstepped constitutional limitations, before we can be justified in declaring section 246 unconstitutional and void. There is no room for conjecture or surmise, sympathy or deprecation. We are not privileged to discuss the wisdom or advisability of this legislation, nor to indulge in speculation touching possible effects.

The question is purely one of law. Does this enactment subject the petitioner to cruel or unusual punishment? Is it special, discriminating, or unequal? Does it deny to him that equal protection which the law accords to all alike, be they exalted or lowly, saints or sinners? Upon the answers to these questions, the answer to the main question depends. These answers must be sought through the light of legal principles, and the investigation must be shorn of every vestige of prejudice or favor. It would be profitless to indulge in a homily touching the relations between the national and state governments, and quite as useless to sermonize on the point that some provisions of the higher Constitution relied upon cannot be invoked to nullify, or in any way affect, the legislation of a sovereign state. The rules of construction as to both Constitutions, so far as the question before us is concerned, are identical. Every point made by the petitioner is covered by provisions of our state organic law, and hence the validity of this statute will be tested by that standard. But, as federal questions are undoubtedly involved, due weight will be given to decisions by the federal courts.

Is the Punishment Cruel or Unusual?

In considering this question the warm impulses of the heart must be stifled; for we are to remember that it is not pity for the culprit, nor resentment for his crime, but cold, dispassionate rules of law, which can lead us to an impartial and correct conclusion. Every humane man feels a pitying regret whenever the death sentence has been, or may be, pronounced against a fellow creature; but human experience, crystallized into law, teaches that very severe penalties are unfortunately necessary to deter men from defying law and daring the consequences. The function of defining crimes and fixing punishments has always been considered a matter of legislative discretion in the very broadest sense. For the judicial department to fix a nicely adjusted maximum or minimum scale for admeasuring penalties for crime would be as much an act of usurpation as if that department should attempt to enumerate the acts which would entail penal consequences. It is therefore for the Legislature alone to define crimes and fix the punishment which may be inflicted. It is only when the punishment is out of all proportion to the offense, and is beyond question an extraordinary penalty for a crime of ordinary gravity, committed under ordinary circumstances, that courts may denounce it as unusual. And a penalty can never be declared cruel, unless it shocks the moral sense and outrages those innate principles of humanity which have been broadened and expanded by civilized enlightenment. It could hardly be contended that the death penalty is cruel per se, for the whole current of law for centuries justifies its infliction. Hence we assume that the point here made is that it is excessive in degree, and therefore inhibited. This and other questions which are to follow seem to make this a case of first impression; for an industrious search by counsel, supplemented by an extensive and patient research by the court, has failed to disclose a parallel case. It is therefore of high importance that each proposition should be fully and clearly stated and decided, and this will, we trust, excuse any seeming verbosity.

It must be admitted that every person, whether felon or freeman, should be punished for making a deadly assault on another. This, then, suggests an inquiry as to the punishment which could be inflicted on a guilty life convict, if the judgment of death be not permissible. Through his own misconduct, such convict has forever forfeited his liberty, and has suffered civil death. The only remaining right or privilege he can forfeit is his physical life. The limit of ordinary punishment has been reached, and, if this only remaining penalty cannot be inflicted, then such convict stands immune from further human retribution. The necessity for such punishment cannot be questioned. So sweet is liberty that men will do and dare anything to gain it; and when a man has forfeited that liberty, when the song of every bird and the breath of every zephyr tells the tantalizing story of privileges forever lost, desperation and despair makes the victim, especially if naturally depraved, a dangerous and daring man. Under such circumstances he will be careless of other lives and all consequences. It is, then, absolutely necessary that those who come in contact with him should be carefully protected against his reckless, and certainly against his malicious and deliberate, acts. But it was urged in argument that such convicts can be punished by solitary confinement, a diet of bread and water, and other penalties now in use as part of prison discipline. The obvious answer to this is that every convict, whatever his term, is subject to such penalties for ordinary infractions of prison rules. This is an incident attaching to the judgment already pronounced against him. But when a life convict commits an act amounting to far more than a mere infraction of disciplinary rules, an act denounced as a grave and dangerous crime in every Criminal Code, for us to declare that such penalties are the only ones that can be decreed as punishment for such act would be to say with deliberate solemnity that the law not only tolerates, but should command, an idle act. Such argument rebounds from reason back upon itself, and proves that such penalties, in addition to being ridiculously inadequate, would be no punishment at all; and if such penalties had been declared in section 246, and one or all of them had been extended for any definite term, or to the limit of imprisonment, the same question here presented would still exist. In that event counsel as industrious, astute, and ingenious would contend, under the same rules and authorities, that such punishment was of greater severity than could be meted out to other offenders, and was therefore excessive. We could then decide, only as we do now, that in view of the necessity for some adequate punishment, and the extraordinary circumstances surrounding the commission of this grave offense, the legislative discretion has not been abused, for the reason that within the domain of logic and law we can conceive of no other adequate penalty which could be inflicted. We agree with counsel that the infliction of the death penalty in such cases is awful, and may add that its infliction in any case is likewise awful; but sentiment must give way to duty. Crime must be punished and prevented, and lives must be protected; and, while such arguments might properly be addressed to legislative discretion, they can have no weight here. The Legislature may attach exceptional penalties to crimes exceptional in their nature, or attended by exceptional circumstances; and this is such a case. Therefore we can only bow to the mandate of that department, finding comfort in the thought that life convicts, in common with other men, may escape penalties by behaving themselves.

We are, however, unwilling to rest a decision fraught with such grave import to a fellow creature upon our own unsupported reasoning. In Territory v. Ketchum, 65 Pac. 169, 55 L. R. A. 90, the defendant had beer convicted and sentenced to death, under a statute making it a capital offense to "willfully and maliciously make an assault upon any railroad train, railroad cars, or railroad locomotives, for the purpose, and with the intent, to commit murder, robbery or any other felony, upon or against any passenger on said train or cars, or upon or against any express messenger, mail agent, engineer, conductor, fireman, brakeman or other employé of said trains," etc. The validity of that statute was assailed upon the very grounds here urged, and the Supreme Court of New Mexico not only held the penalty within the discretion of the Legislature, but went much further, saying: "The question whether the punishment is too severe, and disproportionate to the offense, is for the Legislature to determine. * * * Counsel for defendant claims that as properly understood it means, when used in this connection, punishment out of proportion to the offense. If by this is meant the degree of punishment, we do not think the contention correct. * * * It was never designed to abridge or limit the selection by the lawmaking power of such kind of punishment as was deemed most effective in the punishment of crime." We deem it unnecessary to express either concurrence or dissent touching this extreme view, but invite attention to the many authorities cited to sustain the text, thus avoiding undue prolixity here. A similar statute has been a law of this state for 14 years, and, though two bitterly contested prosecutions were had under it, it stands unimpaired. If, as was said in the earliest of these cases, the "necessity of the times" justified such severe measures for "preventing train wrecking and punishing train wreckers," it is difficult to understand why the exigencies of a peculiar and dangerous situation would not justify equally severe measures, if necessary to restrain or punish hope-abandoned felons. Pen. Code, § 218; People v. Thompson, 111 Cal. 245, 43 Pac. 748; Same v. Worthington, 115 Cal. 245, 46 Pac. 1061; People v. Lovren, 119 Cal. 91, 51 Pac. 638. In Williams v. State, 30 South. 336, the Supreme Court of Alabama held a statute, nearly like ours, constitutional. The only difference between that statute and the one under consideration is that the former makes murder by a convict punishable with death. See, also, Tiedeman on Limitations on Police Power, §§ 10, 11, 31.

Classification as Denying Equality.

The grandest principle of our law, rightly termed the safeguard of our liberties and institutions, is that firmly fixed, but sometimes misunderstood, rule against discrimination between persons or classes merely because they are such. Misunderstood, we say, because it is sometimes difficult to understand what constitutes discrimination between persons or classes of persons. The reason (aptly termed the "soul" of a law) furnishes an unerring guide to its proper interpretation. Knowing that the reason supporting this rule is the idea that "all men stand equal before the law," we readily see that in a broad sense this means equal rights, duties, privileges, and burdens, under laws bearing equally upon all citizens; but when we stop to consider the rights of persons, in view of their relations to other persons and to organized society, and think of the varied conditions arising from vocations and circumstances, creating variant necessities, responsibilities, and duties, we can as readily see that this cannot mean that every law must at all times apply to every person in the same way. Nothing could bring about greater inequality or create more onerous burdens than the strict application of such a rule as this. It would never do to subject the farmer, upon whom all depend, to the same restrictions imposed upon callings deemed injurious, instead of beneficial, to society; nor to class tanneries and powder-works with the business of the baker and tailor, which are not offensive or dangerous to anyone. It would be burdensome in the extreme, as well as impracticable and unnecessary, to compel the ordinary laborer to submit to regulation in the conduct of his calling, and to examination, in order that he might be certificated, a la the teacher, physician, and lawyer. All men cannot be grocers, druggists, or merchants. All do not conduct saloons, theaters, slaughter houses, or hospitals. Happily all men are not lawyers, and unfortunately all cannot hold public office. Hence we have an infinite variety of laws based upon the necessity for regulating the conduct of professional men and public servants, and placing restrictions upon business according to its harmful or beneficial relation toward public health, safety, convenience, or happiness, ad infinitum. Railroads, owing to sparks and speed, make the danger of fire or accident greater than attend other methods of inland transportation; hence the necessity for special rules as to the conduct of such business and touching damage for lack of special precautions and care. All men have a right to use public streets and roads, but all must submit to special rules regulating the use thereof. All have a right to enter public buildings and grounds, but attendants guard the entrance to offices where busy men attend to public duties, and the stroller is frequently admonished to "keep off the grass." Thus, in the infinite variety of human vocations and character, in the vast compass of human achievement and great, small, and intermediate human activities, do we find the secret of inequalities, making necessary general laws adapted to the duties, responsibilities, and necessities arising from conditions and circumstances, and hence applying only to certain classes. And so it is with crime. All crimes are not of the same gravity or nature, and criminals vary in recklessness, depravity, and cruelty. Again, all crimes are not committed in the daytime, nor under the same conditions and circumstances. Of necessity, then, crimes and criminals have ever been divided into classes, and penalties, ranging from a nominal fine to the supreme expiation of a forfeited life, have been inflicted.

From these considerations we evolve the rule and necessity for classification, according to conditions, vocations, circumstances, duties, and responsibilities, attending the relations of individuals toward the public and toward government in any or all of its branches. Nor are we left groping as to restrictions upon such classification. They flow as a logical sequence from the very necessity which compels separation into classes. That necessity rests upon essential differences in the relations of men toward their fellows and the state, and so do the restrictions. These restrictions may be briefly described by saying that classification must not be arbitrary, nor result from mere caprice or the desire or ability to separate and classify. It must not be based on mere physical characteristics, such as height, weight, complexion, or age, nor on race, nativity, mentality, or other personal attribute, which pertains solely to the particular person, and not to any relation that person may bear to other persons in the scope of human conduct and activity. Nor may it be predicated upon religious belief, for that pertains to relations between creator and creature, which concerns only the individual worshiper; and it is not within the range of enlightened law to question the propriety of such worship, nor make equality depend upon the shrine at which the citizen may kneel. It must rest upon some substantial, inherent, intrinsic difference or distinction in the relation of the particular class toward the lives, safety, property, health, happiness, or convenience of the public, when contrasted with the relation, duties, responsibilities, position, or situation of other persons or classes toward the same matters of public concern. Missouri v. Mackey, 127 U. S. 209, 8 Sup. Ct. 1161, 32 L. Ed. 107; Mugler v. Kansas, 123 U. S. 667, 669, 8 Sup. Ct. 273, 31 L. Ed. 205; Minneapolis v. Beckwith, 129 U. S. 33, 9 Sup. Ct. 207, 32 L. Ed. 585; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; A. T., etc., R. R. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909; St. P. R. R. v. Matthews, 165 U. S. 25, 17 Sup. Ct. 243, 41 L. Ed. 611; L'Hote, etc., v. New Orleans, 177 U. S. 597, 20 Sup. Ct. 788, 44 L. Ed. 899; Gulf R. R. v. Ellis, 165 U. S. 155, 17 Sup. Ct. 255, 41 L. Ed. 666; Estate of Campbell, 143 Cal. 623, 77 Pac. 674; Ex parte Jentzsch, 112 Cal. 474, 44 Pac. 803, 32 L. R. A. 664; Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; State v. Fraternal Order (Wash.) 77 Pac. 502; Ex parte Northrup (Or.) 69 Pac. 445; Atkinson v. Woodmansee (Kan.) 74 Pac. 641, 64 L. R. A. 325; Sutherland's Notes on Constitution, p. 728 et seq.; Story on Constitution, § 1961; Cooley on Constitutional Limitations, p. 562 et seq.; Bramon on the Fourteenth Amendment, p. 323 et seq. These authorities not only sustain the proposition to which they are cited, but throw much light on questions to be hereafter determined.

But it is claimed that in the case at bar there is no such difference or distinction as would justify discrimination between life convicts and other felons who make deadly assaults. We have already noticed one very important difference, based on the hopeless and desperate situation in which such convicts are placed, and the utter inability to inflict other adequate punishment upon them. But there is another important difference. In every state of this Union and elsewhere, penalties have always been graded and classified according to the gravity of the crime, and situation or character of the criminal. Our own Penal Code abounds with illustrations proving this assertion. Burglary is punished according to the time the offense is committed; arson, according to the habitancy of the premises set on fire; assaults, according to the use of corrosive or caustic substances; bribery, according to the position of the official or person bribed; embezzlement, according to official capacity and the character of property stolen. See appropriate sections of the Penal Code. But the strongest analogy exists between the section here assailed and chapters 2 and 3 of the Penal Code, relating to rescues and escapes. There, as here, the punishment is classified according to the term for which the prisoner was incarcerated. These sections are based on a very ancient statute, and the principle is entitled to veneration for its age, and respect for the soundness long-continued sanction evidences. Bishop on Criminal Law, vol. 2, §§ 1070–1090. But even stronger is the analogy between section 246 and section 666. The latter section makes the penalty depend upon prior conviction, and upon the term for which the offender might have been sentenced on his original conviction, and the gravity of the original offense. This section has been assailed on constitutional grounds, and the decision sustaining its validity has been cited with approval by courts of last resort in Massachusetts, Wisconsin, Missouri, and Kentucky, where similar statutes were questioned, as well as by the Supreme Court of the United States. People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; McDonald v. Com., 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; Id., 180 U. S. 311, 21 Sup. Ct. 389, 45 L. Ed. 542; Moore v. Missouri, 159 U. S. 675, 16 Sup. Ct. 179, 40 L. Ed. 301; In re Boggs (C. C.) 45 Fed. 475; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; Bishop, Criminal Law, vol. 2, § 959. Such decision has also been approved by our own Supreme Court in language too plain to be misunderstood. People v. Coleman, 145 Cal. 612, 613, 79 Pac. 283. If classification of crimes and penalties may properly be based on terms of three, five, ten, or any definite number of years, there can be no logical reason why it may not be based on a life term, nor why life, as well as liberty, may not be the forfeit.

We have preferred to place our decision on this point on broad grounds. It may, however, be remarked, before passing to other questions, that sections 245 and 246 of the Penal Code define and punish very different offenses. It is manifest that convicts already imprisoned for life cannot be further punished under section 245. It is plainly apparent from section 246 that it was designed to provide suitable punishment for such offenders, when there was added to the deadly assault the elements of deliberation and malice. This in itself justifies the classification; but, waiving this, the classification is in no sense arbitrary or capricious. It is based on natural, palpable, substantial, and inherent distinctions too plainly marked to be ignored. As was said in argument, it may be that men, good, but unfortunate, may sometimes be imprisoned for life. Waiving the rarity and improbability of this, and also waiving the fact that, if it be true, the sorrow and humiliation of such men will furnish ample security against further misconduct on their part, we are again constrained to say that such considerations are for other departments, and therefore they cannot have force here. This argument, however, was directed to the point that the statute is invalid, because it subjects the convict to double punishment, and gives the court power, on first conviction, to declare the penalty which must attach to subsequent transgression. But the same results would obtain in all cases where an increased punishment may be imposed upon offenders twice or thrice convicted, and both propositions were considered and settled in the last line of authorities cited.

Due Process of Law—Uniformity of Operation—Equal Protection of the Law—General and Special Laws.

The reasoning indulged in and the authorities cited touching classification apply with equal force to all questions above enumerated. After all, the one broad principle of "equality before the law" is the test which must be applied to each. Therefore, if we have reached a comprehension of the necessity for classification, and of the reasons requiring separation into classes, we can have little difficulty in understanding the meaning of phrases used in the above subhead. If the multifarious concerns of life result in inequalities affecting man's relation to the purpose of government, and consequent necessity compels classification, in order to prevent resulting and concurrent inequalities in the operation and effect of laws, it follows by the unerring force of reason and logic that if every person, standing in the same situation and relation, under the same conditions, would be punished in the same way under the same law, there is no inequality.

This is established by an infinite number of authorities, from a few of which we will borrow apt quotations: "The right to the equal protection of the laws is not denied, when it is apparent that the same law or course of proceedings would be applied to any other person in the state under similar circumstances and conditions." Tinsley v. Anderson, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91; Brannen on Fourteenth Amendment, pp. 322, 323. "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the [fourteenth] amendment." Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; French v. Davidson, 143 Cal. 662, 77 Pac. 663. "The fourteenth amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Hayes v. Missouri, 120 U. S. 71, 7 Sup. Ct. 350, 30 L. Ed. 578; Brown v. New Jersey, 175 U. S. 177, 20 Sup. Ct. 77, 44 L. Ed. 119; Marchant v. Pennsylvania, 153 U. S. 389, 14 Sup. Ct. 894, 38 L. Ed. 751; Giozza v. Tiernan, 148 U. S. 662, 13 Sup. Ct. 721, 37 L. Ed. 599; Cody v. Murphey, 89 Cal. 524, 26 Pac. 1081; Smith v. McDermott, 93 Cal. 425, 29 Pac. 34; In re Converse, 137 U. S. 631, 11 Sup. Ct. 191, 34 L. Ed. 796; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989. In Leeper v. Texas, 139 U. S. 467, 11 Sup. Ct. 577, 35 L. Ed. 225, it is said that "by the fourteenth amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons or classes of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied." People v. Coleman, 145 Cal. 615, 79 Pac. 283. "An act, to be general in its scope, need not include all classes of individuals in the state. It answers constitutional requirements if it relates to and operates upon the whole of any single class." Abeel v. Clark, 84 Cal. 230, 24 Pac. 383. We might multiply quotations, but the few we have embodied will answer every purpose; but profit could be derived from consulting Pace v. Alabama, 106 U. S. 583, 27 L. Ed. 207; Jones v. Brim, 165 U. S. 183, 184, 17 Sup. Ct. 282, 41 L. Ed. 677; L'Hote, etc., v. New Orleans, 177 U. S. 597, 20 Sup. Ct. 788, 44 L. Ed. 899; Minder v. Georgia, 183 U. S. 562, 22 Sup. Ct. 224, 46 L. Ed. 328; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Aikins v. Wisconsin, 195 U. S. 205, 25 Sup. Ct. 3, 49 L. Ed. 154; West v. Louisiana, 194 U. S. 263, 24 Sup. Ct. 650, 48 L. Ed. 965; Turner v. Williams, 194 U. S. 293, 24 Sup. Ct. 719, 48 L. Ed. 979; M. K. T. Ry. v. May, 194 U. S. 269, 24 Sup. Ct. 638, 48 L. Ed. 971; Cincinnati St. Ry. v. Snell, 193 U. S. 37, 24 Sup. Ct. 319, 48 L. Ed. 604; Detroit Ry. v. Osborn, 189 U. S. 389, 23 Sup. Ct. 540, 47 L. Ed. 860; Hager v. Reclamation Dist., 111 U. S. 708, 4 Sup. Ct. 663, 28 L. Ed. 569; Otis v. Parker, 187 U. S. 609, 23 Sup. Ct. 168, 47 L. Ed. 323.

In State v. Lewin (Kan.) 37 Pac. 169, we find nothing which, well considered, runs counter to the general current of authority. There a summary trial without a jury was provided for, and the punishment was made the same as the original sentence, whether long or short, and was not, therefore, the same as to all like offenders. The law applied to all convicts. Yet the prisoner sentenced for one year would go back for one year, and the prisoner sentenced for ten years would go back for ten. This made the punishment grossly unequal. In the case at bar all convicts imprisoned for life are treated alike, under a statute applying to them only. Herein lies the difference between the law there held invalid and the statute here under consideration. But, if that case did sustain petitioner's contention, it must fall before the rules of logic and reason pointing the correctness of the array of authorities sustaining the conclusion we have reached. Section 246 applies to every person in this state. All may avoid the class, but none within the class are discriminated against. There is no distinction based on race, creed, age, sex, or personal characteristics. Those who by lawless acts bring themselves within its scope must heed the warning it contains. If they fail to do so, they, and not the law, must be held responsible for the terrible consequences entailed by their deliberate acts.

The writ is denied, and the prisoner remanded to the custody of the sheriff of Sacramento county.

We concur: CHIPMAN, P. J.; BUCKLES, J.

147 Cal. 363

HIGGINS v. CALIFORNIA PETROLEUM & ASPHALT CO. et al. (L. A. 1,370.)

(Supreme Court of California. July 29, 1905.)

LEASES — CORPORATIONS — ORGANIZATION OF NEW COMPANY—FRAUD.

A corporation owned an asphalt lease by assignment under which it agreed to pay the lessors a royalty. One individual held substantially all of its stock, and, after one of the lessors conveyed her separate land covered by the lease to the corporation, a new corporation, with the same objects and place of business, was organized, to which all the old corporation's assets, except the lease, were transferred, and substantially all of its stock was issued to the principal stockholder of the old one in consideration of a debt which the latter owed him. The new corporation refused to pay royalties to plaintiff, the other lessor, and, he having recovered royalties against it in an action in which the new corporation was held to have been fraudulently organized and to be in fact the old corporation, the holder of the majority of its stock sold some of the same, and then a third corporation was organized to take over the second company's assets and to interest certain Eastern capitalists; but the latter was organized by the officers and stockholders of the old company, and all three corporations had their offices together in the same room, with practically the same officers, and were organized for substantially the same purposes. *Held*, that such third corporation was also in turn liable to plaintiff for royalties under the lease.

Department 2. Appeal from Superior Court, Santa Barbara County; Dummer K. Trask, Judge.

Action by P. C. Higgins against the California Petroleum & Asphalt Company and others. From a judgment in favor of plaintiff, certain defendants appeal. Affirmed.

Rehearing denied August 28, 1905.

Canfield & Starbuck, for appellants. W. S. Day and Orestes Orr, for respondent.

McFARLAND, J. Each of the three defendants, called the "California Petroleum & Asphalt Company," the "Alcatraz Asphalt Company," and the "Alcatraz Company," is a corporation; and this action is brought by plaintiff as one of the lessors in a certain lease of asphalt mines, to recover from said defendants certain rents or royalties reserved in the lease. The trial court rendered judgment for a certain sum of money which it found to be due as such royalties, and from the judgment the said defendants appeal, bringing up rulings and evidence in a bill of exceptions. Most of the main questions in the case were settled on two former appeals arising out of this same lease. In one of them, namely, Higgins v. California Petroleum & Asphalt Co., 109 Cal. 304, 41 Pac. 1087, the present plaintiff, Higgins, was plaintiff, and the defendant herein first above named, the California Petroleum & Asphalt Company, was defendant; and in the other case, namely, Higgins v. California Petroleum & Asphalt Co. and the Alcatraz Asphalt Co., 122 Cal. 373, 55 Pac. 155, Higgins was plaintiff and the two corporations first named in the complaint herein, to wit, the California Petroleum & Asphalt Company and the Alcatraz Asphalt Company, were defendants. In those two cases many of the facts pertinent to the present case are stated, and also the principles of law involved; and this present opinion will consist largely of references to those cases and quotations from the opinions therein.

On June 4, 1887, the plaintiff herein, Higgins, and Mary A. Ashley, were each the owner in severalty of a tract of land; each tract lying alongside of and adjoining the other. Running horizontally and continuously through both of these contiguous tracts there was a deposit of bituminous rock. On said June 4, 1887, the plaintiff herein and said Ashley jointly executed a written lease to one Joseph Scheerer for the term of 20 years of all the bituminous rock lying in said two tracts of land; and the lessee covenanted, among other things, to pay to the lessors on the 1st day of every month during the term "the sum of 50 cents per ton for each and every gross ton of bituminous rock and liquid asphaltum which he may have mined, taken, or removed from said premises during the calendar month then next preceding." In December, 1891, the defendant and appellant herein, the California Petroleum & Asphalt Company (hereinafter called, for brevity, the "C. P. & A. Co."), became the sole owner of said lease by assignment; and in June, 1902, the said Mrs. Ashley conveyed to said C. P. & A. Co. all that part of the land described in the lease which she severally owned. For several months after said conveyance by Mrs. Ashley the C. P. & A. Co. paid to the plaintiff herein one-half of the stipulated rent or royalty (25 cents per ton); Mrs. Ashley treating her interest in the lease as extinguished or merged in the said deed of her land. But differences arose between plaintiff herein and the C. P. & A. Co., and the latter, after April 1, 1893, refused to make further payments of royalty or rent. Thereupon the plaintiff herein, Higgins, commenced the action of Higgins v. California Petroleum & Asphalt Co., which was reported in 109 Cal. 304, 41 Pac. 1087, as above stated. The object of that action was to recover $1,000, unpaid royalty on 4,000 tons of rock at 25 cents per ton, alleged to have been mined from the deposit during the months of April, May, June, and July, 1893. The court found that the royalties of the defendant amounted to $671.25, and rendered judgment for plaintiff for that amount. The C. P. & A. Co. appealed, and the judgment and order denying defendant's motion for a new trial were by this court affirmed. 109 Cal. 304, 41 Pac. 1087. In that case this court declares that the lease, although made jointly by different owners of contiguous properties, was a valid lease. The court said, through its Commissioner, as follows:

"Had the lessors in this case been tenants in common of the demised premises, the effects of a conveyance by Ashley of her reversionary estate therein to the lessee would have been to merge her interest in the leasehold term in the reversion, and to extinguish pro tanto the covenant of the lessee to pay rent; yet, thereafter, Higgins would have been entitled to receive from the lessee the same portion of rent as before such conveyance (citing authorities), and I perceive no reason why the effects of Ashley's conveyance of her separate part of the demised premises, of which she was sole owner, should not be substantially the same as they would have been if the lessors had been tenants in common of every part of such premises, the only possible difference being in the mode of apportioning the rent. Had they been tenants in common, Higgins would still be entitled to a part of the rent proportionate to his undivided portion of the demised premises; but as they are not tenants in common he is entitled, in the absence of an express or presumed agreement to the contrary, to a portion of the royalty proportionate to the comparative value of his distinct part of the demised premises, and in this case the terms of the lease warrant the presumption that each lessor was to receive one-half of the royalty, and such presumption is in perfect accord with the practical construction of the lease by the parties thereto, up to April, 1893. The fact that, prior to the commencement of this action, the lessee had elected to mine only in that part of the 'deposit' lying within the Ashley tract, detracts nothing from the right of Higgins to demand his proper share of the royalty, nor from the obligation of defendant to pay it. The royalty of 50 cents on each ton of rock mined was, by the terms of the lease, to be paid to the lessors, not to the individual lessor from whose land the rock may have been mined. The lease does not restrict the mining to any particular part of the deposit at any time. The lessee has had the right, at all times since the execution of the lease, to mine any part of the deposit, and will continue to have such right until the expiration of the term of 20 years, only about 5 years of which had elapsed when this action was commenced, and more than one-half of the term is still in the future, during which defendant is at liberty to mine exclusively in that part of the deposit lying within the Higgins tract, and may completely exhaust it. The royalty per ton of rock mined is but a mode of estimating the rent to be paid for the right to occupy exclusively the whole premises demised, and to mine any part or all parts thereof at any time during the term, at the election of the lessee."

After the decision of the case last above referred to, the C. P. & A. Co. conveyed the land which had been conveyed to it by Mrs. Ashley to a new corporation, called the "Alcatraz Asphalt Company," but did not assign to the latter the said lease. After this, rock was taken out of the deposit as before and apparently under the same management; the rock, however, being taken out only from the part of the leased land which had been owned by Mrs. Ashley and conveyed by her to the C. P. & A. Co. The new corporation claimed that it was taking out the rock, and that, as it was not an assignee of the lease, it was not liable to Higgins for any part of the royalty, and refused to pay him any royalty or rent. Thereupon Higgins brought another action to recover from the two companies for royalties due, and recovered judgment, and from this judgment both companies appealed. The appeal in that case is the one reported in 122 Cal. 373, 55 Pac. 155, above referred to. The court in that case affirmed the judgment upon the ground that the two corporations were substantially the same, and that the lease could not be avoided by the scheme of a new corporation organized by the incorporators of the old one. The court said: "But the court below found in substance that the California Petroleum & Asphalt Company and the Alcatraz Asphalt Company (its alleged grantee) are identical, and that the mining operations conducted by the latter company on this land were in reality conducted by the former company. On this ground, the respondent contends that both companies are liable for the royalties in question. We think that there was evidence to sustain this finding. It shows that the new company was substantially a reorganization of the old one. In the old company there was only one real stockholder, and all of the stock issued by the new company was issued to him; the sole consideration being a debt which the old company owed him. It is true that shortly afterward he transferred some of his stock to some Eastern capitalists, and had this in view when the new company was formed; but we cannot agree with appellant that this fact affects the case." And the court further said: "The evidence, morever, strongly suggests, if it does not establish, that the main, and perhaps the sole, purpose of this organization was to evade the obligations of the lease. While transferring to the new company its land and all of the business and assets, it retained the lease, which could be of no avail in its hands. It is a legitimate inference that this was done purposely, and, if so, the only possible object would be to prevent Higgins from collecting royalties. The old company was to continue to be the lessee, but was to do no mining, while it was to permit the new company, its alter ego, to mine without any responsibility therefor. We therefore think that the court below was justified in holding that the new company was only the old one under another name; and, that being so, it is plain that their responsibility to Higgins was not impaired by this merely nominal transfer"—citing cases. "It is true that the court did not find that there was any actual fraud in the transaction; but we think that such a transfer as against the holder of an existing obligation is constructively fraudulent as a matter of law."

After the latter decision, a third corporation was formed under the laws of West Virginia, to wit, the defendant herein the Alcatraz Company; and to this third corporation the said land formerly owned by Mrs. Ashley was conveyed by the second-named corporation, defendant the Alcatraz Asphalt Company. After this rock was taken out as before, and this action is brought to recover royalties therefor. The court found that a certain number of tons of rock were taken out, and that 25 cents per ton amounted to a certain sum, for which judgment was rendered for plaintiff. The findings as to the amount of rock taken out and not paid for, and the amount due for the royalties, are supported by the evidence, and, indeed, are not assailed. The contention is, substantially as in the former cases, that the defendants are not liable because the last-named corporation conducted the business, and, not being bound by the lease, etc., is not under any obligation to pay royalties to the lessor, Higgins. However, we take the decisions of this court in the two cases above referred to as declaring the law applicable to those two cases, and we cannot see any substantial difference between the second of those cases and the case at bar. In the present case the court found that the three corporations defendant are really the same; that the Alcatraz Asphalt Company was organized by the officers and stockholders of the C. P. & A. Co., and the Alcatraz Company was organized by the stockholders of the Alcatraz Asphalt Company; that all three corporations "had their offices together in the same room, had practically the same officers, and were organized by the same persons and for substantially the same purposes." And it further found "that the operations conducted on the leased premises during the time covered by the amended complaint in this action, under the name of the Alcatraz Company, were in reality conducted by, or under the authority of, the Alcatraz Asphalt Company and the California Petroleum & Asphalt Company."

Appellants contend that these findings are not warranted by the evidence; but we think that they are. The evidence in the case at bar as clearly shows the relation as found by the court of the third corporation to the two former ones as the evidence in the case reported in 122 Cal. 373, 55 Pac. 155, shows the relation of the second corporation, the Alcatraz Asphalt Company, to the first corporation, the C. P. & A. Co. The fact that when the Alcatraz Company was incorporated the intention of the incorporators was to take in certain Englishmen as stockholders makes no difference. A similar fact existed when the second corporation, the Alcatraz Asphalt Company, was organized; and on that subject this court said: "It is true that shortly after he [the main stockholder in the C. P. & A. Co.] transferred some of his stock to some Eastern capitalists, and had this in view when the new corporation was formed; but we cannot agree with appellants that this fact affects the case." And the point, here again made, that the rock was taken only from that part of the leased premises which belonged originally to Mrs. Ashley, is fully answered by what this court said in the case in 109 Cal. 304, 41 Pac. 1087, as above quoted. And the point that the articles of incorporation of the Alcatraz Company designated various kinds of business in which it might engage is of no consequence. The articles of incorporation of the other two corporations were of this same general character, and embraced various kinds of business. We are satisfied that the points here made for a reversal are covered, substantially, by the two former decisions against the contentions of the appellants.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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147 Cal. 413

MABB et al. v. STEWART. (L. A. 1,371.)

(Supreme Court of California. Aug. 2, 1905.)

1. PLEDGES—RIGHTS OF PLEDGEE—PAYMENT OF CHARGES—RECOVERY FROM PLEDGOR.

A pledgee of water stock, who is compelled to pay the assessment thereon in order to save the stock and the water right from sale, has a right to demand repayment thereof from the pledgor and equitable owner, but has not the right to enforce payment by withholding the water from the pledgor's land, although the stock stands in his name upon the books of the water company.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, § 68.]

2. DAMAGES — DUTY TO DIMINISH — INCURRENCE OF UNNECESSARY LOSS.

Where the mortgagee of land and pledgee of stock representing a water right appurtenant to the land has, because of the owner's refusal to reimburse him for assessments paid to protect the stock and water right from sale, wrongfully directed the water company to withhold the water from the owner's land, such owner, on being informed of the mortgagee's action, may not further refuse to pay the assessments, and passively allow the time to elapse, without taking means to secure the water either by paying assessments or from some other source, and then recover as damages from the mortgagee the full amount of injury to her crops resulting from their failure to receive the necessary water, but her recovery is restricted to the amount that it would have been necessary for her to pay to obtain sufficient water to replace that of which she was deprived, and cannot under any circumstances exceed the amount of the assessments demanded of her by the mortgagor.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 119–133.]

3. SAME—RIGHT TO ENHANCED DAMAGES.

Plaintiff purchased land and an appurtenant water right, assuming as part of the purchase price payment of an outstanding mortgage to defendant, which defendant had pledged, as plaintiff knew, as collateral security for a loan. Defendant, in addition to the mortgage, also held in his own name the stock which represented the water right. Plaintiff knew of this fact, and also knew that the expenses of the water company were met by assessments upon the stock. She was informed by one whom she knew to be the agent of the pledgee of the mortgage that water assessments had not been paid, and, instead of responding to her duty to pay them, she immediately disclaimed ownership of the stock, and insisted that defendant was the owner, and should pay the assessments. This defendant did, and plaintiff was informed that he had directed the water company to withhold the water. Before the water was actually withheld, the pledgee's agent again spoke to her, and informed her that it was her duty to pay the assessments. *Held*, that plaintiff was charged with knowledge that defendant's directions to withhold the water were made on account of her failure to pay the assessments, and could not claim that she believed it was due to some independent cause arising out of malice in defendant towards her, and recover, on that ground, enhanced damages, resulting from her failure to receive the water, which she could have obviated by paying the assessments.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 106, 107.]

4. PRINCIPAL AND AGENT—ACTS OF AGENT—CONCLUSIVENESS ON PRINCIPAL.

Letters sent to the attorney of a mortgagor by the agent having charge of the note and mortgage must be deemed to have been sent to the mortgagor by the mortgagee.

5. EVIDENCE—CONVERSATIONS — ABSENCE OF PARTY CHARGED.

A conversation between a mortgagor and a purchaser of the land, who agreed to assume and renew the mortgage, which took place in the absence of the mortgagee, was not competent evidence against the mortgagee as to the purchaser's understanding of her obligations.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1174.]

6. NOTICE — IMPUTATION FROM CIRCUMSTANCES.

Knowledge of purchasers of property at the time of their purchase that a mortgage to be executed by them would be pledged by the mortgagee to another charged them with knowledge that the known agent of the pledgee, in so far as he was acting with respect to the payment and collection of the mortgage and matters connected therewith, was acting on behalf of the mortgagee.

7. ATTORNEY AND CLIENT — AUTHORITY OF ATTORNEY—PRIMA FACIE AUTHORITY — SECRET INTENTIONS.

A letter to an attorney, not accompanied by any statement as to the secret intentions of the client, must be regarded as giving the attorney such authority as it purports to give on its face, in so far as that authority is acted upon by the attorney in his communications to others, who have no knowledge or information of the client's secret intentions.

8. PRINCIPAL AND AGENT — NEGOTIATIONS WITH AGENT—COMPETENCY AGAINST PRINCIPAL.

Where the pledgee of water stock directed an officer of the water company to withhold the water from the pledgor until assessments advanced by the pledgee should be paid, a written demand by the pledgor on the officer for water, and the subsequent accompanying negotiations between the pledgor and such officer with regard to the delivery of the water, were admissible on the issue of the pledgor's conduct with respect to her obligation to pay the assessments to the pledgee.

9. WATERS AND WATER COURSES—IRRIGATION —WITHHOLDING OF WATER — ACTIONS FOR DAMAGES—EVIDENCE.

In an action by the pledgor of water stock for damages caused by the act of the pledgee in directing the water company to withhold water from the pledgor because of her refusal to pay certain assessments on the stock, evidence as to what became of the water after it was shut off from the pledgor's land, except so far as it might show that it was delivered to the land of the pledgee, was irrelevant.

10. EVIDENCE—THREATS—WORDS SPOKEN BY OTHERS.

In an action by the pledgor of water stock for damages caused by the act of the pledgee in directing the water company to withhold water from the pledgor, evidence of certain threats made by the man engaged in turning off the water, not brought home to defendant, or shown to have been authorized by him, is irrelevant.

11. TRIAL—OBJECTIONS TO EVIDENCE—ELIMINATING EFFECT.

Incompetent evidence, admitted over objection based on that ground, cannot be considered as evidence of the facts it tends to prove.

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Jessie W. Mabb and another against Lyman Stewart. From a judgment for plaintiffs and from an order denying a new trial, defendant appeals. Reversed.

See 77 Pac. 402.

Rehearing denied September 1, 1905.

Otis & Gregg and E. H. Joliffe, for appellant. J. L. Murphy, for respondents.

SHAW, J. This case was before this court upon a former appeal, in which a judgment for the plaintiff and an order denying a new trial were reversed. 133 Cal. 556, 65 Pac. 1085. The cause was again tried, and judgment given for the plaintiff, from which, and from an order denying his motion for a new trial, the defendant again appeals. The plaintiff J. J. Mabb has no interest in the case except as husband of his co-plaintiff.

The transcript is voluminous, but the case in its main features is simple. It is an action to recover damages caused to the plaintiff's orange and lemon orchard by reason of the action of the defendant in wrongfully depriving the plaintiff of water for the irrigation thereof in the month of August, 1898. The facts necessary to be stated are as follows: The plaintiff was the owner of 10 acres of land, upon which there were growing some eight acres of bearing orange and lemon trees, which required irrigation to make them productive and profitable. Appurtenant to the land was a water right consisting of 10 shares of stock in the San Antonio Water Company, the ownership of which conferred a right to receive from the company a certain proportion of its water. The defendant Stewart held a mortgage of $2,500 upon the land, and the 10 shares of stock were also pledged as security for the mortgage debt, and they stood in Stewart's name on the books of the company; the right to the water, however, being vested in Mrs. Mabb, subject to the pledge and lien. The expenses of the company were raised by means of statutory assessments upon the stock from time to time. These assessments, as between Mrs. Mabb and Stewart, should have been paid by her, although the stock stood in his name. She failed to pay them, and Stewart was compelled to do so in order to prevent a sale after they became delinquent. Upon receiving notice that Stewart was claiming that she had not repaid the assessments previously paid by him, she declared that Stewart was the owner of the stock, and was obliged to pay the assessments himself; whereupon Stewart, treating her declaration as a disclaimer of title to the water as well as the stock, gave directions to the company to withhold the water from her lot until the assessments paid by him had been repaid by her. The company immediately acted upon these directions, and instructed its zanjero, or water overseer, to deliver no more water to the plaintiff's land, and gave the plaintiff notice accordingly. By reason of this action the plaintiff's land was deprived of its regular run of water on August 7, 1898, except for about 4¾ hours. In consequence of this loss of water, the trees were seriously injured, the crop for that year was diminished, and the crop for the succeeding year was also materially lessened; from all of which the court found that the plaintiff had suffered damages to the amount of $2,875.

By several assignments of insufficiency of the evidence the appellant presents the point that this finding with respect to the amount of damages is not supported by the evidence. The particular proposition on which the appellant bases this contention is that the plaintiff did not use proper diligence to replace the water of which she was about to be deprived, and that, consequently, she cannot claim the enhanced loss due to her own neglect. The rule of law on the subject is well established. It is thus stated in 1 Sutherland on Damages (3d Ed.) § 88: "The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss—that which was avoidable by the performance of his duty—falls upon him." This duty is exacted of the injured party "only when, in view of all the circumstances of the particular case, it is a reasonable duty which he ought to perform, instead of passively allowing a greater damage." Id. A large number of cases are cited in support of these principles. Some cases may be stated in illustration of the principle. In Dillon v. Anderson, 43 N. Y. 237, a party who contracted for the erection of a building gave notice, without good cause, after the work was begun, that he rescinded the contract; and it was held to be the duty of the builder, as soon as the notice was given, if he acquiesced in the proposed rescission, to have so acted as to save the owner from further damage so far as it was in his power, and that he had no right thereafter to continue the work, and thereby destroy the value of the material on hand, and consequently enhance the damages. In Culbertson v. Miller, 26 Ont. 36, a party who desired to haul ice from the lake over lots on the lake front was prevented from doing so by another party unless he would pay a certain toll, which this other party unjustly, but in good faith and without malice, demanded. It was held that the first party should have paid the toll under protest, and that he could not refuse to do so, and thereupon recover of the second party for the loss resulting to his business because of his being prevented from hauling and shipping his ice. In the present case the defendant gave the directions to the corporation on the 7th of July. According to the regulations of the company, the water to which the plaintiff was entitled was delivered upon the 7th of each month. The order to withhold the water was received too late to prevent delivery for that month, but within a day or two thereafter the plaintiff was informed that Stewart had given the order, and that she could receive no more water for her land. It appears further that, if she had made any reasonable effort thereafter and before the next run of water became due, she could have obtained water equal to the amount to which she was entitled, from the San Antonio Water Company at an expense of $30; that, if she had made any inquiry in regard to the reason for withholding the water, she would have ascertained that it was due to her failure to pay the assessments, and that under the terms of the order she could have obtained the water by simply paying the amount of $70, then due on the assessments. Indeed, the evidence strongly indicates that, if Stewart had been informed by her that she was willing to pay the assessments, either then or at the time the mortgage became due, he would have revoked his directions to withhold the water. Stewart, as pledgee, having been compelled to pay the assessments in order to save the stock and the water right from sale, had the right to demand the repayment thereof from Mrs. Mabb, who was the equitable owner of both the stock and the water. He did not, however, have the right to enforce payment from her by withholding the water from the land, although being the owner of the stock upon the books of the corporation, and the officers of the company having no knowledge of the rights of Mrs. Mabb, Stewart had the apparent power to control them with respect to the delivery of the water. His action in withholding the water was therefore without right. But, on the other hand, when Mrs. Mabb was informed that he had given directions to withhold the water, she was not justified in further refusing to pay the assessments, nor was she justified in passively allowing the time to lapse in the unwarranted expectation that Stewart would change his mind, and allow the water to be delivered to her land without payment of the assessments, when, by reasonable effort and slight expense, she could have obtained water in place of that of which she was deprived by Stewart, or by complying with the order, could have secured the water as usual. Where the damages that would otherwise result from a wrong of this sort can be reduced by reasonable diligence and at slight expense upon the part of the party injured, the measure of damages, in case the injured party willfully or negligently fails to use the diligence or incur the expense, is not the serious consequences which actually and naturally result from the deprivation, but is limited to the reasonable expense which would be necessary to prevent further loss. 1 Sutherland on Dam. supra. Under this rule the measure of damages in this case was the amount that it would have been necessary for her to pay to obtain sufficient water to replace that of which she was deprived. This would not, under any circumstances, exceed the amount of the assessments demanded of her by Stewart.

The plaintiff claims, and the court seems to have sustained her in this respect, that she had no knowledge of Stewart's demand; that she did not know, and had no means of knowing, the reasons for withholding the water, and believed that it was entirely due to Stewart's malice, arising from some difficulty with respect to church matters, having nothing whatever to do with the contract rights involved. This claim is manifestly insincere, and does not excuse her. Mrs. Mabb bought the land of one Merriman in 1896. Merriman had executed a mortgage upon the land to Stewart for $2,500, which had been by Stewart pledged to one McCulloch as collateral security for a loan from McCulloch to Stewart, and at the time of Mrs. Mabb's purchase it was held by McCulloch. The agreement between her and Merriman was that she should assume payment of the Stewart mortgage, and that this agreement should be consummated by a release of the mortgage of Merriman and the execution of a new mortgage to Stewart by Mrs. Mabb. This agreement was carried out, and in pursuance of it the mortgage in question here was executed. Mrs. Mabb was informed at the time that the new mortgage would be held by McCulloch as collateral security for his loan to Stewart. She knew that the stock was in the name of Stewart, and that it belonged to her land; indeed, it was expressly mentioned in the deed from Merriman to her. She knew that the expenses of the company in carrying on its water system were met by assessments upon the stock, and she is presumed to know that, if the assessments were not paid, the stock could be advertised and sold under the statute, and that the result would be that her land would lose its water right, and become practically worthless. She knew that the affairs of McCulloch were managed by an agent, Mr. J. S. Torrence. She was informed by Torrence in February, 1898, that the water assessments had not been paid. She must be presumed to know that it was her duty to pay them. Instead of responding to this duty, she immediately disclaimed ownership of the stock, and insisted that Mr. Stewart was the owner of the stock, and must pay the assessments. She knew that the assessments had been made, and had not been paid by her, and she was informed that the direction to withhold the water had been given by Stewart. She was again informed by Torrence on the 23d of July—more than two weeks before the water was actually withheld—that it was her duty to pay these assessments. She must be presumed to know that the actions of Torrence in regard to this matter were taken on behalf of himself and Stewart also. Torrence, as the agent of McCulloch, had no relation to the case whatever, except as the holder of the note and mortgage given by her to Stewart. Her actions and conduct throughout the affair are insincere, and indicate a desire on her part to evade meeting her just obligations. Under all these circumstances, upon being informed that Stewart had given directions to withhold the water, she was charged with knowledge that the water was withheld on account of her failure to pay the assessments. She was at least put upon inquiry as to the cause, and upon the slightest inquiry could have ascertained the exact cause, and would have learned that the small sum of $70 would secure her the water at the regular time. The evidence shows that she did demand of the water company the delivery of the water at the regular time, but that she failed altogether to make any inquiry about the cause of withholding it, willfully preferring rather to remain in ignorance, and suffer the consequences of the loss of water, than to do her reasonable duty in the matter and meet her just obligations. In view of this willful neglect she is not entitled to recover the enhanced damages caused thereby, and which could have been prevented by the exercise of reasonable diligence and good faith on her part. It is proper to add that we have imputed to the plaintiff knowledge of the facts which were communicated to her attorney while he was attending to her business for her; and that there was in Stewart's conduct nothing more blameworthy than that he was endeavoring by unwarranted means to enforce a just demand.

The finding that Stewart did not, prior to August 7, 1898, demand of Mrs. Mabb the repayment to him of the assessments previously paid by him, is not supported by sufficient evidence. The letters sent to her attorney must be treated as having been sent to her. Torrence, as agent of McCulloch, had charge of the note and mortgage, and his demands must be treated as having been made on behalf of Stewart. In view of these facts it cannot be said that no demand was made on behalf of Stewart for the repayment of the assessments.

The court finds that the plaintiffs did not understand that they were to pay the water assessments until the principal of the mortgage became due. This finding is entirely unsupported by any competent evidence. The conversation that took place between the plaintiffs and Merriman at the time they purchased his land and agreed to renew his mortgage was in the absence of Stewart, and was not competent evidence of any agreement whatever, so far as Stewart was concerned. There was no other evidence upon which this finding could be supported. Their testimony as to their understanding and belief was incompetent evidence against Stewart.

The court further found that the plaintiff had no notice or knowledge that Torrence was acting for or on behalf of Stewart in any matter. This finding is unsupported by the evidence. The plaintiffs themselves testified that at the time of the purchase from Merriman they were informed that their mortgage would be transferred to McCulloch to hold as collateral security for a debt due him from Stewart. They knew from the beginning that Torrence was acting as the agent for McCulloch in respect to these matters. This necessarily carried knowledge that Torrence, so far as he was acting with respect to the payment and collection of the mortgage and matters connected therewith, was acting on behalf of Stewart.

The finding that the plaintiff Mrs. Mabb did not intend to authorize her attorney to disclaim her ownership in the stock is not supported by competent evidence. He was acting as her attorney, and her letter to him was not accompanied by any statement as to her secret intentions. It must be taken as giving him such authority as it purported to give on its face, in so far as that authority was acted upon by her attorney in his communications to the agents of the defendant. It appeared upon its face to give such authority, and it is immaterial what her intention was, unless that intention was communicated to the defendant or his agents. There is no evidence that they had any knowledge or information of her secret intentions.

The finding that the plaintiffs did not understand that Stewart did not believe that they had refused to pay the water assessments is not supported by the evidence. The letters written by Mrs. Mabb and her attorney in regard to the matter plainly show that she did refuse to pay the assessments, and there is no evidence whatever that Stewart did not believe that she intended the necessary effect of her language.

Some errors of law in the admission of evidence remain for consideration. It was not error to admit the written demand for water, delivered by Mrs. Mabb to Shepherd, dated July 23, 1898. It was admissible to show the efforts made by the plaintiff to get water after having received notice that Stewart had directed it to be withheld. The direction of Stewart to Shepherd was to withhold the water "until the assessments are paid." This would imply that Stewart intended to authorize Shepherd to receive for him the money due him upon the assessments theretofore paid by him, and upon such payment to deliver to Mrs. Mabb the water. Upon this ground the demand was admissible, as were also the subsequent and accompanying negotiations between Mrs. Mabb and Mr. Shepherd with regard to the delivery of the water. This is not contrary to what was said in the opinion upon the former appeal concerning the agency of Shepherd. The particular language of the order given by Stewart to the agent was not under consideration in that case. It is proper to say, however, that the evidence as to these negotiations was pertinent only for the purpose of showing her conduct with respect to her obligation to pay the assessments to Stewart. The testimony as to what became of the water on the 7th of August, after it was shut off from the land of Mrs. Mabb, was irrelevant, except so far as it might tend to show that the water was then delivered to the land of Stewart. Evidence of the threats made at the time by those who were engaged in turning off the water to arrest the plaintiff J. J. Mabb in case he should interfere were not brought home to Stewart, nor shown to have been authorized by him, and they were therefore irrelevant, and should have been excluded. The testimony of Mrs. Mabb as to what she meant by the language of her letter of February 18th to Mr. Murphy was immaterial and incompetent. It is not claimed that the defendant, or any of his agents, had any knowledge with respect to her understanding of her own language. The attorney, in following her instructions, wrote a letter to Mr. Torrence, who was acting on behalf of Stewart, in which he used substantially the same language which she had used in her letter to him. This language must be given such meaning as, under all the circumstances of the case known to the parties who received it, it would naturally bear, and that meaning cannot be controlled by any opinion of Mrs. Mabb as to what ideas she intended to convey in her letter to Mr. Murphy. He had the ostensible authority to make the declarations contained in his letter, and any secret limitations thereon, not communicated to the other party, are immaterial, and incompetent as testimony in the case.

There are a number of other propositions discussed in the briefs, but we consider them unimportant, and not likely to arise upon a third trial.

The incompetent evidence we have referred to was admitted over the objection of Stewart, based on that ground, and hence it cannot be considered as evidence of the facts it tends to prove.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

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147 Cal. 370

In re BURRIS. (No. 21,036.)

(Supreme Court of California. July 29, 1905.)

ATTORNEY—DISBARMENT—REINSTATEMENT.

An attorney, disbarred for professional misconduct involving no criminality and no serious wrong, having thereafter for 10 years lived a life of probity, industry, and sobriety, as shown by the testimonials of judges and prominent attorneys, will be reinstated.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 84.]

In Bank.

In the matter of John F. Burris. Ordered reinstated as an attorney.

PER CURIAM. This is a petition for the modification of an order of disbarment heretofore entered against the petitioner. The order was made more than 10 years ago upon a charge of professional misconduct involving no criminality and no serious wrong to any one, though inexcusable in itself. Since that time, as we learn from the testimonials accompanying the petition, the petitioner has been living a life of probity, industry, and sobriety. These testimonials are signed by a number of judges of the superior court, and by many prominent attorneys of the counties where the petitioner was engaged in practice prior to the order of disbarment. His restoration to the bar is also recommended by the judge in whose court the matter was pending out of which the charge of misconduct arose. In view of this strong testimony in his favor, we are of the opinion that the petitioner is entitled to the modification which he asks.

It is therefore ordered that the said John F. Burris be, and he is hereby, restored as an attorney and counselor of this court, and that his name be reinstated upon the roll of attorneys thereof.

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147 Cal. 384

ANGLO-CALIFORNIAN BANK, Limited, v. CERF et al. (L. A. 1,276.)

(Supreme Court of California. Aug. 1, 1905.)

1. APPEAL—FINDINGS—CONCLUSIVENESS.

A finding of the trial court, based on conflicting evidence, is conclusive on appeal.

2. MORTGAGES — CONSTRUCTION OF INSTRUMENTS—ABSOLUTE DEEDS—AMOUNT OF INDEBTEDNESS.

Notwithstanding the provision of Civ. Code, § 2922, that a mortgage can be created only by writing executed with the formalities required in case of a grant of real property, a deed absolute on its face may in equity be shown by parol evidence to have been intended as a mere mortgage, and the indebtedness intended to be secured thereby, whether present or future, although not specified in the deed or in any contemporaneous writing, may also be shown by parol evidence.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 98.]

3. Same—Parties.

The fact that the manager of plaintiff corporation, instead of plaintiff itself, was named as grantee in certain deeds executed to secure an indebtedness due plaintiff, in no wise impairs the validity of such deeds as mortgages in plaintiff's favor.

4. Same—Interest Created.

Absolute deeds, given solely by way of security and constituting in fact only mortgages, carry with them no estate in the land, but create only a lien thereon as incident to the secured debt.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 278.]

5. Same—Trusts.

If the giving of a mortgage to one person as security for a debt due another creates a trust, it is not a trust in relation to real property, within the meaning of the code provisions relating to trusts.

6. Same—Foreclosure—Parties.

Under Code Civ. Proc. § 367, authorizing the bringing of actions in the name of the real party in interest, one, to secure a debt due whom a deed was executed to another, is a proper party to sue as plaintiff to foreclose the mortgage, whether or not the action could have been brought by the grantee named in the deed under section 369, authorizing trustees of an express trust to sue alone.

7. Same—Debts Secured.

Where deeds absolute in form were executed to secure any and all indebtedness that might subsequently become due, a balance due on a note, after exhausting special security given for the payment of such note, was, in the absence of a special agreement to the contrary, within the protection of the mortgage, notwithstanding the giving of the special security.

8. Same — Sale of Special Security — Absence of Prejudice to Mortgagor.

In an action to foreclose a mortgage, the fact that the mortgagor, after the commencement of the action, disposed of certain special security covering a portion of the debt at private sale and without public notice, was not available in defense, where it was not claimed that the amount realized was not applied to defendant's credit, nor that such amount did not equal the full market value of the property sold at the time of the sale.

9. Appeal—Harmless Error.

Sustaining objections to questions was not prejudicial, where subsequently the witness substantially answered the questions as fully as was desired.

10. Same—Questions Available.

In an action to foreclose a mortgage, the question whether the amount found due by the court included any improper charge on account of taxes, or did not make full allowance for taxes paid, could not be considered on appeal, where there was no specification of insufficiency of evidence to support the finding as to the amount due that could be deemed to include such question.

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the Anglo-Californian Bank, Limited, against Moses Cerf, impleaded with others. From an order denying a new trial, defendant named appeals. Affirmed.

See 75 Pac. 902; 77 Pac. 1132.

Rehearing denied August 31, 1905.

J. J. Burt, for appellant. Jesse W. Lilienthal and W. H. Spencer, for respondent.

ANGELLOTTI, J. This is an action to foreclose as mortgages two certain deeds of conveyance absolute in form, executed by defendants Moses Cerf, Ernest Cerf, and L. M. Kaiser to defendant Ignatz Steinhart. According to the allegations of the complaint, said deeds, while absolute in form, were in fact executed as mortgages for the sole purpose of securing to plaintiff the payment of an indebtedness of $34,300, evidenced by certain promissory notes then existing in favor of plaintiff and against the firm of Blochman & Cerf, and of securing the payment of all further advances that might be made by plaintiff to said firm and all sums that might thereafter become due from said firm to plaintiff. Said firm of Blochman & Cerf was at the date of said deed and ever since has been composed solely of defendant Moses Cerf. It was further alleged that, relying upon such security, plaintiff renewed certain notes from time to time, and made further advances to said firm, until on December 27, 1894, the amount of $27,117.13 was due from the firm to plaintiff, and that on said day a note therefor for $27,000, payable one day after date and bearing interest at the rate of 8 per cent. per annum, was executed by said firm and defendant Moses Cerf to plaintiff, none of which has been paid. This action was instituted October 14, 1895, to obtain a foreclosure of said mortgages to satisfy said claim of $27,117.13, with interest. Defendant Moses Cerf, by his answer, admitted the execution of the deeds to secure to plaintiff the indebtedness of $34,300 existing at the time of their execution, but denied that they were given as security for any continuing credit or any future advances or indebtedness. He averred that the $34,300 indebtedness had been fully paid, denied the making of further advances, and denied that the indebtedness at the time of the giving of the last note exceeded $20,863.17. The trial court found generally in accordance with the allegations of the complaint, finding the indebtedness of said firm to plaintiff to amount, with interest, at the date of judgment, to $28,640.17, and adjudged a sale of the mortgaged premises to satisfy the same. Defendant Moses Cerf appeals from an order denying his motion for a new trial.

1. The evidence upon the question being conflicting, the finding of the trial court to the effect that the deeds were given to secure all future as well as existing indebtedness is conclusive upon this appeal. We know of no reason why it could not be shown by parol evidence that such deeds were given to secure future as well as existing indebtedness. Appellant's contention in this regard appears

to be that as our statute provides that "a mortgage can be created, renewed or extended, only by writing, executed with the formalities required in the case of a grant of real property" (section 2922, Civ. Code), the particular indebtedness intended to be secured must be specified in the conveyance, or at least in some contemporaneous writing. The section cited cannot be construed as impairing the well-established doctrine that a deed absolute on its face may in equity be shown by parol evidence to have been intended as security for a debt, and hence only a mortgage. This doctrine necessarily contemplates a showing entirely at variance with the terms of the conveyance. It is solely because the absolute conveyance does not correctly show the intent and agreement of the parties that equity interposes and allows the real transaction to be shown, thus converting the apparent absolute title of the grantee in the property described in the conveyance to a mere mortgage lien thereon. The showing that the instrument was in fact intended only as security for the payment of an indebtednesss involves a showing as to what indebtedness was intended to be secured thereby. The real transaction between the parties as to the indebtedness to be secured may be fully shown by parol evidence, and any agreement of the parties relative thereto, that would be enforced if evidenced by mortgage executed in the ordinary form, will be enforced under the deed. There can be no doubt, under the decisions of this court, that, whatever the consideration expressed in the purported conveyance, such a conveyance will be effectual to secure both any existing indebtedness, and any future indebtedness, however evidenced, shown by parol evidence to have been intended and agreed to be secured thereby, and that it is not essential that the limit in amount of such future indebtedness should have been specified in the agreement of the parties. See Banta v. Wise, 135 Cal. 277, 67 Pac. 129; Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113; Husheon v. Husheon, 71 Cal. 407, 12 Pac. 410.

2. The fact that the defendant Steinhart, a manager of plaintiff corporation, was named as grantee in the deeds, instead of the plaintiff itself, in no degree impairs their validity as mortgages in favor of plaintiff. If authority is needed upon this proposition, it is to be found in Banta v. Wise, supra, where the question was squarely presented in the case of a deed absolute on its face, purporting to grant certain realty to one who was a member of a partnership. The deed was enforced as a mortgage in favor of the firm; it being shown that it was given as security for an indebtedness due the firm and to secure contemplated advancements by the firm. It was pointed out in the opinion that the general equitable principle applicable in this class of cases applies equally to all cases of deeds made to secure money, whether due or to become due, "or whether due to the grantee or another." It was said therein, speaking of a deed made to one as security for the debt of another: "Such a transaction comes equally within the definition given in the Code, which is that a 'mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession' (Civ. Code, § 2920), and also within the provision that 'every transfer of an interest in property, other than in trust, made only as a security for another act, is to be deemed a mortgage,' etc. Civ. Code, § 2924. The exception made in the section last cited refers only to the express trusts provided for by other provisions of the Code (sections 852, 857), which, though in some cases difficult in principle to be distinguished, are held not to be mortgages. * * * But these decisions apply only to cases where, by the terms of the deed, the trustee is authorized to sell and to apply the proceeds in payment of the debt, and not to deeds where there is no power of sale expressed."

We are unable to see how the provisions of our Civil Code relative to trusts in relation to real property, and the purposes for which they may be created, affect the question under discussion. Admittedly, the deeds were given solely by way of security, and were in fact only mortgages. Being such, they carried no estate in the land, but were mere securities, creating only a lien on the land, which was an incident of the secured debt. Savings & Loan Society v. McKoon, 120 Cal. 177, 52 Pac. 305. If the giving of a mortgage on realty to one person as security for a debt due another creates a trust, it is not a trust in relation to real property, within the meaning of the provisions of our Code relating to trusts.

3. The action was properly brought in the name of the plaintiff, which was, admittedly, the only real party in interest. Code Civ. Proc. § 367. The indebtedness secured by the mortgage was at all times the property of the plaintiff alone, and stood in plaintiff's name, and the mortgage lien was a mere incident of such indebtedness, which would pass by a simple assignment of the debt. It is unnecessary to determine here whether Steinhart, as the trustee of an express trust within the meaning of section 369, Code Civ. Proc., could have maintained an action to foreclose these mortgages. That section is permissive only, and did not exclude an action in the name of the real party in interest. As already stated, Steinhart was made a party defendant, and the record shows that he consented that judgment be entered in favor of plaintiff as prayed for in its complaint.

4. Among the charges against the firm was a balance due upon an item of $5,000 for money loaned January 13, 1891, evidenced by promissory note of that date, bearing interest at the rate of 8 per cent. per annum. It appeared that at the time of the making of this loan warehouse receipts for about 2,-

000 barrels of cement were delivered by the firm to plaintiff as security for the payment of such indebtedness. Portions of this cement were sold from time to time by Mr. Cerf, he paying the plaintiff $2.50 per barrel for the release of all so sold, and the proceeds were credited on the note. At the time of the giving of the last note, December 27, 1894, a balance still remained due on said note, and 595 barrels of the cement remained in the warehouse undisposed of, and so continued to remain until after the commencement of this action. The balance due upon the so-called cement note was included in the note of December 27, 1894, sought here to be enforced under the mortgages. Subsequent to the commencement of this action, Cerf not having sold it, although requested so to do, and the testimony indicating that it had gotten moist and was in bad condition, plaintiff sold the remainder of the cement for $726.12, and the firm has been credited therewith. The balance due is included in the general amount found due by the trial court. It is claimed that this $5,000 loan was a separate, independent transaction, and that no part of this particular indebtedness was secured by the mortgages. We think that there can be no question that any balance remaining due from the firm after exhausting the special security afforded by the cement was a part of the general indebtedness secured by the mortgages. The mortgages were, by reason of the terms of the agreement of the parties, security for any and all indebtedness that might thereafter become due, and any such balance remaining due upon the so-called cement note was certainly such an indebtedness. Of course, the parties might have specially contracted that this loan should be altogether excluded from the arrangement already made; but the mere giving of additional special security, which is all the evidence here shows, does not indicate any such agreement.

Various rulings of the trial court in relation to evidence bearing upon the cement transaction are complained of, but we find no prejudicial error in regard thereto. Although objections to certain questions relative to this matter, asked plaintiff's manager, Steinhart, on cross-examination, were sustained, the subject-matter thereof, so far as proper, was fully covered by other questions and answers on such cross-examination. It does not appear that appellant was not allowed to fully cross-examine Steinhart, or to fully testify himself as to the circumstances under which the $5,000 loan was made, and what the agreement of the parties was in relation to the security therefor.

Some reliance is based upon the fact that plaintiff, after the commencement of this action, disposed of the cement remaining on hand at private sale and without public notice; but we do not see how that fact can avail appellant. There was no pretense that the amount actually realized therefor was not applied to the credit of the firm, and no evidence was given showing that the amount realized was not the then full market value of that cement. The testimony of Steinhart was to the effect that, in view of its then condition, it was disposed of to the best possible advantage. Under the issues made by the pleadings, it may be that the firm was entitled, under the circumstances, to be credited with the full market value of the property at the time of the sale thereof, and, if a question had been asked as to such value at such time, the sustaining of an objection thereto would have raised a serious question. No such question was, however, asked; and it cannot be held that the court committed even technical error in sustaining the objection on the ground of immateriality to either of the two questions asked Cerf as to the value of the cement.

5. Appellant was allowed to fully cross-examine Steinhart as to the negotiations leading up to the execution of the deeds, the circumstances surrounding such execution, all that was said and done between the parties in regard thereto, and the indebtedness to be secured thereby, and the nature and evidences of the indebtedness existing at that time. So far as these matters are concerned, the claim that he was improperly restricted in cross-examination finds no support in the record. The questions to which objections were sustained were objectionable for the reasons stated in the objections, and the rulings of the court in regard thereto were correct.

6. It is contended that the court erred in not allowing appellant to show that he had not been credited with taxes paid by him upon the mortgaged property, and had been improperly charged with taxes paid by plaintiff upon such property. The only evidence sought to be elicited by appellant upon that point, to which any objection was sustained, was on the cross-examination of Steinhart. The first question asked him thereon was: "Did you ever upon the account, upon any account of the bank with Blochman & Cerf, give Blochman & Cerf credit for any payment of taxes?" An objection to this was sustained; one of the grounds thereof being that it had not then been shown that they had ever paid any taxes. The witness was then asked whether plaintiff had at any time made any payment of taxes upon any interest in the land, and an objection to the question was sustained. Thereupon the witness substantially answered both questions, and apparently testified as fully upon the question as was desired by appellant. Under these circumstances it cannot be held that the action of the court in sustaining the objections was prejudicial.

The question as to whether the amount found due by the court includes any improper charge on account of taxes, or does not make full allowance for taxes paid by appellant, cannot be considered on this appeal;

for there is no specification of insufficiency of evidence to support the finding as to the amount due that can be held to include this question. If, however, we could consider the question, the record is such that we could not say that full allowance had not been made for taxes. There was no attempt made to show how much had been paid by appellant in the way of taxes, and it cannot be determined from the record that the credit of $6,052.03, given on account of taxes upon the trial in pursuance of an admission shown by the record, was not more than sufficient to adjust the matter of taxes correctly. We have assumed in this discussion that the plaintiff was liable for the taxes upon the property.

The order denying a new trial is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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147 Cal. 393

ANGLO-CALIFORNIAN BANK, Limited, v. CERF et al. (L. A. 1,323.)

(Supreme Court of California. Aug. 1, 1905.)

1. Appeal—Conclusiveness of Findings.

The determination of the truth or falsity of testimony, which conflicts with other testimony in the case, is within the exclusive province of the trial court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983-3989.]

2. Principal and Agent — Authority of Agent.

Where the authority of an agent is uncertain, and express oral authority is not satisfactorily shown, his authority may be implied from acts and circumstances.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 402, 407.]

3. Mortgages—Security for Future Debts—Evidence—Authority of Agent.

In an action to foreclose a mortgage made in the form of an absolute deed, evidence *held* sufficient to support a finding that the debtor, to whom the other mortgagors delivered the deeds for delivery to the mortgagee, authorized and intended such delivery to be made as security for future, as well as for existing, indebtedness.

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the Anglo-Californian Bank, Limited, against Moses Cerf and others. From an order denying a motion for a new trial, certain defendants appeal. Affirmed.

See 75 Pac. 902; 77 Pac. 1132.

Rehearing denied August 31, 1905.

Venable & Goodchild and Marcel E. Cerf, for appellants. Jesse W. Lilienthal and W. H. Spencer, for respondent.

ANGELLOTTI, J. This is another appeal in the action involved in Anglo-Californian Bank, etc., v. Cerf et al. (L. A. No. 1,276) 81 Pac. 1077, this day decided. The appeal here is by defendants Ernest Cerf and L. M. Kaiser, who joined with defendant Moses Cerf in the execution of the deeds held to be mortgages, and is from an order denying their motion for a new trial. By their answer they expressly admitted that they executed and delivered the same for the purpose of securing to plaintiff the payment of a certain indebtedness of the firm of Blochman & Cerf to plaintiff, viz., an indebtedness of $34,300 existing on October 14, 1885, and evidenced by promissory notes of said firm, but denied that they executed or delivered the deeds for the purpose of securing any other indebtedness of said firm to plaintiff, and alleged that the indebtedness for which the deeds were executed had been fully discharged. The trial court found that the deeds were executed and delivered by all the grantors therein named for the purpose of securing, not only the existing indebtedness of $34,300, but also all future indebtedness of the firm of Blochman & Cerf, and the main question upon this appeal is as to the sufficiency of the evidence to support this finding as against these appellants.

The negotiations leading up to the delivery of the deeds to plaintiff's manager, Steinhart, were conducted entirely by Steinhart and defendant Moses Cerf, the sole member of the firm of Blochman & Cerf, a firm doing business in the city and county of San Francisco, and the deeds were delivered to Steinhart by said Moses Cerf at San Francisco. The evidence sufficiently supports the finding that he delivered them upon the understanding and agreement alleged in the complaint, viz., that they should be security for all future as well as existing indebtedness of Blochman & Cerf. There was no pretense that plaintiff had any notice to the effect that the other grantors had placed any limitation upon his powers in this regard, or that he had not the authority he assumed, viz., to deliver the deeds as security for any indebtedness that might thereafter accrue, as well as such as had already accrued. Plaintiff's manager did know that appellants were not members of the firm of Blochman & Cerf, and were not, therefore, directly interested in the indebtedness of that firm. Moses Cerf testified that the deeds were delivered to him by appellant Ernest Cerf, accompanied by oral instructions to deliver them to secure the existing notes for $34,300, and for no other purpose. This was the only evidence given as to any limitation upon the authority of Moses Cerf to stipulate for the appellants as to the particular indebtedness of said firm to be secured by the deeds; neither of the appellants testifying on the trial. Admittedly, he was authorized to use the deeds for his own benefit, viz., to secure indebtedness of the firm of which he was the sole member, and the only possible claim on appellants' part, in view of the finding as to the agreement upon which he delivered them, is that he exceeded the oral instructions given him by one of the appellants by delivering them as security for future as well as existing indebtedness of his firm.

Although plaintiff had no knowledge of any such limitation, it is contended that it was bound at its peril to know the limit of his authority, and that appellants are not bound by the act of their agent in delivering the deeds as security for his future indebtedness. It may be admitted that, so far as the appellants are concerned, the evidence shows that in the delivery of the deeds Moses Cerf was acting solely as their agent. If we admit that special oral instructions given by appellants to Moses Cerf as to the particular indebtedness to be secured by the deeds would be binding upon plaintiff here, we are still unable to see why the trial court was not at liberty to reject the testimony of Moses Cerf in regard thereto, if it did not believe the same to be true. As already said, this was the sole evidence as to any limitation. The court saw and heard him testify, and upon some material matters, concerning which he testified, there was an irreconcilable conflict between his evidence and that of Steinhart. In addition to this, there were circumstances shown by the evidence which a court might conclude were opposed to his evidence upon certain matters. It is not for an appellate court to intimate as to the truth or falsity of any of the evidence. That was the peculiar province of the trial judge, and upon material matters as to which there was a conflict of evidence he rejected the evidence of this witness. As to these matters he concluded that the witness was at least mistaken, and, possibly, that he was willfully false in his testimony. We cannot assume the contrary on this appeal. If the trial judge believed that the witness had willfully testified falsely as to other material matters, he was not bound to accept his unsupported testimony as to the matter of these instructions, but was at liberty to wholly reject such testimony. In view of the findings, we must assume that he did so reject it. Rejecting such testimony, there remains only such evidence as to the authority of Moses Cerf as is furnished by the facts and circumstances surrounding the transaction.

While the appellants were not members of the firm of Blochman & Cerf, they and Moses Cerf constituted the firm of A. Blochman & Co., doing business in the county of San Luis Obispo, and the property affected by the deeds was apparently the property of this firm. Moses Cerf, as Blochman & Cerf, had for some time previous to October 14, 1885, carried an unsecured account with plaintiff, and some time before that date, owing to a change in the bank's method of doing business, the balance due plaintiff thereon had been put into the form of promissory notes, payable one day after date. According to the testimony of Moses Cerf, Steinhart had informed him that he could not carry the accounts in their then form and unsecured any longer, that notes must be taken for large accounts, allowing for a small overdraft, and that the accounts must be carried in notes. It was in pursuance of this requirement that the first notes were given, and it was evidently contemplated that the account should be continued (as it was for several years thereafter), and that the notes should be renewed from time to time for such sums as might remain due to plaintiff; in other words, that there should be a continuing account between the parties, and the balance due plaintiff thereon at all times evidenced by promissory notes to practically the whole extent thereof. It is apparent that it was this account, rather than any particular note, that plaintiff desired to have secured. It is not intimated that appellants were not fully aware of the course of dealing between their partner, Moses Cerf, and plaintiff. While the matter of giving security was pending, viz., on August 12, 1885, appellant Ernest Cerf wrote to Messrs. Blochman & Cerf a letter, signing the firm name A. Blochman & Co. thereto, in reply to a letter of August 11th, in which, after acknowledging receipt of a letter of August 11th, he said: "In reference to the abstract of the building, we herewith send you the title papers, and will send you the abstract as soon as made out. * * * At any rate you can assure Mr. Steinhart that the property is free, no incumbrances of any kind being on it, the title perfect. So make Mr. Steinhart perfectly safe, and make him not feel any ways anxious about us; and for him to extend to us what further accommodations we need, we would suggest to give him a deed, not only for the store and lot, but also to give him a deed for the Patrick ranch, which contains close on to 2,000 acres, and the San Jose ranch, containing close to 1,000 acres. * * * Should Mr. Steinhart conclude that he wants the deeds, telegraph, and we will have deeds and abstracts made, and forwarded without delay. We don't want him, no more than any one else, to think or feel that his interests are in jeopardy, and we are ready and willing to place anything we have in his way to make him feel perfectly secure and beyond any doubt whatever." The property referred to in this letter was the property described in the subsequently executed deeds. Moses Cerf received this letter in due course and delivered it to Steinhart. There is nothing to indicate that appellant Kaiser was not fully aware of the sending of this letter by his partner, and there was no intimation, so far as the record is concerned, that the letter had reference to any other matter than that of the giving of security for the indebtedness of Blochman & Cerf.

On August 15, 1885, appellants executed and delivered to Moses Cerf a full general power of attorney. No explanation as to the reason for their giving such an instrument was given, and its execution at that time and under the circumstances then existing is a circumstance tending to show a desire on their part to fully accredit Moses Cerf as their representative in the matter then pending between him and plaintiff. The deeds were signed and acknowledged by Moses Cerf on December 2, 1885, on which day a further advance of $3,500 was made to him, and a note taken therefor. They were signed and acknowledged by appellant Kaiser in Santa Barbara county on December 8, 1885, and in San Francisco by appellant Ernest Cerf on December 14, 1885, when they were delivered to Moses Cerf by Ernest, and by him delivered to Steinhart. From that time on to December, 1894, neither of the appellants intimated to plaintiff that it was their claim that their deeds constituted security for the original $34,300 notes only, and it was only when they were then asked by plaintiff to sign a written acknowledgment in accord with plaintiff's claim as to the object and purpose of the deeds, and they refused to so do, that any notice of their claim was given to plaintiff. During the greater part of this time Moses Cerf, in the name of Blochman & Cerf, continued to deal with plaintiff as before. During the last five years of this silence on their part, the only notes enforceable against their interest, according to their theory, could no longer be enforced, because they had been paid or replaced by new notes for the balance due thereon, and, if their claim be well founded in fact, they were, without complaint, allowing plaintiff to hold the apparent legal title to their land, without any right whatever. Their conduct here was a circumstance which might well be claimed to be consistent only with an understanding on their part that they had executed the deeds as security for something in addition to the $34,300 notes. All these circumstances, taken in connection with the admitted fact that the deeds were in fact executed by appellants to be delivered by Moses Cerf as security for an indebtedness of his own, are, in our judgment, entirely sufficient to support a conclusion that appellants authorized the delivery of the deeds as security for all future as well as all existing indebtedness, and intended that they should be so delivered.

It cannot be doubted that where the authority of an agent is unwritten, and express oral authority is not satisfactorily shown, such authority may be implied from acts and circumstances shown. See Reinhard on Agency, § 203. Where an agent is expressly authorized to deliver deeds absolute on their face as security for his own indebtedness, as is admitted here, and no express limitation is placed upon him as to the particular indebtedness to be secured thereby, as the court was at liberty to conclude was the case here, any arrangement as to amount, terms, and character of his indebtedness to be so secured, which under the circumstances existing would not be unreasonable, would appear to be within the authority conferred. Such a case would seem to be somewhat analogous to the case of one who signs a paper with certain blanks to be filled, and intrusts it to another for delivery with the understanding that he is to fill such blanks. Authority to fill the blanks, without express limitation as to the manner, would imply authority to fill them in any way that would not, under the circumstances, be unreasonable. The arrangement here made by Moses Cerf as to the indebtedness to be secured by these deeds was just such an arrangement as might reasonably have been contemplated by parties knowing the course of dealing between him and plaintiff, and the probable object of requiring any security. The facts and circumstances already detailed, taken together, are sufficient to support a conclusion that appellants contemplated the very arrangement made, and delivered the deeds to Moses Cerf with that understanding; in other words, that Moses Cerf had actual authority from them to deliver the deeds upon the conditions and terms upon which he is found to have delivered them.

This practically disposes of the appeal. The delivery of the deeds upon the terms and conditions stated having been fully authorized, appellants' interest in the land therein described stood as security for the payment of all future indebtedness of Blochman & Cerf to plaintiff, in whatever form the same might exist. Various other objections to this conclusion, made by appellants, based upon propositions as to the law of guaranty, suretyship, and the statute of limitations, are fully answered by the decision of this court in Sather Banking Co. v. Briggs Co., 138 Cal. 724, 72 Pac. 352; there being no material distinction between the position of the defendant Butler in that case, and the position of the appellants here. The objection that the action could not be maintained by plaintiff, but should have been brought by the grantee named in the deeds, has been answered in the opinion filed in the matter of the appeal of Moses Cerf from the order denying his motion for a new trial.

The order appealed from is affirmed.

We concur: SHAW, J.; VAN DYKE, J.

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1 Cal. App. 243

MAURER v. WEATHERBY.

(Court of Appeal, Third District, California. July 1, 1905.)

1. Municipal Corporations — Contract — Supply of Information—Duties of Municipal Authorities.

A city charter makes the general revenue law applicable to revenue for city purposes, and imposes on the city council and city assessor powers and duties coextensive with those of the board of supervisors and county assessor, except that the city assessor must prepare the abstracts of incumbrances provided for in Pol. Code, § 3678, and "furnish such information as may be required." The general law (Pol. Code, §§ 3630, 3651, 3654, 3658, 3677, 4300) requires the assessor to give the board of supervisors such information as he possesses, but does not require him to furnish comparative statements, maps, and abstracts. *Held*, that since the city council, sitting as a board of equalization, cannot increase an assessment, except on evidence justifying such increase, and in equalizing assessments is not limited to information which the assessor may be able or willing to furnish, a contract to supply the council with comparative statements, maps, abstracts, etc., in order to aid it in equalizing the assessment roll and taxation of property, is valid and binding on the city.

2. SAME—EVIDENCE.

On the issue of the invalidity of a contract to supply a city council with information to aid it in acting as a board of equalization, which invalidity was claimed to exist on the ground that it was the legal duty of the city assessor to supply the information contemplated by the contract, testimony of the assessor as to the information that he had the ability and inclination to furnish was properly excluded.

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Application for a writ of mandate by J. L. Maurer against S. F. Weatherby. From a judgment directing the issuance of a peremptory writ, defendant appeals. Affirmed.

E. S. Easley and E. P. Campbell, for appellant. J. F. Coonan and J. H. G. Weaver, for respondent.

McLAUGHLIN, J. The plaintiff applied for a writ of mandate commanding the defendant, as city treasurer of the city of Eureka, to pay a warrant drawn in plaintiff's favor by the proper officers of said city. A trial was had, and judgment was entered, directing that a peremptory writ of mandate issue commanding the defendant, as such treasurer, to pay the amount of the warrant. The defendant appeals from said judgment, and from the order denying his motion for a new trial.

The warrant was drawn in payment for certain services performed under a written contract, the validity of which is the bone of contention on this appeal. Said contract was between the city of Eureka and plaintiff, and there seems to be no objection as to its form or proper execution. The services to be rendered are set forth in the agreement in the following language: "The said party of the second part hereby agrees to furnish and render to the council of Eureka, and to the council sitting as a board of equalization, certain maps, data, and information, and services as follows, to wit: An abstract of the assessment roll of the city of Eureka, with various comparisons with the county assessment roll of Humboldt county, Cal., and with maps, and other data and information, showing a gradual raise in such properties as may be deemed undervalued in their present assessed valuations. In the said properties are included real property and the improvements thereon, and personal property. These maps, data, and information are to be of such character as will aid the council, as such and as sitting as a board of equalization, in equalizing the assessment roll and the taxation of the properties in the city of Eureka. The above abstracts, maps, data, and information are to be furnished to the council any time between now and the final adjournment of the council sitting as a board of equalization, when requested." The main contention of appellant is that this contract is void for the reason that the services to be rendered are included in the legal duties of the city assessor, and hence that the council could not legally employ plaintiff to perform them.

Section 79 of the charter of Eureka makes the general law pertaining to revenue and taxation for state and county purposes applicable to revenue and taxation for city purposes. Upon all officers of the city the same powers are conferred and the same duties imposed as rest upon county officers in relation to such matters. The city council and city assessor under this section are vested with powers and duties coextensive with the powers and duties of boards of supervisors and county assessor. The only substantial exceptions are that the city assessor, instead of the county recorder, must prepare the abstracts of incumbrances provided for in section 3678 of the Political Code, and "furnish such information as may be required." It will thus be seen that whatever duties rest upon a county assessor are imposed upon the city assessor, and that the powers of the city council are as unlimited as the powers of boards of supervisors in such matters. The general law provides that the board of supervisors must furnish the assessor with certain maps, blanks, and data, but we can find no law requiring the county assessor to do more than to give the board the benefit of his experience and advice, and an explanation of the basis or rule governing his valuation. He must give the board such information as he possesses, but he is not required to make special investigations, comparative statements, maps, and general abstracts. Pol. Code, §§ 3630, 3651, 3654, 3658, 3677, 4300. The charter imposes no greater duties upon the city assessor. These services are not included in the general phrase providing that "he must furnish information required." He must furnish the abstracts necessary to enable him to make an assessment, but no more.

The contract here provides for services with which the assessor has nothing whatever to do. The board of equalization is practically a board of review to pass upon his work, and it would be passing strange if they could have recourse to no other source of information than the person upon whose work they sit in judgment. Boards of equalization cannot increase an assessment, unless they have evidence before them justifying such increase. Oakland v. S. R. R., 131 Cal. 230, 63 Pac. 371. When an assessment is too high, the taxpayer may be depended upon to furnish the evidence upon which they may act in reducing it; but if there is an undervaluation, the assessor having recorded his best judgment on the face of the assessment roll, we have no doubt that the board may call to its aid such maps, abstracts, data, and information as will enable the members to act fairly, intelligently, and legally in equalizing assessments. They are not limited to information and data the assessor may be able or willing to furnish. Lewis v. Colgan, 115 Cal. 529, 47 Pac. 357; K. P. R. v. Ry. Co., 20 Kan. 141; City of Wellman (Mich.) 48 N. W. 534; Bardrick v. Dillon (Okl.) 54 Pac. 785; Am. Dig. 1892, p. 4883; La Grange v. Carter, 142 Cal. 565, 76 Pac. 241. If the powers of the board were so limited, then, when the assessor was content with the valuation, there could be no evidence upon which to base an increase; and, if their powers are not so limited, they may legally enter into bona fide contracts for such services as are provided for in the contract under consideration.

There was no error in excluding the testimony of the assessor touching the information he had the ability and inclination to furnish. This had no relation to the vital point in the case, which was, not what he may have been willing to do, but what he was compelled to do under the law defining his duties. This was a question of law, and not of fact. This disposes of all questions presented by the pleadings and discussed in the briefs.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

1 Cal. App. 257

HUMPHREYS v. MOULTON et al.

(Court of Appeal, Second District, California. July 5, 1905.)

WATERS AND WATER COURSES—SURFACE WATERS—DUTIES OF UPPER PROPRIETOR.

A proprietor of land over which surface water is wont to flow in two or more channels may not collect such water into a single channel and discharge the aggregated volume of water upon the land of a lower proprietor, to the detriment of the latter.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 131.]

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by J. F. Humphreys against John Fletcher Moulton and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Collier & Carnahan and O. P. Widaman, for appellants. Purington & Adair, for respondent.

SMITH, J. The suit was brought to recover damages to the plaintiff's land, caused by the act of the defendants in collecting into a single channel the surface waters flowing over the defendants' lands in time of rain, and thereby discharging the aggregated volume of water upon plaintiff's land, to the damage of plaintiff, etc. Judgment was rendered for the plaintiff for damages, and also for an injunction. The appeal is from the judgment and from an order denying the defendants' motion for a new trial.

The plaintiff's land lies below the canal of the Riverside Land Company, and some distance to the north therefrom. The defendants own the land intervening between plaintiff's land and the canal, and also lands to the south of the canal, extending up into a valley or ravine in the hills, along which there lies a dry channel or water way, which, it is found by the court, at a point described as the southern end of the lot of the defendants, known as "Lot 21," divides itself into three channels; one running along the west, and the other along the east boundary of that lot, and the third over the intervening space. The water way along the east boundary of the lot is found by the court to be the main branch or wash, and its general course to its point of discharge is described in detail, and this is true, also, of the water way on the west side of the lot as it was in its natural condition; and it is urged by the appellants that these findings are in some particulars not justified by the evidence. But with regard to each of the findings objected to the evidence seems to be conflicting, and, at all events, the findings seem to be immaterial; for the ultimate finding is that there were two or more channels or water ways, and that all of these were brought together into the channel complained of, and this finding is not attacked, nor, indeed, under the evidence could it be, and upon these facts, under a long line of decisions in this state, it must be held that the plaintiff was entitled to recover. Ogburn v. Connor, 46 Cal. 350, 13 Am. Rep. 213; Lamb v. Reclamation District, 73 Cal 125, 14 Pac. 625, 2 Am. St. Rep. 775; McDaniel v. Cummings, 83 Cal. 519, 23 Pac. 795, 8 L. R. A. 575; Gray v. McWilliams, 98 Cal. 163, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; Los Angeles Cemetery Assn. v. Los Angeles, 103 Cal. 467, 37 Pac. 375; Rudel v. Los Angeles County, 118 Cal. 288, 50 Pac. 400; Cushing v. Pires, 124 Cal. 665, 57 Pac. 572; Larrabee v. Cloverdale, 131 Cal. 99, 63 Pac. 143.

Other points made by the appellants are: (1) The refusal of the court to admit "a topographical sheet of the United States Geological Survey" covering the locality in controversy; (2) the admission of the plat put in evidence by the plaintiff; and (3) the indefinite character of the judgment with reference to the injunction adjudged. As to the first two of these, it is by no means clear that any error was committed; but, if there was, the admission of the evidence in the one case, or its exclusion in the other, could have had no effect upon the result. As to the last point, we think the judgment is as definite as it was practicable to make it. Nor does the objection urged to it by the appellants apply. It is, indeed, adjudged, that the defendants abate the nuisance by removing the embankment or dike made by them and filling up the ditch to its former level, and that they be enjoined from a further continuance of said embankment and ditch in its present condition; but it is also provided that "the said defendants, as an alternative for the doing of said acts, may make such other suitable and proper provision for the care of the storm waters which naturally reach the southerly end of said lot 21 as that no greater portion of said storm waters will flow onto the lands of plaintiff than flowed thereon before the defendants made the aforesaid changes on their lands."

The judgment and order are affirmed.

We concur: GRAY, P. J.; ALLEN, J.

(1 Cal. App. 241)

LEVIS et al. v. ROYAL PACKING & DRYING CO.

(Court of Appeal, Second District, California. July 1, 1905.)

SALE—REFUSAL TO ACCEPT—DAMAGES.

The measure of damages for refusal to accept personal property under a contract of purchase is the contract price, less the market price in the same market where the property is sold, on the refusal to accept.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1098, 1099.]

Appeal from Superior Court, Tulare County; M. L. Short, Judge.

Action by A. Levis and another, copartners, against the Royal Packing & Drying Company. From an adverse judgment and order, defendant appeals. Affirmed.

Will M. Beggs and G. G. Murry, for appellant. Charles G. Lamberson, for respondents.

ALLEN, J. Action for damages alleged to have been sustained by plaintiffs from violation of a contract of defendant to buy and pay for certain personal property. Findings and judgment went for plaintiffs. Defendant appeals from the judgment and order denying a new trial.

The record discloses that on August 27, 1901, defendant entered into a written contract to buy of plaintiffs five car loads of prunes, of certain sizes designated, to be delivered in the first half of October, f. o. b. at Visalia, packed in sacks or boxes, to be paid for on receipt of bill of lading. Subsequently the time for delivery was extended during the month of October. Again, upon defendant's request, time of delivery was extended to November 15th. During October one car was shipped to defendant and paid for. On November 1st, defendant notified plaintiffs that the remaining cars would not be accepted, for the reason that the prunes were not up to the count, were improperly cured, and were cracked. This rejection was based upon an examination by a proposed buyer, who, in company with the defendant's agent, visited plaintiffs' warehouse the latter part of October and made an examination of certain prunes then in the bins of said warehouse. Afterwards, on November 3d, plaintiffs notified defendant in writing that the goods were on hand ready for delivery under the contract, and that no extension of time beyond the 15th of November could be granted. To this defendant never made reply, and never received or ordered the goods as per previous arrangement. The court finds, and there is testimony in its support, that defendant's refusal to accept the prunes was not justified by the facts, and was, therefore, unwarranted. The market having declined between the date of the contract and November 15th, plaintiffs were compelled to sell the property, in the market where originally sold, at a loss, for the amount of which judgment was rendered.

The contention that no authority was given the writer of the letter of October 18th to ask on behalf of defendant an extension of time for delivery to November 15th is not borne out by the record. In addition, there was other testimony establishing such extension of time. The letter of plaintiffs to defendant, properly admitted in evidence, was sufficient as an offer in writing to deliver the property sold within the time agreed upon. The refusal on defendant's part to accept the offer is equivalent to actual production and tender of the property. Code Civ. Proc. § 2074. There was testimony tending to show that after the rejection and refusal to accept, and within the month of November, plaintiffs resold the prunes, boxed as originally directed by defendant, to other purchasers; such sale being at the identical market where the original contract required delivery, and at the market value, which was in line with the duty devolving upon plaintiffs by section 3311, Civ. Code. The amount of the judgment is based upon the decrease in such market value; the same being the proper measure of damages.

There was no prejudicial error in admitting copies of the correspondence, or in the refusal of the court to strike out the same. The matters therein were not material. The contract was unambiguous, and there was no error in rejecting testimony explanatory thereof. There are more than 100 other exceptions appearing in the statement, but an examination of them satisfies us that they possess no merit.

Judgment and order affirmed.

We concur: GRAY, P. J.; SMITH, J.

(1 Cal. App. 246)

PEOPLE v. WAYSMAN.

(Court of Appeal, Third District, California. July 3, 1905.)

1. Murder—Malice—Definition — Instructions.

Where, in a prosecution for homicide, the court defined malice, as an element of murder, as a deliberate intention unlawfully to take away the life of a fellow creature, without provocation or under circumstances showing an abandoned or malignant heart, as provided by Pen. Code, § 188, defendant was not prejudiced by the fact that the court also stated that malice imported a wish to vex, annoy, or injure another, or an intent to do a wrongful act, as provided by section 7, though such definition was inapplicable to malice as an element of murder.

2. Same—Instructions—"Reasonable Man."

In a prosecution for murder, defendant was not prejudiced by an instruction on the law of self-defense that the "reasonable man" of the law was each particular juror, standing as near as the efforts of the law could place him in the precise condition the defendant stood at the time he committed the fatal act, which instruction was given in connection with others correctly stating the doctrine of appearances.

3. Same—Instructions—Repetition.

Where the doctrine of reasonable doubt was correctly charged, it was not necessary that it should have been repeated with reference to other instructions.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1991.]

4. Same — Instructions — Manslaughter — Malice.

In a prosecution for murder, it was not error for the court to strike a paragraph including malice as an element of manslaughter from an instruction defining such offense.

5. Same — Instructions Invading Province of Jury.

An instruction that the jury were the exclusive judges of the evidence or credibility of the witnesses, the weight to be given to their testimony, and that they might consider the character and appearance of the witnesses, the consistency and reasonableness of their statements, the interest, if any, they might feel in the case, and from these and such reasons judge and determine as to the credibility, weight, and effect and sufficiency of their testimony, was not objectionable as an invasion of the province of the jury, though defendant was a witness in his own behalf.

6. Same—Instructions.

Where the court had charged that the law presumed every man to be innocent until his guilt was established beyond all doubt, which presumption attaches at every stage of the case and to every fact essential to a conviction, and, again, that if the jury entertained any reasonable doubt on any single fact or element necessary to constitute the crime it was their duty to give the defendant the benefit of such doubt, and acquit, defendant was not entitled to object to a further instruction that if the jury entertained a reasonable doubt on any single material fact, which was inconsistent with defendant's guilt, arising from the evidence in the case, it was their duty to acquit, on the ground that such instruction dealt only with facts inconsistent with guilt.

Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Thomas Waysman was convicted of murder in the second degree, and he appeals. Affirmed.

Rehearing denied by Supreme Court September 1, 1905.

G. B. Martin and E. V. Mering, for appellant. J. B. Dozier, Dist. Atty., and C. N. Post, Dep. Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against for the crime of murder, and upon his trial was convicted by the jury of murder in the second degree, and was sentenced to imprisonment for 15 years. He appeals from the judgment. The evidence taken in the case is not before us. The errors complained of relate exclusively to certain indicated instructions, given or refused by the court.

1. The court instructed the jury as follows: "The word 'malice' imports a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." It is contended that the malice which enters into the crime of murder, as an essential element thereof, and as referred to in sections 187 and 188 of the Penal Code, is something more than malice which simply "imports a wish to vex, annoy, or injure another person"; that the malice stated in the instruction could be predicated of a very trivial act, which would wholly fail to manifest "a deliberate intention unlawfully to take away the life of a fellow creature," or from which it might be implied that "no considerable provocation appears," or which would fail to show "an abandoned and malignant heart." See section 188, supra. If the jury had been left to be guided alone by this instruction as to what would constitute malice when applied to the charge of murder, we should be inclined to hold it prejudicial. The instruction is taken from section 7 of the same Code, where certain terms are defined in the senses in which they are used in this Code. The word "malice" is there given the meaning above defined, "unless otherwise apparent from the context"; and, where used in defining the crime of murder, it does mean something more than the word imports as defined in section 7. We do not think the definition found in section 7 appropriate in a case of this kind, and would be better omitted altogether. It was given, however, in People v. Dice, 120 Cal. 189, 52 Pac. 477, which involved the crime of murder, in connection with the definition of malice as found in section 188, and the same objection was made as is now urged. The court said: "We think the complaint unfounded. The court but instructed the jury as to the general import of the word 'malice,' and immediately and in the same connection specifically defined the word when used in the Code as an element of the crime of murder." The question as presented in the case now here differs from that in People v. Dice only in the fact that the instructions of the court upon the malice required to constitute murder are separate from the one of which complaint is made. Both for the people, and also at the request of defendant, specific instruc-

tions were given defining the malice mentioned in section 188, and the jury were told that unless the evidence showed the presence of the elements of the crime charged, there defined, they must acquit the defendant. We think the case is thus brought within the rule in People v. Dice.

2. The court instructed as follows: "The 'reasonable man' of the law is each particular juror, standing as near as the efforts of the law can place him in the precise condition the defendant stood at the time he committed the fatal act." This instruction was given in connection with others correctly stating the doctrine of appearances. The court probably meant to tell the jury that, in judging of the apparent danger with which defendant claimed he was confronted, each juror must put himself in the place of the defendant and decide as a "reasonable man" whether he under like circumstances would have regarded himself as in imminent danger of great bodily injury. The instruction is not particularly lucid, but, read in connection with the instructions immediately preceding it, the jury could not have been misled by it to defendant's injury, even though they did not understand precisely what was meant by it.

3. The doctrine of reasonable doubt was correctly given to the jury, and the instructions respecting it are not open to the criticism made by appellant. Several instructions were given in which no mention was made of this doctrine. It was not necessary to repeat it after having been once clearly stated. People v. McRoberts, 81 Pac. 734.

4. The jury were correctly and fully instructed as to the law of manslaughter and self-defense. In an instruction (13) given at defendant's request, defining manslaughter, the court struck out the concluding paragraph. This was not error, as it included malice as an element of manslaughter. It is the absence of this element which reduces the homicide to the lower grade of offense. The point that the court did not submit to the jury with sufficient clearness the law as to manslaughter and self-defense is not well taken. We have carefully read all the instructions on these points, and find them to be a clear and fair statement of the law.

5. It is argued that instruction 28, given for the people, is an invasion of the province of the jury, and especially so because defendant was a witness in his own behalf. In this instruction the jury were told that they were the exclusive judges of the evidence and of the credibility of the witnesses and of the weight to be given to their testimony; and the court then proceeded to point out that as such judges of the evidence they "may consider the character and appearance of the witnesses, the consistency and reasonableness of their statements, the interest, if any, they may feel in the case, and from these and such reasons * * * may judge and determine as to the credibility, weight, effect, and sufficiency of such testimony." We perceive no invasion of the prerogative of the jury, as judges of the evidence, in this instruction. It does not fall within the rule in People v. Van Ewan, 111 Cal. 144, 43 Pac. 520, where the instruction was held error because pointing to the testimony of a particular witness. A similar instruction is found in People v. Iams, 57 Cal. 115, at pages 122, 123, and, although not specifically pointed out for approval, was included in the charge of the court, which, after careful examination, was said to have been "entirely correct."

6. The following instruction was given for the people: "If you entertain a reasonable doubt upon any one single material fact, which is inconsistent with the defendant's guilt and arises from the evidence in this case, it is your duty to give the benefit of such doubt to the defendant and acquit him." The criticism of this instruction is that it dealt only with facts which are inconsistent with guilt, but does not include facts which are consistent with guilt, and is therefore erroneous and misleading. The court had just before instructed the jury fully as to the doctrine of reasonable doubt, and the court said, among other things: "The law presumes every man to be innocent until his guilt is established beyond all reasonable doubt, and this presumption attaches at every stage of the case, and to every fact essential to a conviction." Elsewhere, at defendant's request, the court charged the jury: "If the jury entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and acquit." We cannot see that there was any failure of the court to fully instruct the jury upon the point now presented; and it is quite apparent that the jury could not have been misled by the particular instruction complained of.

Some other instructions are subjected to adverse comment by appellant, but they do not seem to us to call for particular notice.

The judgment is affirmed.

We concur: BUCKLES, J.; McLAUGHLIN, J.

147 Cal. 359

In re DOLBEER'S ESTATE. (S. F. 4,366.)

(Supreme Court of California. July 28, 1905.)

1. EXCEPTIONS—PROOF IN SUPREME COURT—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 652, providing that, if a judge in any case refuses to allow an exception in accordance with the facts, the party desiring the bill may apply to the Supreme Court to prove the same, does not afford a remedy for the wrongful refusal of the trial judge to settle any bill of exceptions, which may be compelled by mandamus, but only authorizes proof of an exception to a particular ruling or matter alleged to be untruly stated in or omitted from the original bill of exceptions.

2. SAME—AMENDMENT.

Where a bill of exceptions was settled on April 28, 1905, and more than two months elapsed thereafter before a petition to prove exceptions alleged to have been erroneously disallowed was filed, as authorized by Code Civ. Proc. § 652, petitioner was not entitled to amend his petition by adding thereto certain specifications of other rulings and exceptions alleged to have been improperly disallowed.

In Bank. Proceedings for the probate of the will of Bertha M. Dolbeer, deceased, to which Adolph Schander filed objections, and from an order admitting the will to probate, he appealed. Original application for leave to amend appellant's original petition to prove certain exceptions denied by trial judge according to the facts. Application denied.

Hiram W. Johnson and Albert M. Johnson, for contestant.

BEATTY, C. J. On July 7th, inst., Adolph Schander, who is appealing from a decree of the superior court admitting to probate the will of Bertha M. Dolbeer, filed his verified petition for leave to prove certain exceptions to rulings of the court which, as he alleged, the judge thereof had refused to allow in accordance with the facts. An order was thereupon entered allowing the petitioner to make proof of the alleged exceptions, and referring the matter to the Chief Justice "to take the testimony in reference to the exceptions alleged in said affidavit to have been reserved by the contestant and the circumstances under which the same were taken, and to report the result of his proceedings." At the time agreed upon the parties appeared before the Chief Justice, and much evidence was heard in relation to the exceptions specified in the petition. During the hearing the petitioner sought to prove some exceptions additional to those specified in his petition, but the Chief Justice held that he had no authority under the order of reference to take proof of such additional exceptions, and the petitioner subsequently, on July 14th, made the present application to the court for leave to amend his original petition by adding thereto certain specifications of other rulings and exceptions which he alleged the judge has refused to allow in accordance with the facts.

For the reasons following, we think the application should be denied: The proceeding is under section 652 of the Code of Civil Procedure, which reads as follows: "If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the Supreme Court to prove the same. The application may be made in the mode and manner, and under such regulations as the court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause." This court has never made any formal rules governing applications to prove exceptions, and, so far as the mode of procedure is concerned, the practice has been sufficiently liberal. As to the extent of our powers the construction of this section has been rather strict. Landers v. Landers, 82 Cal. 480, 23 Pac. 126; Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500; Hyde v. Boyle, 86 Cal. 352, 24 Pac. 1059; Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092; Cox v. Delmas, 92 Cal. 652, 28 Pac. 687; Matter of Gates, 90 Cal. 257, 27 Pac. 195. The result of these cases and of the later decisions, in which they have been followed, is to settle the construction of the section as to the extent of the power which it confers upon this court, and also to indicate the proper practice in invoking the exercise of that power. It cannot be held that a judge has refused to allow an exception, unless it is shown that he has been properly requested to allow it, and therefore the petition for leave to prove an exception should show that the petitioner has taken the proper steps to procure the settlement of a bill of exceptions, that he included in his proposed bill a statement of the particular exception which he desires to prove, and that the judge in settling the bill refused to allow that he had taken such exception. The contention that this section affords a remedy for the wrongful refusal to settle any bill of exceptions has been repeatedly and distinctly overruled in the cases in which it has been held that for such refusal the remedy is by mandamus. And it has been held with equal distinctness that, when an exception to a particular ruling has been allowed, this court has no authority to strike out any evidence or other matters stated in connection with such ruling, upon the ground that such evidence was not given, or that such matters are untruly or incorrectly stated, from which it follows that we are equally without authority to add to the statement of the ruling and exception contained in the settled bill any evidence or other matters which may be alleged to have been improperly omitted therefrom. In short, the final result of all the decisions is that, when a bill of exceptions has been settled by the trial judge, the bill so settled is complete and unchangeable as to every exception therein contained. If the judge has put in incorrect statements of evidence or other matters bearing upon his rulings, or has omitted evidence or other matters claimed to be material, the evil is not remediable here. All that the statute provides is that, when he has refused to allow an exception according to the facts—that is to say, when he has refused to allow that a particular ruling was made and excepted to, when in fact it was made and excepted to—the party aggrieved may then apply to this court to prove that he did reserve an exception to such ruling, and in that connection, and as a necessary incident, may prove and have allowed the evidence and other matters material to the exception. The exception or exceptions so proved will then be certified by the Chief Justice of this court, and will constitute a separate and distinct bill of exceptions additional to the bill settled and allowed by the trial judge, and will constitute a portion of the record on appeal.

From this it follows that, just as soon as the trial judge has concluded the settlement of the proposed bill of exceptions or statement, and directed its engrossment, with the omission of an exception or exceptions which the party seeking the allowance of the bill claims to have reserved, the right to apply to this court for relief under section 652 of the Code of Civil Procedure has accrued, and the application should be made with reasonable promptitude. In this case it appears from the original petition that the trial judge concluded the settlement of petitioner's bill on the 28th day of April, 1905, and directed its engrossment as allowed. It was more than two months thereafter before the petition to prove exceptions was filed here, and the respondents in the appeal complain of this delay, and make it a ground of objection to the original petition. But, considering the length of time consumed in the trial of the will contest, the great number of controverted points in the case, and the necessary bulk of the statement to be engrossed, we think that any apparent delay in presenting the original petition is excusable. We are, however, unwilling to make a precedent for allowing further amendments to petitions of this character after a reference to hear the evidence and report upon the matters originally presented. The whole proceeding is anomalous, and when conducted in the most methodical and expeditious manner makes a demand upon our time which interferes most seriously with the performance of our more legitimate and more imperative duties, as defined by the Constitution. We feel justified, therefore, in insisting that the party seeking the allowance of exceptions which the trial judge has refused to allow should present his whole case in his original petition, or, at least, before a hearing upon a reference to take the testimony and report.

Petition for leave to amend denied.

We concur: VAN DYKE, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.

147 Cal. 371

POLLITZ et al. v. WICKERSHAM. (S. F. 4,265.)

(Supreme Court of California. July 29, 1905.)

APPEAL—MOTION TO DISMISS—TRANSCRIPT—FILING—TIME.

Where a motion to dismiss an appeal was made under the rules requiring the transcript to be filed within 40 days after the settlement of the bill of exceptions on motion for a new trial, as amended March 23, 1905, providing that, when proceedings for a new trial are pending at the time the appeal is taken, the time does not begin to run until the motion is decided or the proceedings dismissed, the appeal would not be dismissed for failure to file the transcript within 40 days after settlement of the bill of exceptions on motion for a new trial, pending the determination of such motion.

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Edward Pollitz and others against Mary C. Wickersham, as executrix, etc. From a judgment in favor of plaintiffs, defendant appeals. On motion to dismiss. Denied.

Campbell, Metson & Campbell, Lippitt & Lippitt, and Thomas H. Breeze, for appellant. Edmund Tauszky, for respondents.

SHAW, J. This is a motion to dismiss the appeal, upon the ground that the transcript was not filed within 40 days after the settlement of the bill of exceptions on motion for a new trial, as required by the rules in force prior to February 18, 1905. Notice of motion to dismiss the appeal was filed in this court on March 23, 1905. By the rule existing prior to February 18th it was necessary to file a transcript within 40 days after the settlement of the bill of exceptions. By the amendment which took effect February 18th it is provided that, when proceedings for a new trial are pending at the time the appeal is perfected, the 40 days' time within which the transcript must be filed does not begin to run until the motion is decided, or the proceeding dismissed for want of prosecution. In view of this amendment of the rule, and the fact that the proceeding to dismiss the appeal was instituted after this rule had taken effect, and before the motion for new trial was disposed of, we think that the time for the filing of the transcript must be determined by the rule now in force, and that the motion to dismiss the appeal upon the ground stated should be denied; and it is so ordered.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; VAN DYKE, J.; LORIGAN, J.

147 Cal. 426

PEOPLE v. BLACK. (Cr. 1,195.)

(Supreme Court of California. Aug. 3, 1905.)

CHILD STEALING—INTENT TO DETAIN—EVIDENCE.

Evidence that defendant induced two willful girls, bent on making a trip by themselves to San Francisco, to go instead to a respectable summer resort, furnishing them the means and leaving them free to act as they wished, and that, pursuant to his promise to one of them not to tell her mother where she was, he misinformed her, does not authorize a conviction under Pen. Code, § 278, making it an offense for one to entice away a minor child with intent to detain and conceal her from her parents; there being no evidence of intent to detain.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Kidnapping, §§ 1, 4.]

Department 2. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Robert Black appeals from a conviction of child stealing. Reversed.

Bell, York & Bell, for appellant. U. S. Webb, Atty. Gen., and J. C. Daly, Deputy Atty. Gen., for the People.

LORIGAN, J. The defendant was indicted and convicted of child stealing, under section 278 of the Penal Code, which provides that "every person who maliciously, forcibly, or fraudulently, takes or entices away any minor child, with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is punishable," etc. He was sentenced to 10 years in the state prison, and appeals from the judgment and order denying his motion for a new trial.

The defendant, a divorced man aged about 43 years, was employed in a livery stable at St. Helena, Napa county, where the offense of which he was convicted is alleged to have been committed. There also resided at the same city a Mrs. Yeamans and her daughter, Dottie Higgins, the latter a girl 16 years of age, of rather willful and headstrong disposition, and who had as a companion another girl, named Mattie, slightly older, but also a minor, and of equally willful inclination. The defendant had known Dottie Higgins for several years, and, to give the substance of his own testimony, had, some three months prior to October 12, 1903, become very well acquainted with her, going with her off and on; that is, meeting her, took her driving once, met her at different times on the streets of St. Helena, their relations were very friendly, he was paying his attentions to her, and was in love with her. The girl Dottie seems to have been self-willed, impatient of parental restraint, and much disposed to stroll about the streets of St. Helena of evenings. She had for a couple of years been employed as a domestic in several places in the vicinity of her home, refusing to go to school, and preferring to work rather than remain at home, claiming that she could not get along with her stepfather. When not working out, she stopped with her mother at St. Helena; sometimes with her grandmother at Napa City. It does not appear that the defendant had any acquaintance with the girl's mother or stepfather, and he had never visited her at her home.

Early on Monday evening, October 12, 1903, the girl Dottie met the defendant on one of the streets of St. Helena, and requested him to take her in his buggy to the residence where her friend Mattie was stopping. He did so, Mattie was called out, and the three proceeded for a drive. Her object in calling on Mattie was to have her accompany her to Napa that night. While out driving Dottie stopped at her home, and told her mother she was going to return to her grandmother's at Napa City that evening with a young man with whom she had come over from her grandmother's to St. Helena that day. Her mother consented, and Dottie, leaving the house ostensibly for the purpose of returning to Napa, resumed her drive with defendant and Mattie. After driving around some time, Dottie asked the defendant to take them to Napa City that night, so that they might take the train to San Francisco. The girls had made up their minds to go to San Francisco. They had made an effort a week or so previously to get to San Francisco. They had no definite object in view in going there. It was Dottie's desire to go anywhere where she would be away from home. The defendant had heard the girls talking about going to San Francisco, and Dottie had told him that her mother said she could not remain at home, because her stepfather did not want her there. Defendant promised to take them to Napa as requested, and to carry out his promise left the girls at Mattie's residence while he drove back to the stable to get a double team. He shortly returned with the team, but, instead of taking the girls to Napa City, proceeded with them to a summer resort on Howell Mountain, some 11 miles distant from St. Helena. Arriving there about 2 o'clock in the morning, he awakened the proprietor and his family, with whom he was acquainted, told them he had brought up a couple of guests, and, when one of the ladies of the family came out to receive the girls, he immediately started back for St. Helena. On the way up to the resort he gave both of the girls some money to pay their expenses while there, they having told him they had no money for the purpose, and promised to return and visit them the following Wednesday. When the defendant returned to the stable that night, he met a deputy constable and night watchman, who seems to have known that the defendant had driven away with the girls, because he asked him what he had done with them, and defendant told him he had taken them to the summer resort at Howell Mountain, naming the place.

On the following Wednesday defendant heard that a complaint had been made before the justice of the peace at St. Helena, charging him with having taken the girl Mattie away, and he called at the office of the justice to learn if this was a fact. The justice told him that no complaint had been sworn to, but that it was rumored that he had taken the girls to Napa and sent them to San Francisco. The defendant denied this, saying that he had taken the girls to a respectable place, and left them there, as any one else would have done, and that they could get away any time they pleased, and could be had at any time they were wanted. The justice did not ask where he had left them, and defendant did not tell him. On the same day he met Dottie's mother, who asked him if he knew where her daughter was, and he told her he had taken her to Napa on the Monday night previous, at her request, left her near her grandmother's residence, and had immediately returned to St. Helena; that he had not seen or heard of her since, and knew nothing of her whereabouts, or of Mattie's. That same evening he drove up to visit the girls at the summer resort, as he had promised, remaining there a couple of hours talking with them on the porch. This was the only visit he made. On the following Saturday afternoon the girls obtained a buggy and drove from the summer resort some distance to a telephone station, and telephoned the defendant at the stables where he was employed, to send up a conveyance to take them home, as they wished to return. He promised to do so, but, before he could do it, was arrested on a complaint made by Dottie's mother, charging him with having taken, detained, and concealed her daughter. He, however, arranged that a conveyance from the stable should be sent up for the girls, which was done, and the girls returned to St. Helena in it that evening.

Upon the trial, defendant admitted taking the girls to the summer resort at Howell Mountain, stating that they wanted him to take them to Napa City, so that they might go to San Francisco; that, as they seemed bent on going to San Francisco, he persuaded and coaxed them to abandon their trip to that city, and suggested that they go to the summer resort at Howell Mountain instead, as he did not want them to go to San Francisco; that they agreed to do so, and he took them there; that his reason for so persuading the change was that he thought a good deal of the girl Dottie, and wanted her to do well; that he did not tell the girl's mother where he had taken her daughter when she asked him, because he had promised Dottie that he would not do so. The evidence in the case further showed, affirmatively: That the defendant was a man who had always borne a good reputation in the community. That the summer resort to which he had taken the girls was a proper and respectable place, managed and conducted by a respectable family. That no restraint of any kind was imposed upon the girls, nor was it suggested, when the defendant left them there with the proprietor and his family, that any surveillance should be placed upon them. That there was no understanding between the girls and defendant that they should remain there for any definite period. In fact, it was understood they should leave there whenever they wished to do so. The girls made their own arrangements for their accommodations at the resort and settled their accounts before departure. They were at entire liberty to depart from and return to the resort as they saw fit, and, in fact, strolled about the country as their inclinations prompted. That a stage passed the resort daily to St. Helena, and they had the means to procure passage thereon, if they saw fit or wished to leave. The testimony of the girl Dottie clearly shows that she went to the resort of her own volition, at the suggestion of the defendant that she go there, instead of to San Francisco; that nothing was said to her by defendant which would indicate an intention on his part to detain or keep her there, nor was she detained; that she went with the expectation of remaining there just as long as she chose to do so, and with the intention of returning to St. Helena whenever she pleased; and that when she got ready she did return. There was no suggestion of any improper relations between the defendant and either of the girls, or that any sinister motive for taking them to the summer resort existed on the part of defendant, or that in taking them there he was prompted by any other motive than a wish to prevent the girls from going to San Francisco, as they had announced their intention of doing.

This is a substantial statement of the evidence in the case. As grounds for a reversal it is urged, among other things, that the evidence in the case was insufficient to sustain the verdict of the jury, and we are of the opinion that this latter ground is well taken. It will be observed, from the provisions of the section of the Penal Code under which the defendant was prosecuted, that the gist of the offense consists of the taking and enticing away of a minor child "with intent to detain and conceal such child" from its parent, guardian, or other person having lawful charge of it. In a prosecution under this section, it is not enough to show that there was an intent to conceal the minor, but the intent must be accompanied with an intent to detain, and both must exist and be found by the jury in order to constitute an offense under the statute. The matter of intent, both as to detention and concealment, is made a question of fact under the provision of the section, and this question of fact is to be proven, like any other fact, from the acts and conduct of the parties, considered in connection with all the other circumstances in the case; and while it is the peculiar province of a jury to find upon the fact of intent, and their finding thereon is generally conclusive, yet this conclusiveness exists only when the evidence bearing upon intent (when intent is made a question of fact) is such that the jury were warranted in reasonably inferring therefrom the existence of the particular intent, made necessary by the law to be found by them in order to support their verdict. This is true when the evidence, even though meager, is yet sufficient, if believed by the jury, to support their finding, and is always true when sufficient, but conflicting, evidence is presented upon the subject. When, however, there is no conflict, and all the evidence which was before a jury, and from which they found upon the matter of intent, is before this court, there is then presented a question of law, whether such evidence was sufficient to sustain the finding of specific intent, which the law requires shall exist in order to constitute an offense.

This is the question presented here—whether the evidence which is undisputed was sufficient to warrant the jury in their finding (essential to support the verdict against defendant) that the girl Dottie was taken and enticed away by him with intent to detain her from her mother. Now, while it is true that, in compliance with the promise made to the girl Dottie not to disclose her abiding place, he deceived her mother when she sought information from him as to where her daughter was, still, taking this as evidence tending to prove concealment under the statute, it was only proof bearing on one of the essential elements necessary to be proven thereunder. It was essential, further, to prove that the girl was taken by defendant with intent, not only to conceal her, but to detain her from her mother. Upon the latter fact we are satisfied, from an examination of the record, that there is no evidence tending to show that the girl was taken to the summer resort by defendant with any intention of detaining her there, or from which an intent to detain could reasonably be inferred. On the contrary, the evidence without contradiction shows that nothing was done by defendant which tended, expressly or impliedly, to disclose any intention on his part to detain her anywhere. It may be true that the girl Dottie, being under age, could not legally consent that the defendant could take her from her home in St. Helena to the summer resort at Howell Mountain, and that she could not authorize the defendant, he having persuaded her and her companion to go there, instead of going to San Francisco, to conceal from her mother her whereabouts. But the fact that she was a minor, and that he took her to the resort and concealed her presence there from her mother, did not of itself prove that he intended to detain her. Nor did the circumstance that she was a minor preclude taking into consideration her conduct and actions, for the purpose of ascertaining whether, as a fact, her will was dominated by that of the defendant, and her freedom of action controlled and restrained entirely by his wishes, or whether her going to and remaining at the resort for the five days that she did was not a matter of her own volition, induced by the suggestion of the defendant that it was much better for her to go there than to go to San Francisco, as she and her companion contemplated. The evidence shows that the girl Dottie was self-willed and disposed to follow her own inclinations; that she was not of such tender years that her will and capacity to act freely could be easily controlled; she was not of submissive disposition; and it is apparent from her testimony on the trial that she was not, even in her youthfulness, a girl disposed to be influenced by the wishes or judgment of more mature persons. Her close companion, Mattie, was of the same general disposition. Both girls were tired of home, and desirous to get away to San Francisco, and were bent on going there the evening the defendant met them. Had they not gone that night, it would have been but a postponement of their going. Conceding that the defendant should not have promised to take the girls anywhere, that he should not have agreed to take them to Napa, and should not have persuaded them to go to Howell Mountain, still the fact that he did so did not, of itself, subject him to punishment under the section. He could only be guilty where the taking was with the intent both of detaining and concealing them. His concealment consisted of keeping a promise, foolishly made and as foolishly adhered to, not to tell Dottie's mother where she was. He seems not to have otherwise kept it—a circumstance which, while it would not excuse his conduct in the matter of concealment from the mother, yet has an important bearing upon the question as to whether there existed an intent to detain.

Now, as to that intent. There is no doubt but that both these girls—one as willfully disposed as the other—had in contemplation for some time getting away from St. Helena and going to San Francisco. They had nothing in view on such a journey, except to get away from home, attracted, doubtless, by the allurements of a large city, and it needs no comment as to the dangers which would beset them when they arrived there. It was to prevent their going to San Francisco that the defendant persuaded them to go to Howell Mountain, a well-known locality, and not far distant from their home. There was no intention thereby to detain either of them from their parents. His intention was to protect them against their own folly. He appears to have had no other motive. To accomplish a worthy purpose, he took them to a respectable place, and left them among worthy people. They were not requested or enjoined by him to remain there for any length of time. They were free to remain as long as they wished, or to leave when they felt disposed. Their freedom of action was unhampered, they had the means with which to depart when they chose, and there were facilities for departure for home whenever they wished to embrace them. All they had to do was to take the stage for St. Helena, which passed the resort daily, or to send word to defendant, to their parents, or to any one else in St. Helena or Napa, to send a conveyance for their return. They sent for such a conveyance when they got ready to come home. It cannot be seriously or successfully contended that under such circumstances there was room for even an inference that the defendant took and enticed either of these girls to the summer resort with intent to detain them from their parents, or with any sinister motive, or for any other purpose than their own good. However injudicious the conduct of the defendant may have been, the evidence is far from showing the guilty intent to detain either of them which the law requires to exist as a fact under the section in order to warrant conviction. It would have been better for the defendant, as he has doubtless now realized, to have persuaded the girls to remain home for at least a few days, and in the meantime have informed their parents of their contemplated departure for San Francisco, and so permitted the parental authority to be exercised to restrain their youthful indiscretion. While his motive in persuading the girls to abandon their clandestine departure for San Francisco was commendable, his persuading them to go to the Howell Mountain resort, and taking them there when they submitted to his persuasion, was indiscreet and injudicious, and his deception of Dottie's mother as to her daughter's whereabouts was inexcusable. Indiscretion and falsity amounting to concealment cannot, however, subject him to punishment under the section of the statute upon which he was prosecuted, in the absence of all evidence as to one of the essential facts necessary to conviction—evidence showing that the taking of the girl Dottie to the summer resort at Howell Mountain was with intent to detain her from her mother. The evidence not only does not show such intent, but effectually negatives it, and for this reason the verdict was not justified by the evidence.

The judgment and order denying the motion for a new trial are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; HENSHAW, J.

147 Cal. 379

PEOPLE v. WING. (Sac. 1,104.)

(Supreme Court of California. Aug. 1, 1905.)

1. Nuisance—Abatement—Pleading.

A complaint under St. 1899, p. 103, c. 88, authorizing the district attorney of any county to bring a civil action in the name of the people to abate a public nuisance, alleging specific facts tending to show that the place complained of—a tippling house and gambling room—is a public nuisance in fact, and has been so conducted that the keeping thereof is injurious to health, is indecent and offensive to the senses, and interferes with the free use of property and the comfortable enjoyment of life and property at the town in which it is located, and is a public nuisance therein, sufficiently states a cause of action as against a general demurrer for want of facts.

2. Courts—Superior Court—Jurisdiction.

Under Const. art. 6, § 5, providing that the superior court shall have original jurisdiction in all cases in equity, and of all such special cases and proceedings as are not otherwise provided for, a suit under St. 1899, p. 103, c. 88, authorizing the district attorney to bring a civil action in the name of the people to abate a public nuisance, is within the exclusive jurisdiction of the superior court.

McFarland, Henshaw, and Angellotti, JJ., dissenting.

In Bank. Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Proceeding to abate a nuisance by the people against G. A. Wing. From a judgment for defendant, the people appeal. Reversed.

U. S. Webb, Atty. Gen., and Frank R. Wehe, Dist. Atty., for the People. John B. Irish, for respondent.

PER CURIAM. This action was brought by the district attorney of Sierra county, under the statute authorizing the district attorney of any county "in which a public nuisance may now or hereafter shall exist" to "bring a civil action in the name of the people of the state to abate said nuisance" (St. 1899, p. 103, c. 88), to procure a decree abating an alleged public nuisance in the town of Loyalton, Sierra county, a municipal corporation of the sixth class, and enjoining the defendant from maintaining the same. A demurrer was interposed to said complaint, the grounds thereof being (1) want of facts sufficient to constitute a cause of action, and (2) that the court had no jurisdiction of the subject-matter of the action. The superior court sustained said demurrer, and, plaintiff declining to amend, judgment was entered in favor of defendant. The plaintiff appeals from said judgment.

The alleged public nuisance is the keeping and maintenance in said town of "a tippling house where spirituous, vinous, malt, and intoxicating liquors are sold and given away," and "a gambling room," all "known as 'Wing's Saloon,'" which it is alleged said defendant has maintained for some time, and threatens to continue to maintain. It appeared from the allegations of the complaint that the board of trustees of this town has by ordinance prohibited the maintenance of such places, and has declared by the same ordinance the doing of any act prohibited thereby "to be a public nuisance." Reliance is placed by appellant upon this official declaration of said trustees. See section 868, Mun. Corp. Act; Gen. Laws 1903, p. 902. We do not here, however, feel called upon to express any opinion as to the effect of this declaration. Independently of the allegations as to said ordinance, there are allegations of specific facts tending to the conclusion that the place complained of is being conducted in such a way that it is a public nuisance in fact, and that the maintenance of it in this way is threatened to be continued. It is also alleged in terms that it has been so conducted "to the extent that the keeping of said tippling house and place and gambling room is injurious to the health, is indecent and offensive to the senses, interferes with the free use of property and the comfortable enjoyment of life and property at said town of Loyalton, and is a public nuisance therein." It is unnecessary to here consider the allegations of the complaint in this behalf further than to say that we think they sufficiently state a cause of action for abatement of a public nuisance, as against a general demurrer for want of facts.

We see nothing in the contention made by the demurrer that the superior court of Sierra county was without jurisdiction of the subject-matter of the action. The superior court is the only court in which actions of this character may be maintained. Const. art. 6, § 5.

The judgment is reversed and the cause remanded, with directions to the lower court to overrule the demurrer interposed to the complaint.

We dissent: McFARLAND, J.; HENSHAW, J.; ANGELLOTTI, J.

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147 Cal. 382

PEOPLE v. WING. (Sac. 1,103.)

(Supreme Court of California. Aug. 1, 1905.)

NUISANCE—ABATEMENT—PLEADING.

A complaint by the people to abate a public nuisance, consisting of a wooden building in which business is conducted, situated within the fire limits of a town, and having therein a sheet iron pipe passing through the ceiling and the roof from an iron stove in which a wood fire is maintained, and alleging facts tending to show that the maintenance of the building in its present condition is an unnecessary menace to the safety of the town from fire, and constitutes a public nuisance in fact, and further expressly alleging that by the maintenance thereof defendant has endangered and now endangers the public safety of the town, and threatens to continue to maintain the building in its present condition, is sufficient to withstand a general demurrer.

McFarland, Henshaw, and Angellotti, JJ., dissenting.

In Bank. Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Proceedings to abate a nuisance by the people against G. A. Wing. From a judgment for defendant, the people appeal. Reversed.

U. S. Webb, Atty. Gen., and Frank R. Wehe, Dist. Atty., for the People. John B. Irish, for respondent.

PER CURIAM. This action, like that of People, etc., v. Wing (Sac. No. 1,104) 81 Pac. 1103, was commenced by the district attorney of Sierra county to procure a decree abating an alleged nuisance in the town of Loyalton, and enjoining the defendant from continuing the same. The general demurrer to the complaint, on the ground of want of facts and want of jurisdiction of the subject-matter, was sustained, and, plaintiff declining to amend, judgment was entered for defendant. Plaintiff appeals from such judgment.

The alleged nuisance here is the maintenance of a wooden building within the fire limits of the town of Loyalton, "wherein a sheet iron pipe passes from an iron stove situated in said building, through the ceiling of a room therein, and the roof thereof," and the conducting of business in said building, and the maintenance in said stove of a wood fire. From the allegations of said complaint, it appears that such maintenance is prohibited by an ordinance of said town; such ordinance further stating that the doing of any act prohibited by the ordinance is declared to be a public nuisance. Waiving the question as to the effect of this declaration of the board of trustees of said town, there are other allegations of the complaint tending to show that the maintenance of said building in its present condition is an unnecessary menace to the safety of the town from fire, and that such maintenance, independent of the provisions of said ordinance, constitutes a public nuisance in fact. It is also squarely alleged that, by the maintenance thereof, said defendant "has thereby endangered and now endangers the public safety in said town." It is further alleged that defendant threatens to continue to maintain said building in its present condition. The complaint is, perhaps, not so full and specific upon this point as it might be, and was evidently drawn upon the theory that it was only necessary to show a maintenance of a building in violation of the terms of the ordinance. We think, however, that it was sufficient as against a general demurrer.

The contention that the superior court of Sierra county was without jurisdiction of the subject-matter of the action has been disposed of in People, etc., v. Wing (Sac. No. 1,104) 81 Pac. 1103.

The judgment is reversed, and the cause remanded, with directions to the superior court to overrule the demurrer to the complaint.

McFARLAND, J. I dissent. In my opinion the facts stated in the complaint are not sufficient to warrant the equitable remedy prayed for. I think that the demurrer was properly sustained by the court below.

We concur: HENSHAW, J.; ANGELLOTTI, J.

147 Cal. 424

PUCKHABER v. HENRY. (S. F. 4,221.)

(Supreme Court of California. Aug. 2, 1905.)

APPEAL—TIME FOR TAKING.

A judgment is not absolutely vacated during the time within which an appeal from an order granting a new trial may be taken, nor during the pendency of such an appeal, but until the order granting a new trial becomes a finality the judgment is a potential one, sufficient to support an appeal taken therefrom, and the party against whom the judgment is rendered must, if he is not satisfied to rest upon the order granting him a new trial, prosecute his appeal from the judgment with diligence, and is not excused by the pendency of the appeal from the order granting a new trial from filing the transcript within the time limited by the rules of the Supreme Court.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1895.]

Department 2. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Charles R. Puckhaber against Kate Henry, administratrix, etc. From a judgment for plaintiff, defendant appeals. Dismissed.

T. Z. Blakeman, for appellant. Cushing, Grant & Cushing, for respondent.

HENSHAW, J. This is a motion to dismiss defendant's appeal from an adverse judgment for her failure to file a transcript within the time limited by the rules of this court. The fact of the failure is admitted. It is sought to excuse it by a showing of the following facts: Defendant in due time perfected her appeal from the judgment, and likewise gave notice of her intention to move for a new trial. The date of filing her transcript in this court was extended from time to time by a stipulation between the parties, and during this period the court heard and granted defendant's motion for a new trial. After the order granting a new trial had been made, defendant neither sought for nor obtained any further extension of time for the filing of her transcript, has never filed any transcript, and for a long time has been in default in this regard. Plaintiff in turn duly took his appeal from the order granting the new trial.

It is contended by the respondent on this motion that, the judgment being vacated by the order in her favor granting the new trial, there is no longer any judgment from which she can prosecute her appeal, but, upon the other hand, she insists that she should be protected, so that, in the event that this court should reverse the order granting the new trial, and thus revivify the judgment, she may then proceed with her appeal from it. In this contention she is in error. During the time in which an appeal from an order granting a new trial may be taken, and during the pendency of such an appeal, the judgment is not absolutely vacated. It is absolutely vacated only when the order granting a new trial becomes a finality. Certain rights under the judgment are, of course, suspended, but it is still a potential judgment, sufficient to support the appeal taken from it. Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205; Henry v. Merguire, 111 Cal. 1, 43 Pac. 387. If an appellant from such a judgment is not satisfied to rest upon the subsequent order which he obtains granting him a new trial, it remains his duty to prosecute his appeal from it with diligence. If, upon the other hand, he is satisfied with the security afforded him by the order granting him a new trial, he may submit with complacence to a dismissal of his appeal from the judgment. It would subject the adverse party to an unjust and unwarranted delay if, as here, after prevailing upon his appeal from the order granting him a new trial, he was still to be confronted with the postponed appeal from the judgment which had been left slumbering to abide the issue of the appeal from the order. Respondent's delay in filing her transcript standing thus unexcused, it is ordered that her appeal from the judgment be dismissed, without prejudice to any of her rights under the order granting her a new trial.

We concur: BEATTY, C. J.; LORIGAN, J.

147 Cal. 372

ELLIS et al. v. WHEATLY, City Clerk. (S. F. 4,289.)

THOMPSON et al. v. SAME. (S. F. 4,290.)

(Supreme Court of California. July 31, 1905.)

ELECTIONS—PRIMARIES—STATUTORY REQUIREMENTS.

Where delegates to a nominating convention of a party entitled to participate in a primary election were elected at primaries held in full compliance with the primary election law, under direction of the city council, which canvassed the returns and issued certificates of election to the delegates, nominees of such convention were entitled to have their names printed on the official ballot, although the petition of the party to participate in the primary, which is required by Pol. Code, § 1361, to be filed with the city council at least 30 days before the date of the election, was not filed until 27 days before such date.

In Bank. Applications by F. E. Ellis and others and by Ed. R. Thompson and others for writs of mandate, prayed to be directed against George S. Wheatly, city clerk of the city of Stockton. Granted.

C. H. Fairall, Arthur Levinsky, and E. P. Foltz, for petitioners Ellis and others. Budd & Thompson, Mr. Clark, and J. W. Kile, for petitioners Thompson and others. Ansell Smith, Goodwin Williams, De Witt Clary, and Thos. S. Louttit, for respondent.

ANGELLOTTI, J. These were applications for writs of mandate to compel the city clerk of the city of Stockton to print upon the official ballot to be used at a municipal election held in said city on May 16, 1905, the names of the various candidates nominated for city officers by the Republican and Democratic parties, respectively. The applications were heard by this court on May 2, 1905, upon demurrers interposed to the petitions, and at the conclusion of the argument orders were made directing the issuance of the peremptory writs as prayed; it being then stated that a written opinion giving the reasons for the decision would be filed.

The city of Stockton is one of the cities of the state where the provisions of the primary law are obligatory and mandatory (section 1372, Pol. Code), and no convention can be recognized as in law entitled to make nominations therein unless the delegates thereto are elected under the provisions of such law. Section 1368, Pol. Code. In this case the delegates of the respective parties making the nominations were in fact elected at a primary election held in all respects as required by the primary law; i. e., an election held under the direction and control of the city council on the day fixed by law, after notice duly given by said council, which notice contained the names of both the Republican and Democratic parties as parties entitled to nominate candidates to be voted for at the municipal election and entitled to participate in said primary. The ballots provided by the council for said election contained the names of said parties, with directions as to the number of delegates each was entitled to, and appropriate spaces for the insertion of the names of persons to be voted for as such delegates. The returns of said election were regularly canvassed by the city council, and certificates of election issued by that body to the persons who subsequently organized the respective conventions, nominated the candidates, and regularly certified the nominations to the respondent, who received and filed such certificates. The Republican and Democratic parties were in fact entitled to participate in said primary upon complying with the provisions of section 1361, Pol. Code. That section in effect requires that the governing committee of the political party entitled to participate must file with the city council, "at least 30 days before the date of such primary election," its petition stating its intention to hold a convention, showing in detail the apportionment of delegates, and requesting that a place be given it on the official ballot. The governing bodies represented by petitioners did file with the city council their respective petitions, in due form, in ample time to enable the council to give the proper notice and furnish the proper ballots. The primary election was held on April 4, 1905. The petitions of the respective parties to be allowed to participate therein were filed with the council on March 8, 1905. The resolution of the council calling the election was adopted March 13, 1905, and notice of such election was commenced to be given on March 16, 1905.

The sole objection of respondent to the printing of names of the nominees upon the official ballot for the municipal election was that the petitions to be allowed to participate in the previous primary election were not filed with the council "at least 30 days before the date of such primary election." His contention was that, owing to the fact that the petitions were filed only 27 days before the primary, the subsequent conventions were mere nullities, and their nominees without any right whatever to places on the official ballot. We were unable to see any merit whatever in this contention. It may be that, owing to the fact that the petitions were presented after the expiration of the time fixed by law, the city council could not be compelled to grant the request of these parties, and allow them a designation and place upon the official primary ballot. But we are not now concerned with that question, and do not decide it. They were by the council given their designations and places on the official ballot; the effect of such action on the part of the council being that all the delegates to their respective conventions were, after legal notice of the proposed election, elected in full accordance with all the requirements of the primary law, which is all that the law required to constitute a legal convention of any political party which at the last election prior to the primary polled at least 3 per cent. of the entire vote of the city. Pol. Code, §§ 1186, 1368. That result having been obtained, it is entirely immaterial whether there were irregularities, rather of form than of substance, in the steps preceding the calling and notice of the election. A substantial compliance with the provisions of the statute is, of course, essential, and where, after due notice and at the proper time, and at an election held under the control of the proper legal body and in conformity to the substantial requirements of the laws governing such election, the delegates of any party are elected by the electors of the district, there is such a substantial compliance as to fully attain every object of the law, and to render the convention composed of those delegates a legal convention, entitled to make nominations; and the objection that a party otherwise entitled to participate in a primary election, and participating therein, should not have been allowed by the council to so do, simply because of some defect in the request to be allowed so to do, is not available to any one. Participation in the election, under the circumstances stated, closes the door as to all such objections, and gives to the party the absolute right to have the nominees of its convention placed upon the official ballot, provided, of course, that it complies with the requirements of the election law as to filing certificates of nomination, etc., which is not here disputed. We find nothing in the primary law warranting any different conclusion.

Regardless of other points made by petitioners, the foregoing constitutes a sufficient reason for the granting of the writs which have heretofore been issued in these proceedings.

We concur: BEATTY, C. J.; SHAW, J.; VAN DYKE, J.; LORIGAN, J.; HENSHAW, J.

147 Cal. 401

SOUTHSIDE IMPROVEMENT CO. et al. v. BURSON et al. (L. A. 1,383.)

(Supreme Court of California. Aug. 1, 1905.)

1. Irrigation — Enlargement and Change of Ditch—Rights under Contract.

Several landowners, including G., constructed a dam and ditch, and thereby took water from a stream with which they irrigated their lands; G. under the arrangement being entitled to a flow of 25 inches, one day in six. None of his land was on the stream, and only 70 acres of it could be irrigated by gravity from the ditch as then constructed; the rest of it being higher than the ditch. Thereafter they made an arrangement with S. that he should enlarge the ditch; they reserving their "present rights" to take and use the water by means of the ditch, and he to have "the water of said ditch after" they "have been supplied with all the water they may require for irrigating their own lands." S., in fulfillment of his contract and with the acquiescence of the others, constructed a dam higher up the stream, and constructed a new ditch near the other, but on a higher level, so that more of the land of G. could be irrigated therefrom by gravity. *Held* that the "present rights" reserved gave G. no right to receive more water than he had before used, and that, though under the further provision he was entitled to enough additional water to, in connection with the 25 inches before received, fully irrigate his land irrigable from the old ditch, he was not entitled to more water, nor to use such additional water to irrigate the land irrigable from the new ditch, but not from the old ditch, but that, the right to the 25 inches of water being by appropriation and prescription, he could use such water on any lands.

2. Costs—Appeal—Modification of Decree.

Modification on appeal of a decree will be without costs; the appeal not having been taken to secure the right thereby given.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 892–899.]

3. Estoppel—Consent.

One who improves his land by use of the property of another against the known opposition of the other, or with knowledge that he does not consent thereto, cannot invoke the doctrine of estoppel solely because the other did not prevent his action.

4. Appeal — Harmless Error — Amending Pleadings.

Any error in refusing an amendment to plead estoppel as a defense is harmless; the parties having stipulated that any estoppel appearing in the evidence could be availed of as though estoppel were pleaded.

5. Same—Dismissal—Parties.

Appeal will not be dismissed because of failure to serve notice of appeal on a party to the action, where he is not injuriously affected by the modification to be made in the decree.

Department 1. Appeal from Superior Court, Ventura County; B. T. Williams, Judge.

Suit by the Southside Improvement Company and others against Edward Burson and others. From an adverse decree, certain defendants appeal. Modified.

Blackstock & Orr and J. S. Chapman, for appellants. Lee & Scott and Barnes & Selby, for respondents.

SHAW, J. The defendants, except William Horton, appeal from the judgment and from an order denying their motion for a new trial. The plaintiffs, other than the Southside Improvement Company, are the stockholders thereof and owners of tracts of land entitled to water for irrigation from a certain water ditch under the control of the improvement company, and the suit is brought on behalf of the plaintiffs and all other persons owning stock in the company, and as such having rights to water from said ditch, to quiet their title to the water, to determine the amount to which they are entitled, and to enjoin the defendants from diverting from the said ditch more than a certain amount thereof, which the plaintiffs admit they are entitled to.

The principal question arising in the case is the construction of the contract of December 18, 1886, set forth in the findings and known as the "Surdam Contract," and the several rights of the respective parties under its provisions to receive water of the Santa Clara river from the ditch now controlled by the Southside Improvement Company. When this contract was made Surdam was in possession of something over 1,000 acres of land situated below that of the predecessors of the defendants, and he desired to obtain a supply of water for the irrigation thereof and other uses thereon. Edwards, Guiberson, Horton, Morrison, and Swanson, the other parties to the contract, each owned or possessed a tract of land, and had been using for the irrigation thereof the water of the river, obtaining the same and conducting it to their land by means of a common dam and ditch. Edwards and Morrison each had 160 acres; Horton and Swanson each 80 acres, and Guiberson 192 acres, only 70 acres of which, however, could be irrigated from the ditch then in use. The land of Edwards was nearest to the point where the water was diverted from the river, and that of Guiberson furthest therefrom, and the latter was not contiguous to the river and had no riparian rights therein. The other tracts abutted on the stream. In pursuance of an arrangement between themselves, each had been accustomed to use the water during certain proportional parts of each week, excepting Sunday, corresponding to the interest which he appears to have claimed in the water; Guiberson using it for only one day of the six. The ditch at its head had a capacity to carry at least 200 inches of flowing water under a 4-inch pressure, but decreased in its course, so that at its entrance upon Guiberson's land it could carry but 25 inches. Prior to that time the parties had posted a notice of appropriation at the point of diversion, claiming the right to 1,000 inches of water to be taken from the river at that point. At the time of posting this notice, however, the ditch was already constructed and in use, and no further works or means of diversion were constructed thereafter, nor was any change made in the dam or ditch in pursuance of the notice, and the rights of the parties, other than riparian, were therefore dependent upon the actual appropriation previously made and subsequently continued by means of the dam and ditch as originally constructed. The several tracts of land lay contiguous to each other along the line of the ditch; Edwards' being the most easterly, and Guiberson's the most westerly, tract. The ditch had not been constructed entirely across the land of Guiberson, but terminated at a point 9½ chains from his westerly line.

By the Surdam contract the parties of the first part, namely, Edwards, Horton, Morrison, Swanson, and Guiberson, agreed that Surdam should have the right and privilege to enlarge the ditch then owned and controlled by the first parties, and to divert water from the river into the ditch at its head, and increase the capacity of the ditch so that it would carry at least 1,000 inches of flowing water under a 4-inch pressure, and to extend the ditch beyond its lower end to and upon the lands lying westerly of Guiberson's tract—that being the land then in possession of Surdam, and for which he wished to obtain the water—and to conduct the water by means of said ditch to the said lands of Surdam for irrigation and other uses thereon; that he should have the right to take the water of the river by means of said ditch at the point where it had been theretofore diverted by the said first parties, as stated in the notice of appropriation posted as aforesaid, which was referred to; and, further, that he should have the right to enter upon the lands of the first parties for the purpose of working upon the ditch, keeping the same in good condition and repair, and providing water therefor. It further declared that the first parties, and each of them, reserved their right, then existing, to take and apply for irrigation and domestic use, on their respective lands on the line of the ditch, all the waters of said ditch that might be required by them for said purposes, and that the right given to Surdam was upon the express condition that he should only have and use the water of the ditch after the first parties had been supplied with all the water they required for irrigating their own land and for domestic use, and that he was only to have the excess of water from the ditch over the quantity required by the first parties. Surdam promised that he would immediately take charge of the ditch, and proceed to deepen, widen, repair, and enlarge the same, and open channels from the sloughs and the Santa Clara river to the ditch, and make proper headgates to carry at least 1,000 inches of water under a 4-inch pressure into the ditch, when the same could be had from the river, and that he would always keep the ditch in good and proper condition for conveying that quantity of water, and at his own expense and cost keep, construct, and maintain the ditch, and use, appropriate, and supply said water in said water ditch, and all other rights and privileges given to him by the first parties, to the best advantage of the first parties in irrigating their lands and for domestic use, and would only apply the water to his own use, or that of his assigns, after the first parties had been supplied with water from the ditch for their respective lands. If the ditch at that time used by the parties to the Surdam contract had been extended, its elevation was such that the land of Surdam could not all be irrigated therefrom. Claiming to act in pursuance of the contract, Surdam proceeded to construct a dam further up the river than the one previously constructed, and to construct therefrom a new ditch at a higher level than the old one, but substantially parallel thereto, and but a short distance therefrom, until it reached the land of Guiberson, where, owing to the flat grade of the ground, it diverged a considerable distance to the south of the line of the old ditch, so that between the line of the old ditch, extended to the westerly line of Guiberson's land, and the line of the new ditch, there were 46.7 acres of land which could be irrigated by gravity from the new ditch, but which could not be irrigated by gravity from the old ditch. It is the right to irrigate this tract of land which is the subject of contention between the parties.

After the completion of this ditch Guiberson sold his tract of land to Edward Burson, and the other appellants, except C. W. Edwards, claim under the said Edward Burson and Guiberson. The change made by Surdam in the location of the ditch was with the consent of all the other parties to the Surdam contract, but this consent was not accompanied by any agreement whatever with regard to any change in the right to irrigate land, or to receive water from the ditch. The first parties to the contract, however, accepted the new ditch as a compliance with the undertaking on the part of Surdam to enlarge and extend the old ditch. It must be considered, therefore, as an oral alteration of a written contract, and valid and effective as an alteration only so far as it was executed. Its effect was to substitute the line of the new ditch as the place where the ditch was to be constructed, instead of the line of the ditch existing at the time the contract was made. The land and water rights of Surdam under the contract were afterwards transferred to the plaintiff the Southside Improvement Company, and thereafter the land was given the name "Bardsdale Tract," and was subdivided into small tracts and sold to different persons, each of whom also received a certain number of shares of stock in the corporation, which made a proportional part of the water right of Surdam, under the contract, appurtenant to the particular tract sold. The other plaintiffs are purchasers of particular lots in the Bardsdale tract, and, as such, stockholders in the company. After the completion of the new ditch, Edwards, Horton, Morrison, Swanson, and Guiberson, and their successors in interest, obtained the water for use on their lands from the new ditch, and from time to time increased the amount of land cultivated and irrigated, and took from the ditch a quantity of water largely in excess of the amount to which they were entitled before the execution of the Surdam contract. At the time the suit was begun, in 1898, each had been using such increased quantity of water for some years. This increase appears to have been consented to by all the interested parties so long as it was confined to the land lying below and irrigable from the old ditch prior to the change. None of the parties, except Guiberson and his successors, the Bursons, ever used the water on land above the old ditch. The Bursons, however, at the time the action was begun, had growing upon the land between the two ditches crops and trees requiring irrigation, and were irrigating the same from the new ditch, claiming the right to do so and the right to take additional water for that purpose. The lines of the two ditches through the land of appellant Edwards were so near together that no appreciable area of land lay between them. The court in its findings and decree awarded to Edwards the right to receive from the new ditch water sufficient for use upon all his land lying below that ditch, and gave a similar right to the other interested parties holding as successors of the parties of the first part in the Surdam contract, except the Bursons. The rights of the Bursons were limited by the decree, so as to exclude therefrom the right to receive water from the ditch for use upon the tract of 46.7 acres lying between the two ditches. Whether or not the contract, as altered by the change in the location of the ditch, carried with it the right to irrigate all the land of Guiberson lying between the two ditches, and to take from the new ditch an additional quantity of water sufficient for that purpose, is the main question for determination.

The Guiberson tract was not riparian to the stream, and hence its right to the water and Guiberson's interest in the water right at the time the contract was executed was a right by appropriation and use only. With respect to quantity, it was limited to such amount as had been theretofore diverted and applied to beneficial uses by Guiberson upon the land; that is to say, to 25 inches continuous flow delivered at the land for one day in every period of seven days. Smith v. O'Hara, 43 Cal. 371; Barrows v. Fox, 98 Cal. 63, 32 Pac. 811; Santa Paula W. W. v. Peralta, 113 Cal. 44, 45 Pac. 168. The surplus water of the stream was, so far as he was concerned, subject to diversion and appropriation by others, and Surdam needed no permission from Guiberson to give him the right to appropriate this surplus, but could have secured it at his own volition, provided he had the means of diversion and a beneficial use to which he could apply the water. Smith v. O'Hara, supra; Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685; Davis v. Gale, 32 Cal. 27, 91 Am. Dec. 554; McKinney v. Smith, 21 Cal. 374; Santa Paula W. W. v. Peralta, supra. Neither the fact that he had additional land which could be irrigated from the old ditch, nor the presence of unappropriated water in the river which he might have diverted and used thereon, had the ditch been large enough to carry it, nor any claim which he might have asserted to such unappropriated water for future use on his land, could give him any right in the surplus water of the stream, nor increase his interest therein beyond the quantity necessary to supply him with the 25 inches actually used. Hence it follows that the provision of the Surdam contract, reserving to the first parties their "present right" to take and use the water of the river by means of their ditch, did not give to Guiberson the right to receive through the new ditch any quantity of water in excess of the 25 inches for one day each week, which he had previously used from the old ditch. As to the other parties, their lands are riparian to the stream, and a reservation of their "present rights," as it is expressed in the contract, would include the right to the reasonable use of the water of the stream upon the whole area of their respective tracts, although, of course, the contract did not bind Surdam to deliver it anywhere, except in and by the new ditch, and they could not require him to deliver water to them at a higher level so as to enable them to use it on land above the ditch. There is nothing in the case that would justify the conclusion that either of the parties contemplated the pumping of water from the ditch for irrigation, or the diversion of water from the ditch otherwise than by the force of gravity, or that the contract was intended to bind Surdam to carry water in the ditch to be applied on lands to which it would not naturally flow from the ditch.

When the contract is considered in the light of the surrounding circumstances and the subsequent conduct of the parties, it is not unreasonable to conclude that it was intended to give to the first parties the right in future to use more water and irrigate a larger area of land than before. As to the land which was riparian to the stream, the reservation of the "present rights" would include the right to such future use upon all such riparian land. As to the Guiberson land, which is not riparian, the terms of the contract are sufficient to give him a right in addition to that which he reserved, and to secure him the use of more water than he had previously enjoyed. Accordingly the court awarded a greater right to his successors, the Bursons, and the other parties have acquiesced in that part of the decree. The appellant Edwards is not aggrieved, as he is given the right to water for all of his land that can be reached from the new ditch. The Bursons have no reason to complain on this score, unless the rights given to Guiberson by the contract, in addition to those he then possessed, are greater than those awarded by the decree. The contract declares, among other things, that the rights granted to Surdam are given upon the express condition that he is only to have "the water of said ditch after the said first parties have been supplied with all the water they may require for irrigating their own lands or for domestic use." This provision clearly implies the right in the parties of the first part to take water in addition to the amount theretofore used, and to apply the same for irrigation and domestic use upon all the lands included in the designation "their own lands," although theretofore the water diverted by the respective parties may not have been sufficient for that purpose. The contention of the Bursons is that it gives the right to demand water sufficient for all the additional land covered by the new ditch, as well as that irrigable from the old ditch. Their theory is that, when the line of the ditch was changed, the effect is the same as if the new line was specifically described in the contract, and that, if the contract as originally made carried the right to demand water upon and for all the lands irrigable from the old ditch, whether theretofore irrigated or not, then, after the alteration effected by the making of the new ditch, it must be construed to give the right to water for use upon all the land irrigable from the higher level of the new ditch, as well as that lying below the old ditch. This theory cannot be upheld. At the time the contract was drawn and its language chosen by the parties, neither of them had in mind a ditch upon any other line than that which then existed, and which is specifically described therein as the "Edwards Ditch." Nor did they contemplate the irrigation of any land above the level of that ditch. The lands to which the contract refers as the lands for the irrigation of which they were to receive water from the enlarged ditch were none other than the lands then manifestly in the minds of the parties; that is, the lands lying below the level of the ditch therein described, and upon any and every part of which they then had the right to use, and the means of conducting, the water. The change in the line by the construction of the new ditch, made as it was by mere tacit permission or consent, was without effect upon the other provisions of the contract. It is not shown that the parties in giving such permission took thought regarding any other term of the agreement, or reconsidered its effect in any other particular. Contracts are made for the purpose of expressing that which the parties intended. To give this contract the effect here claimed for it would be to make it declare something which the parties certainly never did intend. The court adjudged to the Bursons the right to take from the new ditch as much water as would be necessary to irrigate all of the Guiberson tract lying below the line of the old ditch, to the extent of a continuous flow of 100 inches of water for a period of 96 hours every 6 weeks, and a like quantity for 46 hours every 4 weeks. This gave them more than 4 times as much water as Guiberson had title to at the time the contract was made. This is, at least, as favorable to them as the terms of the contract and the evidence would warrant, so far as the quantity of water they are entitled to receive is concerned.

There is, however, a right which Guiberson had at the time the contract was made, with respect to the water theretofore diverted, which is not secured to the Bursons by the decree; that is to say, the right to change the place of use of the water to which he had the present right at that time. This does not seem to have been urged in the court below, and the appellants in their brief do not expressly mention it, although they contend generally that they have the right by the contract to use all the water upon all the land to which it can now be carried. Under the contract, as above construed, Guiberson possessed two distinct water rights, with different incidents and characteristics. One was the right by appropriation or prescription which he previously possessed, and which he reserved by the terms of the contract, modified thereby only to the extent that it was to be diverted and carried to his land by Surdam or his successors by means of a different dam and ditch, but otherwise the same water and the same right. The other was the additional right, gained solely by the contract, to receive from Surdam, or his successors, such water, in addition to that reserved, as should be required for a specified purpose; that is, to complete the supply necessary for irrigation of, and domestic use upon, that part of the land lying below the old ditch. The former right is subject to the rules of law applicable to prescriptive and appropriative water rights, and the place of use may, therefore, be changed at the will of the owner, so long as others are not injured thereby. Ramelli v. Irish, 96 Cal. 214, 31 Pac. 41; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; Davis v. Gale, supra; Hargrave v. Cook, 108 Cal. 80, 41 Pac. 18, 30 L. R. A. 390; San Luis, etc., Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Civ. Code, § 1412. The latter right is a right by contract with Surdam, by which Surdam was to furnish additional water from the additional appropriation which he expected to make and did make of the surplus water of the river, or from any other source from which he could get it. Its extent and quantity is fixed by the contract alone, and cannot be enlarged or in any manner changed against the will of Surdam or his successors. As to this additional water, Surdam's contract was to supply it only for use upon, and in the quantity necessary for, the lands below the old ditch. The amount is measured by the specified necessity. Neither he nor his successors can be required to furnish it upon any other land, or in greater quantity. As to the original 25 inches held by prescriptive title, however, the Bursons had the right, if they chose, to use it upon any other land to which it could be carried by them after its delivery to them, provided no injury to others was caused by the change. This change of place of use cannot be allowed to work injury by increasing the total amount of water which the Bursons are entitled to receive, on the one hand, and, so limited, it will not, on the other hand, add to the burden of the company. The contract cannot be construed to give the right to receive sufficient water to irrigate the original 70 acres in addition to the 25 inches originally acquired by prescription. As above stated, Surdam's agreement was to supplement that amount only so far as should be necessary to supply the original tract with water. For these reasons the decree must be modified so far as to permit the Bursons to use the water to which they are declared entitled upon the land lying between the two ditches, to the extent of a continuous flow of 25 inches, measured under a 4-inch pressure, for the equivalent of 24 hours in each week. This would amount to a continuous flow of 100 inches for 36 hours every 6 weeks, or for 24 hours every 4 weeks, the same to be delivered to them at one place, and to be divided among them according to their interests as they may agree. As it is manifest that the appeal was not taken to secure this right, we think the modification should be made without costs to the respondents.

The appellants claim that the conduct of the parties shows that they so construed the contract as to give the right to use all or any part of the water upon all the Guiberson tract below the new ditch. We do not think this claim can be sustained. The Bursons have claimed the right to do so, and at times when water was plentiful there was usually no objection, but at other times there were objections, and the evidence is not such as to justify the court in disturbing the finding of the court below on this point. The same is true of the claim that the evidence does not sustain the finding that the plaintiffs are not estopped to deny the right of the Bursons to irrigate the 46.7 acres in question. They (the Bursons) have, it is true, planted valuable orchards on this land, which will be injured or destroyed if deprived of water; but we cannot say that they were led to do this by any acts or statements of the plaintiffs, or either of them. The evidence rather indicates that they were asserting the right to the water for this land against the known opposition of the plaintiffs. A person who makes valuable improvements upon or by the use of the property of another, in the face of opposition by the other, or with knowledge that he does not consent thereto, cannot invoke the doctrine of estoppel to protect him, upon the sole ground that the other party did not prevent him from making the outlay.

The defendants were not injured by the refusal of the court to allow them to amend their answer during the trial, so as to plead the estoppel as a defense. Conceding that the court in its discretion might have allowed the amendment, the necessity of it was removed by a stipulation, made at the time, to the effect that the appellants might avail themselves of any estoppel that appeared in the evidence, in like manner as if it was pleaded. No evidence offered thereafter was excluded on the ground that there was no plea of estoppel, and the court made full findings on the question. The stipulation did not include Horton; but, as he did not ask leave to present any such defense, the omission is immaterial. We think the findings that the cause of action is not barred by the statute of limitations, and as to the location of the line of the old ditch, are sustained by sufficient evidence. The other points made by appellants are not of sufficient importance to deserve special mention.

The respondents have moved to dismiss the appeals upon the ground that there has been no service of notice of appeal upon the defendant Horton. The modification of the decree which will be ordered will not injuriously affect the rights of Horton, and therefore it is not necessary to consider the motion. It will be denied.

It is ordered that the decree entered by the court below be modified by adding thereto a clause in the following words, to wit: "It is further ordered, adjudged, and decreed by the court that the defendants E. Wright Burson, Willis Burson, John W. Burson, George W. Burson, Joseph H. Burson, and Albert L. Burson may use upon the tract of land containing 46.7 acres lying between the line of the said ditch controlled by the Southside Improvement Company, and the line herein described as the line of the ditch owned and constructed by Edwards and others, a portion of the water which they are hereinbefore adjudged to be entitled to receive, equal to a continuous flow of 100 inches, measured under a 4-inch pressure, for the period of 36 hours every 6 weeks, in case they shall take said amount of water out of the allowance made to them at 6 weeks' intervals, or equal to a continuous flow of

100 inches of water, measured under a 4-inch pressure, for 24 hours every 4 weeks, in case they shall elect to take the same out of the amount allowed to them at intervals of 4 weeks, said quantity of water to be delivered to them at the times and places as hereinbefore provided, and to be divided by them among themselves after delivery as they may agree; but the right so to use the quantity of water above mentioned shall not increase the amount of water which they are hereinbefore declared entitled to take and receive from the said ditch."

As thus modified, the judgment is affirmed, without costs. The order denying the new trial is affirmed, and the motion to dismiss the appeals denied.

We concur: ANGELLOTTI, J.; VAN DYKE, J.

(147 Cal. 376)

MOULTRIE v. TARPIO et al. (HOFFMANN, Intervener). (S. F. 4,343.)

(Supreme Court of California. July 31, 1905.)

1. APPEAL—SETTLEMENT OF BILL OF EXCEPTIONS — ABANDONMENT OF PROCEEDING—FAILURE TO SERVE TRANSCRIPT—DISMISSAL.

Code Civ. Proc. § 650, after providing for the service of a proposed bill of exceptions and amendments, requires the bill and amendments to be presented to the trial judge within 10 days thereafter. Section 473 authorizes the court to relieve a party in case of mistake or excusable neglect, provided that application for relief be made within 6 months. *Held* that, where more than a year and a half has elapsed after service of a proposed bill of exceptions and amendments, without any step having been taken for the settlement of the bill, or any stipulation or order having been made extending the time within which to proceed with such settlement, so that it is apparent that the bill can never be settled, there is no "proceeding pending for a settlement of a bill of exceptions," within Supreme Court rule 2 (64 Pac. vii), providing that in such case the time for filing a transcript shall not begin to run until a settled bill of exceptions has been filed, and the appeal will be dismissed for failure to file the transcript within 40 days after the perfection thereof, as required by other provisions of such rule.

2. SAME—DISMISSAL—WANT OF PROSECUTION.

The Supreme Court has the inherent right to, and will, dismiss an appeal for want of prosecution, where for more than a year and a half appellant has practically abandoned all proceedings looking to a prosecution of the appeal by failing to take any step toward preparing the necessary record.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3129.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Emelie Moultrie, as administratrix, etc., against Felipe Tarpio and others. W. C. Hoffmann intervened. From an order denying a motion to vacate an order granting a writ of assistance, intervener appeals. Dismissed.

Chas. M. Cassin and Benj. K. Knight, for appellant. Mullany, Grant & Cushing and Charles B. Younger, for respondents.

ANGELLOTTI, J. This is a motion made July 3, 1905, to dismiss an appeal from an order of the superior court of Santa Cruz county, made and entered on March 13, 1903, denying a motion of appellant to vacate an order theretofore made, granting a writ of assistance. The appeal was perfected on March 16, 1903. The motion to dismiss the appeal was based on the ground that no transcript on appeal has been served or filed, although no stipulation or order had been made extending the time to serve and file the same, and on the further ground that appellant has failed and neglected to prosecute his appeal with due or any diligence. Although duly served with notice of this motion, appellant did not appear on the hearing thereof, and has in no way opposed the granting of the same.

According to the undisputed showing made by respondent, appellant served his proposed bill of exceptions on plaintiff on August 10, 1903, and on October 24, 1903, respondent duly served on appellant her proposed amendments to said bill of exceptions. No stipulation or order has ever been made extending appellant's time within which to proceed with the settlement of said bill. Appellant has never presented said proposed bill or amendments to the judge who made the order appealed from, or to the clerk of the court for said judge, and has taken no step whatever looking to the settlement of said bill. In consequence of this nonaction on his part, although more than a year and a half has elapsed since the service of the proposed amendments, no bill of exceptions has been settled. It is provided by rule 2 of this court (64 Pac. vii) that the appellant in a civil action shall serve and file his printed transcript on appeal within 40 days after the appeal is perfected, "provided that, when there is a proceeding pending for the settlement of a bill of exceptions or a statement which may be used in support of such appeal, the time for filing and serving the transcript shall not begin to run until the settled and authenticated statement or bill of exceptions has been filed." If it must be held that, under the circumstances above stated, a proceeding for the settlement of a bill of exceptions to be used on the appeal is still pending, it must follow that the time for filing the transcript has not, under the rule, commenced to run.

Section 650, Code Civ. Proc., after providing for the service of the proposed bill of the adverse party and the service of proposed amendments thereto on the appellant, provides: "The proposed bill and amendments, must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge." Compliance with this requirement is essential to the right of a party to have his bill of exceptions settled, and, if he fails to so comply, his right is gone, unless he be relieved from the effect of such failure by the trial court, under the provisions of section 473, Code Civ. Proc., on account of "mistake, inadvertence, surprise, or excusable neglect." The time within which such relief might be granted under the term of said section, viz., six months, has long since passed. It is manifest, upon the undisputed showing made by respondent, that appellant's proceeding for a settlement of a bill of exceptions lapsed more than a year before the making of this motion, and could never be effectual for any purpose, and has practically been abandoned by appellant. The rule of this court quoted above contemplates a proceeding for a settlement that is alive—at least to the extent that it is being in some degree pressed by the appellant. Ordinarily, this court would not undertake to determine, on a motion to dismiss an appeal, whether or not a party had so failed to comply with the requirements of the law in regard to the settlement of a bill of exceptions that his pending proceeding for such settlement must ultimately fail, but would leave that question to be determined by the trial judge, subject to review on appeal. But where, as here, the facts are not in dispute, and it is apparent that no bill can ever be settled, and that the appellant has long since practically abandoned his proceeding for the settlement of any such bill, we are satisfied that it should not be held that there is "a proceeding pending for a settlement of a bill of exceptions," within the meaning of the rule.

We are also of the opinion that upon the facts stated above the appeal should be dismissed for want of prosecution. As shown above, for more than a year and a half appellant has practically abandoned all proceedings looking to a prosecution of the appeal by failing to take any step towards preparing the record essential to a hearing thereon, and there can be no doubt of the inherent right of this court to dismiss an appeal under such circumstances.

The appeal is dismissed.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; VAN DYKE, J.

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1 Cal. App. 238

BALL v. LOWE.

(Court of Appeal, Second District, California. June 29, 1905.)

BILLS AND NOTES—ACTIONS—LIMITATIONS—COMPLAINT—AMENDMENT.

Where an original complaint set out the note sued on as containing a promise to pay to the order of "the First National Bank of Pasadena $1,000," etc., and an amended complaint was filed after limitations had run, in which plaintiff's name was inserted as payee in the note in place of the bank, and alleging that the note, a copy of which was set out, was the same note sued on in the original complaint, and that in the original complaint the name of the bank was inserted by a clerical error, the cause of action was the same as that intended, but defectively stated, in the original complaint, and hence it was not error for the court to overrule a demurrer on the ground that the action was barred.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by B. F. Ball against T. S. C. Lowe. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Lynn Helm, for appellant. C. J. Willett, for respondent.

SMITH, J. Appeal from a judgment for the plaintiff on the promissory note set out in the amended complaint, which was filed May 14, 1902, more than four years after the maturity of the note. In the original complaint the note sued upon purported to "promise to pay to the order of the First National Bank of Pasadena $1,000," etc. In the present complaint the name of the plaintiff is inserted as payee, in place of "the First National Bank of Pasadena," occurring in the note as set out in the original complaint; and it is alleged "that the note, a copy of which is herein set forth, is the same note alleged in the original complaint," and, in effect, that in the original complaint the name of the First National Bank of Pasadena was inserted, instead of the name of the plaintiff by a clerical error. A demurrer to the amended complaint was filed on the ground that the cause of action was barred by the provision of section 337 of the Code of Civil Procedure, but was overruled, and, the defendant failing to answer within the time allowed by the order, judgment against him was entered by the clerk by default.

It is now claimed that a new cause of action was introduced by the amended complaint, and that the demurrer should have been sustained. We are of the opinion, however, that the cause of action in the amended complaint is the same as that intended, but defectively stated, in the original complaint, and that this appears, not only from the express allegations of the amended complaint, but also from the allegation in the original complaint, that the defendant "promised to pay plaintiff the sum of $1,000," etc., and from the stock certificates attached to the original complaint which were pledged to the defendant to secure the payment of "said note delivered to the plaintiff." See report of the case on a former appeal, 135 Cal. 678, 68 Pac. 106. The case seems to come within the direct application of the case of Nellis v. Pacific Bank, 127 Cal. 166, 59 Pac. 830.

The judgment is affirmed.

We concur: GRAY, P. J.; ALLEN, J.

1 Cal. App. 272

CARPENTER et al. v. IBBETSON et al.

(Court of Appeal, Second District, California. July 6, 1905.)

1. Contracts—Substantial Performance—Defects—Measure of Damages.

Where a building contract for the construction of stairwork, etc., provided for payment of the contract price before commencement of the work, such provision constituted an independent promise; and, the contract having been substantially performed, defendant's measure of damages for specified breaches suffered was the amount of detriment sustained thereby.

2. Same—Evidence.

Where a building contract had been substantially performed, evidence as to the amount it would cost to build a new staircase in accordance with the plans and specifications was insufficient to sustain a recovery for specified breaches of the specifications in the staircase constructed; the defects being of a character which could be remedied at a moderate cost.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by A. L. Carpenter and others against Maud Rice Ibbetson and others. From a judgment in favor of defendants on a cross-complaint, plaintiffs appeal. Reversed.

J. C. Brown and Borden & Carhart, for appellants. Isidore B. Dockweiler, for respondents.

SMITH, J. Appeal from a judgment for the defendants, and from an order denying the plaintiffs' motion for a new trial. The suit was brought on a written agreement of the plaintiffs with the defendants to furnish all inside millwork for a building on defendants' premises, as per details then in their possession, among which the following appear in the specifications: "All interior finish, etc., to be constructed of selected, even-colored, and even-grained kiln-dried lumber of the several kinds specified, all to be neatly hand smoothed, scraped, and sandpapered to perfect, smooth, even finish, no tool or sandpaper marks to be left on same. All oak finish and finish in dining room below architrave to be secret nailed. Balusters of the main stairs to be * * * glued into steps and glued into rail"—the contract price of $1,000 to be paid before the commencement of the work. The complaint alleges a completion of the work in accordance with the terms of the contract, and that plaintiffs had been paid on the contract price the sum of $900, leaving unpaid, with allowance for the omission of certain work by agreement, the sum of $94.75, with interest, and that there is now a balance due and owing on the contract of that amount, with interest, etc. It is further alleged that extra work, described in separate paragraphs of the complaint, was done by the plaintiffs, aggregating, with the balance unpaid on the original contract, the sum of $328.52, which amount the complaint alleges is now due and owing to plaintiffs, with interest, etc. The answer denies the completion or performance of the contract, or that the amounts claimed by the plaintiffs are due, and in a cross-complaint specifies, as breaches of the contract, the failure of plaintiffs "to secret nail all stairwork, * * * and to furnish selected lumber for aforesaid work, and to build the stairs in accordance with said contract," etc.

The court finds the plaintiffs' allegations to be true, except that it finds that it is not true that the plaintiffs have completed the contract in accordance with its terms, or that there is now due to the plaintiffs the several amounts alleged, or any sum of money whatever; and it further finds that plaintiffs have not performed or completed the contract, and that they have "neglected, failed, and refused to secret nail all stairwork, and to properly put in the balusters of the stairs, and to furnish selected lumber for said stairwork, and to complete the stairs referred to in said contract in accordance with said contract," etc., and that by reason of said failure the defendants have suffered damage in the sum of $328.52, being the amount claimed to be due on the contract by the plaintiffs. From the statement on motion for new trial it appears that the defendants were permitted to prove by several witnesses, over the objections of plaintiffs, the amount it would cost to build a new staircase in accordance with the plans and specifications; the amounts, as given by the several witnesses, varying from $400 to $600. This was the only evidence of damages introduced in the case, except that of plaintiffs' witnesses, who testified that the damages resulting from the defects of construction would amount only to a few dollars. And from the testimony of these witnesses it appears, without contradiction, that all the defects complained of could be remedied at a trifling expense, except the failure to secret nail the stairs, and even this, it would appear, could be substantially remedied at a moderate cost.

On this state of the record the points are made by the appellants that the measure of damages allowed by the court was not the true one, and that there was no evidence to justify the findings of the court as to the extent of the damages. Both of these points, we think, must be sustained. The case presented is one of substantial compliance with the contract, within the rule laid down in Perry v. Quackenbush, 105 Cal. 307, 38 Pac. 740 et seq., and other decisions of the Supreme Court cited in appellants' brief; and from the findings it is apparent that it was so regarded by the court. It is also to be noted that the payment was to be made before the commencement of the work, and is therefore to be regarded as an independent promise, within the rule stated by Mr. Anson in his work on Contracts (page 377 et seq.). The measure of damages, therefore, was merely the amount of detriment suffered by the defendants by reason of the breaches of the contract, and as to this there is no evidence in the record.

Judgment and order appealed from must therefore be reversed, and it is so ordered.

We concur: GRAY, P. J.; ALLEN, J.

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1 Cal. App. 251

CRYSTAL v. HUTTON.

(Court of Appeal, Third District, California. July 3, 1905.)

1. PRINCIPAL AND SURETY — PAYMENT OF DEBT—EXTINGUISHMENT—ACTION BY SURETY—INDEMNITY—LIMITATIONS.

Under Civ. Code, § 1473, providing that full performance of an obligation by the party whose duty it is to perform it, or by any other person on his behalf or with his consent, if accepted by the creditor, extinguishes it, where a surety paid a note to the holder and thereafter accepted an assignment of the note, the surety was only entitled to maintain an action against the maker on an implied contract of indemnity, notwithstanding sections 2848, 2849, giving a surety, on satisfying the obligation of the principal, the right to enforce any remedy that the creditor then had against the principal, to the extent of reimbursing what he had expended, etc.

2. BILLS AND NOTES — PAYMENT — ASSIGNMENT.

The surety having paid the note, before it was assigned to him, with knowledge of all the facts, it was not revived by the assignment.

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by G. W. Crystal against Mrs. C. A. Hutton. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A. G. Perry and E. E. McFarland, for appellant. Colgan, Harvey & Goodman, for respondent.

CHIPMAN, P. J. Action by a surety against the principal on a promissory note. Defendant pleaded by demurrer subdivision 1, § 339, Code Civ. Proc., in bar of the action. The complaint was filed March 11, 1903. The demurrer was sustained, and, plaintiff declining to amend his complaint, judgment passed for defendant, from which plaintiff appeals.

The complaint alleges that defendant, Mrs. Hutton, made her certain promissory note, which is set forth in hæc verba. The note is dated March 12, 1898, and is payable to the order of H. C. Deakin 12 months after date, with interest at 10 per cent., payable annually and to be compounded, and is signed as follows: "Mrs. C. A. Hutton. G. W. Crystal, Surety." It is alleged in the complaint that on March 17, 1898, the note was duly indorsed to Mrs. C. Deakin; that plaintiff, at request of defendant, signed said note as surety and had no interest therein; that defendant refused and neglected to pay said note and interest when the same fell due, and plaintiff, as surety, was compelled to pay the same, and did pay to Mrs. C. Deakin thereon the sum of $2,360.10 on March 30, 1900; "that thereupon, on said day, said Mrs. C. Deakin indorsed, assigned, and delivered said note to this plaintiff, and plaintiff ever since has been and now is the legal owner and holder thereof"; that no part of said sum of $2,360.10 has been paid, and the whole thereof is due and unpaid. The prayer of the complaint is for the sum of $2,360.10, with interest thereon from March 30, 1900, at the rate of 10 per cent. per annum, compounded annually.

1. It is contended by appellant that the action is founded upon a written instrument, namely, the promissory note set out in the complaint, and may be brought at any time within four years from its maturity. Respondent's contention is that when the surety paid the original obligation, namely, the promissory note, it became extinguished, and no action could be maintained upon it, and that the action of the surety in such case is upon an implied promise of the principal to reimburse the surety, and is not an obligation in writing, and was, therefore, barred in two years from the time the surety paid the note. Appellant relies upon the provisions of sections 2848 and 2849 of the Civil Code, which gives to a surety, upon satisfying the obligation of the principal, the right "to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended," etc. He also contends that section 1473, which provides that "full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it," does not apply to sureties. It is urged that effect must be given to section 2849, in considering these two sections together, because this section is a special law, while section 1473 is a general law, and the latter must give way to the former. Appellant's attorneys appear to have made a very careful study of the history of these provisions of the Code, tracing their origin to the New York Code, and they show by decisions of the courts of that state that apparently the construction contended for by appellant is there held to be the correct one, and that the rule of law respecting the rights of a surety is as appellant urges should be the rule here. Cases are also cited from other states holding in consonance with the rule said to be enforced in the New York courts. Two cases from our own Supreme Court are cited as supporting appellant, namely, Waldrip v. Black, 74 Cal. 409, 16 Pac. 226, and Williams v. Riehl, 127 Cal. 365, 59 Pac. 762. If the question were res integra in this state we should feel called upon to give it a searching examination; for the courts have differed widely, and are far from agreement upon it. However the question may be regarded elsewhere, we think the rule firmly settled in this state that payment by the surety of the obligation evidenced by a promissory note, under the cir

cumstances shown in the complaint, extinguishes the obligation, and that the remedy given the surety in such case is upon the implied obligation of the principal debtor to reimburse the surety "what he has expended." The cases which more or less sustain this rule are the following: Chipman v. Morrill, 20 Cal. 131; Gordon v. Wansey, 21 Cal. 77; Moran v. Abbey, 58 Cal. 163; Wright v. Mix, 76 Cal. 465, 18 Pac. 645; Stone v. Hammell, 83 Cal. 547, 23 Pac. 703, 8 L. R. A. 425, 17 Am. St. Rep. 272; James v. Yaeger, 86 Cal. 184, 24 Pac. 1005; Stanley v. McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545; Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998; Yule v. Bishop, 133 Cal. 574, 65 Pac. 1094; Loewenthal v. Coonan, 135 Cal. 381, 67 Pac. 324, 87 Am. St. Rep. 115.

The question had careful consideration in Yule v. Bishop, supra, as, indeed, in other cases above cited, and, after reviewing the cases, it was there said: "In this state, therefore, it seems to be well settled, both by the language of the Code and by the decisions of this court under it, that full payment and performance by the surety extinguishes the primary obligation; that new rights and liabilities then arise—upon the part of the principal, to reimburse the sureties for the moneys expended, with legal interest, though not according to the terms of the primary obligation, and upon the part of the surety, the right to an action in assumpsit upon the implied promise of the principal to make him whole. Since the principal obligation is thus extinguished, it cannot be with us, as it may be elsewhere, that the original obligation is kept alive and passes to the surety by equitable assignment or subrogation." This case was reconsidered on petition and the department decision was approved. There is nothing in the dissenting opinion of Mr. Justice Harrison which necessarily contravenes the majority opinion. Furthermore, in Loewenthal v. Coonan, supra, which was decided subsequently to Yule v. Bishop, Mr. Justice Van Dyke, who concurred in the dissenting opinion just referred to, speaking for the court, held to the rule laid down in Yule v. Bishop, and with him concurred Mr. Justice Harrison; and a rehearing in that case was denied. In Waldrip v. Black, supra, relied on by appellant, there are expressions used in the opinion which seemingly support appellant, but they must be considered in connection with the facts in the case, or, otherwise, they must be held to give way to the well-considered rule which has withstood all attacks in our Supreme Court for over 40 years, though repeatedly assailed. In Waldrip v. Black the action was by the surety to foreclose the mortgage given to secure the note of the principal, which the surety paid after maturity, and which was thereupon indorsed to him. It does not appear from the opinion what were the grounds for the appeal. No question of the statute of limitations arose, and the rule there stated, that the surety "became the equitable assignee of the note, it being the principal undertaking, and entitled to enforce its payment according to its tenor and effect, as the holder thereof, as well as to foreclose the mortgage, which was the collateral security," might apply upon equitable principles to enable foreclosure by the surety. It might be his only adequate means of reimbursement, as, for example, in case of the insolvency of the maker of the note. However this may be, the case cannot be regarded as in the slightest degree weakening the position taken by the court in those cases where the question was presented as we now have it. Waldrip v. Black was a case where all the facts of the transaction were set out, and, under our system of pleading, as was said in Yule v. Bishop, "it can make little difference in the generality of cases, whether it be said that an accommodation maker or indorser who has been compelled to meet the obligation of his principal is entitled to sue upon the note, with a recovery limited to the amount which he has expended, with legal interest, or whether it be said that his action is in assumpsit for money laid out on behalf of his principal." But in the present case it is of vital consequence to defendant that he have the benefit of the correct rule of law applied. The case of Williams v. Riehl, supra, cited by appellant, does not, in our opinion, in any wise weaken the force of the cases previously and subsequently decided by the court.

2. It is further contended that the demurrer should have been overruled because there is a cause of action stated independently of the allegations as to suretyship. The contention is grounded on the allegation that Mrs. Deakin assigned the note to plaintiff, and that plaintiff ever since has been and is now the owner and holder thereof and that the note has not since been paid. It clearly appears that plaintiff had paid the note before it was assigned to him. The note thereupon became functus officio, and was not revived by the assignment to plaintiff who took the note with knowledge of all the facts. Gordon v. Wansey, 21 Cal. 77. By payment to the payee "the note became extinct and ceases to be a binding obligation." James v. Yaeger, 86 Cal. 184, 24 Pac. 1005. We have not here, as is contended, the statement of two causes of action improperly united, one of which may be good as against the demurrer pleading the statute of limitations only. We have the case where the pleader alleges ownership, but in doing so alleges facts as to how he became such owner which are inseparable from the assertion of ownership. Indeed, in view of the facts stated as to how he became the owner and holder, the latter allegation is rather a conclusion of law than a statement of fact. By his own showing he became the owner and holder of a piece of paper which had ceased any longer to be the existing enforceable

obligation of anybody. The complaint is constructed wholly upon the erroneous theory, contended for by appellant, that he had the same right to sue upon the note precisely as any innocent indorsee for value would have had.

The judgment is affirmed.

We concur: McLAUGHLIN, J.; BUCKLES, J.

1 Cal. App. 239

PETERS v. GEORGE.

(Court of Appeal, Second District, California. July 1, 1905.)

1. CONTRACT FOR BENEFIT OF THIRD PERSON—ENFORCEMENT.

The contract of defendant, on buying property of M., to pay a certain part of the price to plaintiff, may, by provisions of Civ. Code, § 1559, be enforced by plaintiff, being made expressly for his benefit.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 798–807.]

2. SAME—STATUTE OF FRAUDS.

The statute of frauds is not involved, where, on the sale to defendant by the widow of W. of property inherited by her from W.'s estate, defendant promised to pay a certain part of the price to plaintiff, then a creditor of said estate.

3. SAME—CONDITION.

Where defendant, on purchasing from the widow of W. property which she inherited from W.'s estate, promised to pay a certain part of the price to plaintiff, then a creditor of W.'s estate, it is immaterial, in an action on the promise, whether plaintiff has given the estate a release; the promise not being conditioned thereon.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by H. F. Peters against C. W. George. Judgment for plaintiff. Defendant appeals. Affirmed.

E. J. Emmons and S. G. Edwards, for appellant. Reardan & Whitaker, for respondent.

ALLEN, J. The complaint alleges, and the court finds, that one May Webb, as the widow and sole heir at law of Birt Webb, sold certain property inherited by her from the estate of her husband to defendant for the sum of $450, of which amount $100 was paid to the said May Webb, and the remainder was by defendant agreed to be paid to the plaintiff, who was then a creditor of the estate of Birt Webb. Judgment went for plaintiff, and defendant appeals from the judgment.

No time for the performance being specified, the money was payable immediately. Civ. Code, § 1657. The contract as to the excess above $100 was made expressly for the benefit of the plaintiff, and is enforceable by him. Id. § 1559. It is immaterial whether he executed, or established by proof, his release of the estate on account of previous indebtedness. Such release was not subject of the contract, nor was the payment to plaintiff dependent thereon. The statute of frauds was not involved.

Judgment ordered affirmed.

We concur: GRAY, P. J.; SMITH, J.

1 Cal. App. 236

McALISTER v. TINDAL.

(Court of Appeal, Second District, California. June 30, 1905.)

1. JUSTICES OF THE PEACE — JURISDICTION — TITLE TO REAL ESTATE — AFFIDAVIT — REMOVAL OF CAUSE.

In an action before a justice of the peace to recover for personal services and rent, a verified answer, merely alleging the affiant's conclusion that the title to real estate would be brought in issue, without stating the facts from which such conclusion followed, as required by Code Civ. Proc. § 838, was insufficient to justify the removal of the cause to the superior court.

2. SAME—CHANGE OF VENUE.

Where an action before a justice was improperly removed to the superior court, which court acquired no jurisdiction of the action, it did not err in refusing a change of venue.

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by A. McAlister against Isabella W. Tindal. From an order of the superior court, remanding the case to a justice for trial, defendant appeals. Affirmed.

T. Z. Blakeman, for appellant. Shipsey & Norton and William Shipsey, for respondent.

ALLEN, J. This action was brought in a justice's court to recover a judgment for personal services and rent. An answer was filed, which, while not controverting the facts of the complaint, denied indebtedness, and by way of further answer alleged that the determination of the action would necessarily involve title to real property. This opinion in the answer was not supported by any statement of fact. The justice certified the case to the superior court, which court, on motion, remanded the cause to the justice for trial. Before such order of remand, a motion was interposed in the superior court, supported by affidavit, demanding a change of the place of trial to the city and county of San Francisco, being the county in which defendant resided. The court refused to grant a change of the place of trial, from which defendant appeals.

The verified answer filed in the justice's court did not conform to the requirements of section 838, Code Civ. Proc. The mere statement of the opinion of the affiant that the title to real estate would be brought into issue on the trial is not sufficient. Facts should be stated from which such conclusion would follow.

The action of the justice in certifying the case was unauthorized, and the case was, therefore, not legally before the superior court for determination. Arroyo Ditch Co. v. Superior Court, 92 Cal. 47, 28 Pac. 54, 27

Am. St. Rep. 91. The court having no jurisdiction of the action, it would, of course, follow that there was no error in denying the motion to change the place of trial.

Order affirmed.

We concur: GRAY, P. J.; SMITH, J.

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1 Cal. App. 229

REYNOLDS v. PRESIDIO & F. R. CO.

(Court of Appeal, First District, California. June 30, 1905.)

1. NUISANCES—PUBLIC NUISANCES—ABATEMENT BY INDIVIDUAL—EXPERIENCE OF SPECIAL INJURY.

Civ. Code, § 3479, declares anything which unlawfully obstructs the free passage or use of a public street a nuisance. Section 3480 defines a public nuisance as one affecting an entire community or any considerable number of persons. Section 3493 provides that a private person may sue for a public nuisance only if it is specially injurious to himself. Plaintiff was the owner of a lot abutting on a city street, and defendant street railroad, in violation of its franchise, constructed its track away from the center of the street and over on plaintiff's side thereof, so that it came within about four feet of the sidewalk. The maintenance of the track in this position was claimed by plaintiff to deprive her and her tenants of the use of the street, to obstruct the use of the sidewalk, to obstruct access to plaintiff's property, to endanger the safety of plaintiff, her family, and tenants, and to depreciate the rental value of plaintiff's property. *Held*, that the injury claimed by plaintiff to result from the obstruction of the street was not different in kind from that suffered by the public at large, and she was not entitled to have the same abated as a public nuisance specially injurious to her.

2. SAME—PLEADINGS—INSTRUCTIONS.

A complaint, alleging the existence of a nuisance consisting of the obstruction of a street in front of plaintiff's premises by the tracks of a street railroad, and further alleging that it had depreciated the rental value of plaintiff's property in a certain sum, and praying that the tracks be adjudged to be a nuisance and that they be abated, and demanding damages equal to the depreciation in the rental value of the premises, could not be held to be one for compensation for damaging private property, within the rule that authorizes an abutting owner to sue for damages suffered through the occupation of a street by a railroad, but was one for the abatement of a nuisance.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Ann E. Reynolds against the Presidio & Ferries Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

James Alva Watt, for appellant. Jesse W. Lilienthal, for respondent.

COOPER, J. The court sustained defendant's demurrer to the amended complaint, and thereupon judgment was entered for defendant. Plaintiff prosecutes this appeal from the judgment, and contends that the demurrer was improperly sustained.

The complaint alleges that plaintiff is the owner of a lot 60 feet in depth fronting 42 feet on the southerly line of Union street, between Hyde and Larkin streets, in the city of San Francisco; that the franchise of defendant required it to construct and operate its cable railway as nearly as possible in the center of the street, but that, in violation of its franchise, it forcibly intruded upon said street and the southerly half thereof, and constructed its tracks and subways so that the southerly track and subway was constructed, and ever since has been maintained and operated, within 4 feet 2 inches of the southerly sidewalk of said street in said block, and about 8 feet southerly of the line where it would be if constructed as required by its franchise; that the maintenance of said track as aforesaid has for two years next preceding the commencement of the action "and does still deprive plaintiff and her tenants of the use of the southerly half of said street, obstructed the use of the sidewalk in front of plaintiff's said property, obstructed ingress and egress to and from said property, endangered the lives and limbs of the plaintiff, her family, tenants, and the public at large, and has during all said time been and is still a public nuisance and a private nuisance to the plaintiff, has depreciated the rental value of plaintiff's said property, to the plaintiff's damage in the sum of $7,800." Judgment is prayed that the defendant's tracks in said block be adjudged to be a public nuisance, and a private nuisance to plaintiff, and that they be abated, and the defendant enjoined from maintaining its tracks and operating its cars thereon, and for damages in the sum of $7,800. The theory of the plaintiff is that the obstructions placed upon the public street by the defendant constitute a public nuisance, and that such nuisance is specially injurious to her. Anything which unlawfully obstructs the free passage or use in the customary manner of any public street or highway is a nuisance. Civ. Code, § 3479. "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Id. § 3480. "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." Id. § 3493.

The well-recognized rule in this state is that, in order for a private person to maintain his action for the abatement of a public nuisance, he must allege and prove that the injury to him is not only greater in degree, but different in kind from that suffered by the public at large. Any obstruction placed on a public street or highway would probably not affect any two individuals of that uncertain quantity known as the public in exactly the same degree. The person who had occasion to use the street every day would, of course, suffer more injury than one who only used it occasionally. We cannot find from the language of the complaint in this case that the plaintiff has suffered any injury different in kind from that suffered by every person who has had occasion to pass on the public street. The first statement is that the obstruction deprives plaintiff and her tenants of the use of the southerly half of the said street. This, if so, is equally true as to all other persons who have had occasion to use the southerly half of said street. The next statement is that the operation of the track obstructs the use of the sidewalk in front of plaintiff's property. It is not clear how the track and the operation of the cars upon it, more than four feet from the sidewalk, could obstruct the use of the sidewalk; but, if this is true, the same would be equally true as to every other person whose property is similarly situated and as to every person desiring to use this sidewalk. Then follows the statement that the operation of the cars and the maintenance of the track "has obstructed ingress and egress to and from said property, endangered the lives and limbs of the plaintiff, her family, tenants, and the public at large." The obstruction of ingress and egress to and from the plaintiff's property is not different in kind from that suffered by every other owner of property along the street in the vicinity of the alleged obstruction. The use of the street by any one, whether by operating cars upon, or driving teams over, or passing on foot along, the street, would obstruct ingress and egress to and from the property situated upon the street; and the same is true as to endangering the lives and limbs of plaintiff and her tenants. The lives and limbs of all persons who have occasion to use the sidewalk or street are more or less endangered by the use of the street for all other purposes, whether by driving teams over it, riding on horseback, or operating cars upon it. There is no allegation that the obstruction prevents the plaintiff from having access to and from her property, nor is it alleged that the track of defendant is above or below the surface of the street, nor that the cars stand upon it in front of plaintiff's property. We must therefore presume that the tracks are the ordinary car tracks of a street railway, and that the cars pass over and along the track 4 feet 2 inches from the line of the sidewalk in front of plaintiff's property at intervals, and that during the greater part of the time there are no cars passing in front of plaintiff's lot. Such obstruction clearly would not prevent the plaintiff from getting on or off her lot to the public street.

In Aram v. Schallenberger, 41 Cal. 450, it was held that a private individual could not maintain an action to abate a nuisance caused by obstructing a public highway, unless he showed special damages to himself. The court said: "No doubt a private individual may sue to prevent or abate a public nuisance; but he must always show some special damage to himself in addition to that received by the public. The rule is plain, and has always, so far as I know, been adhered to. * * * No special injury to their property is averred, and although from the facts stated we may conclude that the inconvenience to them will be greater than to the general public, it results simply from the more frequent occasion they may have to travel the road, and is of the same nature as would occur to any other person who might have occasion to use it." In Jarvis v. Santa Clara Val. R. R. Co., 52 Cal. 438, the defendant had obstructed the navigation of a navigable stream. The complaint alleged that the obstruction "was a nuisance and a perpetual obstruction to the navigation of the creek, and delayed the plaintiffs in the navigation of their vessel." It was held that the facts stated did not show damage "differing in kind and character from that suffered by members of the general public having occasion to use the navigable stream," and that the action would not lie. In Bigley v. Nunan, 53 Cal. 404, the obstruction consisted of a fence running lengthwise along the middle of the street, and connected by cross-fences with the side of the street opposite to the premises of plaintiff. It was held that the action by a private individual would not lie. The court said: "The access from plaintiff's lot to the street has not been cut off or impeded, and, if plaintiff or his immediate neighbors have more occasion to pass through the street than the public at large, this is an inconvenience in degree only, and is not an injury in kind different from that sustained by the public. The only damage complained of by plaintiff is that, by reason of the obstruction, his property is lessened and decreased in value. But it has been expressly held by this court that, in an action to recover special damages caused by placing an obstruction in the street opposite the residence of a plaintiff, evidence to show that the land would sell for less on account of the nuisance is not admissible." In Hogan v. Central Pacific R. R. Co., 71 Cal. 83, 11 Pac. 876, the defendant had placed an embankment and railway track along Sacramento street opposite plaintiff's property. It is said in the opinion: "The facilities and means of ingress and egress to and from plaintiff's land, and the free use and occupation thereof, were obstructed by the embankmant and track. * * * Plaintiff suffered no injury by reason of the construction and operation of the railroad different in character or kind from that which other landowners fronting on the line of the street have suffered. * * * We are of opinion the judgment in favor of defendant was proper and should be affirmed." See, further, San Jose Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. 250; Siskiyou Lumber Co. v. Rostel, 121

Cal. 511, 53 Pac. 1118; Canal v. Newcomb, 7 Metc. 276, 39 Am. Dec. 778; Fogg v. Nevada Co., 20 Nev. 429, 23 Pac. 840; Baker v. Selma Co. (Ala.) 33 South. 685; O'Brien v. Norwich & Worcester R. R., 17 Conn. 372; Thompson on Highways, p. 256, and cases cited.

The cases of Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82, and S. F. Savings Union v. R. G. R. Petroleum & Mining Company, 144 Cal. 134, 77 Pac. 823, 66 L. R. A. 242, are not inconsistent with what has been said. In Fisher v. Zumwalt the odors and stenches from the defendant's tanks polluted the atmosphere in and about the dwelling house of plaintiff; and the court held that the fact that it affected many other dwelling houses did not prevent a private person from bringing his action to abate it. The court said: "There is no doubt but that there are many nuisances which may occasion an injury to an individual from which an action would not lie by him in his private capacity, unless he can show special damage to his person or property differing in kind and degree from that which is sustained by other persons who are subjected to similar injury. Among such may be mentioned the invasion of a common and public right which every one may enjoy, such as the use of a highway, or canal, or public landing place. * * * In the one case the invasion is of a public right which injures many individuals in the same manner, although it may be in different degrees. In the other case no public or common right is invaded, but by the one nuisance the private rights and property of many persons are injured." In S. F. Sav. Union v. R. G. R. Petroleum Co., the obstruction prevented the plaintiff from access to the ocean. The court said: "An obstruction to navigation, in so far as it would prevent the plaintiff from the right to the free use of the public waters just as it would prevent every one else, would in one sense be an injury suffered alike by all the public. But the plaintiff has the right to free access from his land to the ocean. The obstruction of this right is a damage different in kind from that suffered by the general public, and in such case a private person may maintain his action." We know of no case, and none has been cited, where it has been held that an obstruction to a public highway may be abated by a suit at the instance of a private party, where the damage is not different in kind from that suffered by the public at large.

Plaintiff earnestly contends that the cases of Kishlar v. Southern Pacific R. R. Co., 134 Cal. 636, 66 Pac. 848, St. Clair v. San Francisco, etc., Ry. Co., 142 Cal. 647, 76 Pac. 485, and Smith v. Southern Pacific R. Co. (Cal.) 79 Pac. 868, are authority in support of this action. Those cases were all actions to recover damages, and not for the purpose of abating a nuisance. It has long been settled that under our present Constitution an abutting owner may maintain an action to recover the damage which he suffers through the occupation of a street by a railway company. Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149. These decisions are placed upon the constitutional provision that private property shall not be taken or damaged without just compensation to the owner. But the gravamen of this case is the abatement of a nuisance. It is alleged incidentally that the nuisance has depreciated the rental value of plaintiff's property to plaintiff's damage in the sum of $7,800. It is not alleged that the value of the property has been depreciated, but its "rental value." The nuisance may have depreciated the rental value of plaintiff's property, and yet not have damaged the plaintiff. In an action for damages, the plaintiff must show that he has sustained some injury for which he can recover damages, and the object of the action must be the recovery of such damages. We cannot, under the most liberal rules, hold that this is an action for compensation for "taking or damaging private property."

The judgment is affirmed.

We concur: HARRISON, P. J.; HALL, J.

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1 Cal. App. 259

HAYDEN v. COLLINS.

(Court of Appeal, Third District, California. July 5, 1905.)

1. Pleading—Cause of Action—Designation.

Where a complaint states any cause of action entitling plaintiff to any relief at law or in equity, it is immaterial that it does not properly designate the form of action alleged.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 109.]

2. Same—Ejectment.

A complaint alleging that plaintiff was the owner and entitled to the possession of the premises described, that defendant was a tenant at will; that his tenancy had been determined, and after due notice defendant had refused to surrender possession and remain in the occupancy of the premises, and praying for restitution of the premises, for treble damages, and for costs, stated a cause of action in ejectment.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 155.]

3. Same—Issues—Proof and Variance—Ownership.

Where a complaint stated a cause of action in ejectment, alleging plaintiff's ownership and right to possession, which was denied by the answer, an issue of title and right of possession was thereby tendered, on which evidence of plaintiff's ownership was admissible, though the action was erroneously styled an action of forcible entry and detainer.

4. Escrow—Deeds—Delivery.

Where defendant claimed that a deed to the property in question under which he claimed had been delivered in escrow, but the evidence did not show that the attorney to whom the grantor had delivered the deed in escrow understood that it had been delivered to him beyond the power of control of the grantor, and at her request such attorney without protest surrendered the deed to her, there was no delivery sufficient to sustain the conveyance.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escrows, § 5.]

5. DEEDS—DELIVERY AFTER DEATH OF GRANTOR.

A deed cannot be executed as a testamentary disposition, to be delivered after the grantor's death.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 123, 140, 141.]

6. SPECIFIC PERFORMANCE — AGREEMENT TO DEVISE—CONSIDERATION—SERVICES.

An agreement to make a testamentary disposition of property in consideration of services will not be enforced in equity until the services have been fully performed, and then not unless it appears that they cannot be adequately compensated in money.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 252.]

7. VENDOR AND PURCHASER — CONTRACT OF SALE—EVIDENCE.

Evidence *held* insufficient to establish an agreement by an incompetent to convey certain property to defendant by deed or will, in consideration of services.

8. LANDLORD AND TENANT—TENANT AT WILL.

Where defendant entered and remained in possession of certain real estate by permission of the owner, he became a tenant at will.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 403.]

9. EJECTMENT—PLEADING.

Where, in ejectment, defendant denied only that plaintiff, who was an incompetent, herself signed the notice to quit, such denial did not put in issue the service of such notice.

10. SAME—GUARDIAN—MOTIVE—EVIDENCE.

In ejectment to recover certain premises by the guardian of an incompetent, evidence of the guardian's motives, and his belief and desires, was immaterial.

11. SAME—CONVERSATIONS.

In ejectment by the guardian of an incompetent, conversations between the guardian and defendant and his wife, concerning an alleged agreement between defendant and the incompetent as to the property, were inadmissible.

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by Sarah C. Hayden, an incompetent, by A. L. Westing, her guardian, against F. H. Collins. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Rehearing denied by Supreme Court September 1, 1905.

A. H. Carpenter, for appellant. Nicol & Orr and E. P. Foltz, for respondent.

McLAUGHLIN, J. This action was brought to recover the possession of certain real property in the city of Stockton. The complaint was filed May 23, 1903, and the following facts are therein aptly and sufficiently stated: (1) The due appointment and qualification of the guardian; (2) that the action was brought in behalf of the incompetent; (3) "that said Sarah C. Hayden is, and was at all times herein mentioned, the owner, and is now entitled to the possession, of the premises"; (4) that on September 24, 1901 defendant "became a tenant at will of said premises," and "that he was at all times herein mentioned, and now is, in possession thereof"; (5) that on April 2, 1903, said defendant was served with a notice in writing, signed by said incompetent, by her said guardian, requiring said defendant to quit said premises, and to deliver up possession of the same, on or before May 3, 1903; (6) that on May 19, 1903, defendant was served with a similar notice, requiring him to quit and deliver up possession of said premises within three days after such notice; (7) "that said defendant has refused and neglected, and still refuses and neglects, to quit said premises, and still occupies the same"; (8) that the monthly rental value of the property is $15. The prayer was for restitution of the premises, for treble damages and costs of suit.

The demurrer was properly overruled. The arguments of counsel and the authorities cited go to the sufficiency of the pleading as a complaint in forcible entry and detainer, or unlawful detainer. We are not concerned with technical questions as to the proper designation of an action. It is for us to determine whether the complaint states any cause of action entitling the plaintiff to any relief at law or in equity. Reiner v. Schroeder (Cal.) 80 Pac. 517; Rogers v. Duhart, 97 Cal. 505, 32 Pac. 570; Grain v. Aldrichs, 38 Cal. 521, 99 Am. Dec. 423; Walsh v. McKean, 75 Cal. 522, 17 Pac. 673. In the complaint before us it is alleged that plaintiff is the owner and entitled to the possession of the premises, that the tenancy at will had been determined, and that defendant, after due notice, refused to surrender possession and remained in the occupancy of said premises. These averments state a cause of action in ejectment, and the prayer is for the relief which may be granted in such an action. Civ. Code, § 3345; McKissick v. Ashby, 98 Cal. 424, 33 Pac. 729; Wise v. Eveland, 134 Cal. 617, 66 Pac. 1082; Holloway v. Galliae, 47 Cal. 476; Payne v. Treadwell, 16 Cal. 243; McCarthy v. Yale, 39 Cal. 586; Moore v. Morrow, 28 Cal. 554. In the absence of any ambiguity or uncertainty, it is no objection that the facts stated may also show a cause of action in unlawful detainer, or, mayhap, to quiet title. Adams v. Helbing, 107 Cal. 302, 40 Pac. 422; Brison v. Brison, 90 Cal. 329, 27 Pac. 186. The defendant, answering, denied that plaintiff was the owner or entitled to possession, and set up title in himself under a conveyance executed by the incompetent August 24, 1902. He also claimed under an agreement to convey and make testamentary disposition to him of this and other property. The agreement so pleaded was considered by this court in another proceeding between the same parties, and it is therefore unnecessary to give its terms here. See Estate of Hayden (decided May 29, 1905) 81 Pac. 668. The cause was tried without a jury, and the court found in accordance with the averments of the complaint and against the averments contained in the answer. Judgment was entered decreeing that plaintiff have and recover possession with $15 damages and costs. The judgment also recited that the plaintiff was entitled to a writ of possession. From this judgment the plaintiff appeals upon a bill of exceptions.

It is first contended that the court erred in admitting evidence pertinent to, and finding on, the question of ownership. This contention is based on the proposition that the title is not involved, and that evidence to show ownership is not admissible in actions of forcible entry and detainer or unlawful detainer. Conceding the premise, the conclusion does not follow. Title and right of possession are certainly involved in the case at bar. The parties made the issues, and the court could not limit the scope of the inquiry nor refuse to find on questions so clearly in dispute. We have seen that the pleadings presented a case in ejectment, and, no matter what the action might be styled or called, the court was compelled to admit the evidence and find on the issues so pointedly presented for trial and decision. Marshal v. Shafter, 32 Cal. 191; McCarthy v. Brown, 113 Cal. 18, 45 Pac. 14; Eva v. Symons, 145 Cal. 202, 78 Pac. 648; Nuttall v. Lovejoy, 90 Cal. 167, 27 Pac. 69; Estate of Toomes, 54 Cal. 517, 35 Am. Rep. 83.

The case was evidently tried on the theory that title and right of possession were both involved, for the next contention of appellant to be noticed is that the finding that plaintiff owns the property is not sustained by the evidence. This point is so intimately connected with assaults on the findings touching the deed and agreement relied upon by appellant that all of these questions will be considered together. It is claimed that the evidence shows title and right of possession in appellant. This contention rests on the assumption that the existence and validity of both the deed and agreement were established. It seems to be admitted that the title is in plaintiff, unless it passed under one or the other of these alleged transfers or contracts.

The evidence relating to the execution of and property conveyed in the deed is far from satisfactory; but, granting that it was sufficient in form and substance, still it could not, and did not, pass title. Delivery with intent to pass title is essential to a valid conveyance of real property. Black v. Sharkey, 104 Cal. 280, 37 Pac. 939; Kenney v. Parks, 137 Cal. 531, 70 Pac. 556. Appellant admits that the deed was never delivered to him, but seems to rely on a delivery in escrow; but it is absolutely essential to the validity and effectiveness of a deed in escrow that it be delivered to a third person for the grantee, beyond any power in the grantor to recall or revoke it. The grantor must clearly and unequivocally evidence an intent and purpose to part with the possession and control of the deed for all time. In short, the delivery and transfer must be irrevocable. Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Kenney v. Parks, 125 Cal. 146, 57 Pac. 772; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300. Such was not the case here. The lawyer who drew the deed, and who says he held it to be delivered on the death of the grantor, could not remember anything Mrs. Hayden said touching this point so vital to the validity of an escrow. He evidently did not understand that it had been delivered to him beyond any power of recall, for he gave it to the grantor with other papers in his possession, upon her request, and apparently without protest or question. Mrs. Hayden certainly understood that it was under her control, for she did recall it, and when last seen it was in her possession. Then there is another salient fact, not only pointing to the intent and purpose of the grantor, but showing the utter impotency of this alleged conveyance. The lawyer does remember that it was distinctly understood that the deed was not to take effect until after Mrs. Hayden's death. This clearly shows that there could have been no such delivery as is requisite to the validity of any deed. If that deed was not effective as a conveyance during the life of the grantor, it could not become quick with life the moment she died. If delivery with intent to pass title was not accomplished in life, it certainly could not be accomplished after death. When annihilation as to this world and its concerns comes upon a person, all power to act is gone, and it is the wise policy of the law to frown upon any attempt to retain in eternity the power over property enjoyed in life. The law does not allow a testamentary disposition by deed. The deed which falls from hands palsied by death is void, and equally void is any deed which remains under the control of the grantor until the cord of such control is severed by the final call. The essential element of delivery while power to deliver remains cannot be dispensed with. If the title does not vest when the deed is delivered, it does not vest at all.

The undisputed evidence shows that this was never intended, and therefore if the deed was ever made it did not pass title. It seems clear, however, that no agreement to make testamentary disposition of this or any other property was shown. Such agreements must be established by clear and convincing evidence. The services to be performed by the beneficiary must be such that they cannot be adequately compensated in money, and they must be fully performed by such beneficiary before full performance can be enforced. Owens v. McNally, 113 Cal. 451, 45 Pac. 710, 33 L. R. A. 369; McCabe v. Healy, 138 Cal. 86, 70 Pac. 1008. The evidence here is vague and unsatisfactory. Appellant seems to be at sea touching its most essential terms. He is sure that he was to get certain property, but whether he was to get title by present conveyance, by parol gift, by deed in escrow, or by will, is more than he can say. A thorough analysis and study of the evidence convinces us that nothing was said or done to indicate an agreement. There was no meeting of minds on any definite proposition made by any of the parties. Nothing is indicated more than that Mrs. Hayden at one time probably intended to remember appellant in her will, or "do something for him." He came there at her request and lived with her. He had her house rent free, the use of wood furnished from her property, and pursued the even tenor of his way, working at his trade most of the time. In fact, it seems that he went about his business in the usual way and devoted but little time to her or her concerns. True, he boarded her for a time, but it seems that he kept an account against her for articles furnished. We are left groping touching the causes which induced a change; but it appears that about February 1, 1903, Mrs. Hayden employed a servant, who waited upon her and cooked for her employer and herself. Mrs. Hayden paid for the provisions and paid the servant. This and more is gleaned from his evidence, and from the same source we derive the knowledge that she was to give him the property if she wanted to, that everything was dependent on her will.

From the foregoing it is apparent that there was no agreement, and that, if there was, he failed in the performance thereof; but, conceding that such an agreement existed, we have been cited to no law giving countenance to the proposition that an agreement of this kind could operate to deprive the incompetent of her property, or any rights pertaining thereto, during her lifetime. Equity will enforce the full performance of such contracts where the beneficiary has fully performed his part of the agreement; but it will never compel performance by one party when there can be no certainty that the other party even intends to carry out the promises made by him. To tie up her property and deprive her of its enjoyment and use, while he remained free to do as he pleased, would be intolerable. O'Brien v. Perry, 130 Cal. 528, 62 Pac. 927; Civ. Code, § 3390. Equality is equity, and there could be no equality of benefits or burdens if onerous restrictions were imposed upon one party to the agreement, while the other could perform or repudiate according to his pleasure, interest or whim. From the negative pregnant in the answer, aided by the decree of distribution introduced in evidence, it follows that the title was in Mrs. Hayden; and this, coupled with the above considerations as to the invalidity of both deed and agreement, points to the conclusion that the findings relating to ownership, possession and the agreement are fully sustained by the evidence. The appellant entered and remained in possession by permission of the owner. This made him a tenant at will. Jones v. Shay, 50 Cal. 509; Wood on L. & T. p. 48. The appellant did not deny that the notices to quit were served. His denial went only to the fact that Mrs. Hayden did not herself sign the notices.

We regard the other findings and all evidence relating to them as entirely immaterial. The motives of the guardian, what he believed or desired, had nothing whatever to do with the issues to be tried. There could be no prejudicial error if the findings and rulings in this regard were all wrong. Clavey v. Lord, 87 Cal. 421, 25 Pac. 493; Costa v. Silva, 127 Cal. 354, 59 Pac. 695; Grimbley v. Harrold, 125 Cal. 31, 57 Pac. 558, 73 Am. St. Rep. 19; Corker v. Corker, 87 Cal. 651, 25 Pac. 922. The rulings on evidence relating to the execution and contents of the alleged deed were more than liberal to appellant. No doubtful question as to the admissibility of such evidence was resolved against him. The conversations between the guardian and Mr. and Mrs. Collins concerning the agreement were inadmissible. The self-serving declarations of either husband or wife would be plainly irrelevant, and if they were against appellant's interest the rulings were not prejudicial. The guardian had testified that he had never talked with Mrs. Hayden about the matter, and knew nothing concerning it. It is obvious from this that anything he might say could not deprive his ward of her property or rights. The other rulings on evidence were so clearly right that it could serve no good or useful purpose to dwell upon them.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

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ROGERS v. BYERS.

(Court of Appeal, Third District, California. July 6, 1905.)

COMPLAINT—AMENDMENT—DIFFERENT CAUSE OF ACTION—LIMITATIONS.

Where an original complaint was based on an alleged unconditional promise to pay, and, the proof establishing a conditional promise, a judgment in favor of plaintiff was reversed, whereupon, after limitations had run, the complaint was amended, so as to state a cause of action on a conditional promise, the second cause of action was not the same as that alleged in the original complaint, and was barred.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 545.]

Appeal from Superior Court, Lassen County; F. A. Kelly, Judge.

Action by L. H. Rogers against J. D. Byers. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Rehearing denied by Supreme Court September 4, 1905.

Garoutte & Goodwin, for appellant. E. V. Spencer, N. J. Barry, and A. D. Burroughs, for respondent.

McLAUGHLIN, J. Upon a former appeal in this case, the judgment and an order denying a new trial were reversed, because there was a fatal variance between the allegations of the original complaint and the proofs. Rogers v. Byers, 127 Cal. 531, 60 Pac. 42. It was there held that certain letters contained conditional promises to pay, and did not support the averments of the complaint. After the remittitur was filed in the court below, the plaintiff amended her complaint by declaring upon such conditional promises in separate counts. In other words, she stated three causes of action, each of which rested on a letter from defendant containing a conditional promise to pay a certain note. The defendant died before the trial, and the executor of his last will was substituted as defendant in this action. The executor, answering, denied the allegations of the amended complaint, and as a separate defense alleged that each cause of action stated therein was barred by the provisions of section 337 of the Code of Civil Procedure. The court found for plaintiff on all of the issues, and, judgment having passed for plaintiff, the defendant appealed.

In the bill of exceptions, plaintiff specifies many particulars in which the evidence is insufficient to sustain the findings. The main question argued in the briefs arises from the attack on the finding in respondent's favor on the statute of limitations. It is conceded, and under the evidence it must be held, that, if the causes of action stated in the amended complaint are new and different from the cause of action stated in the first instance, then the finding in question is erroneous. We think the former decision is absolutely conclusive upon this question.

The letters upon which the causes of action stated in the amended complaint are based, were there held to be irrelevant, and not germane to the cause of action originally pleaded. If there was an absolute failure of proof, and the proof consisted of these letters, it follows that any cause of action based on such proof must be foreign to the cause of action stated at the outset. If, as was there said, the former pleading was predicated upon "one promise," and the letters evidenced "another and different promise," it needs no more than the mere statement of the proposition to show that the causes of action are different. If the causes of action were the same, then certainly the evidence which would sustain one would sustain the other, and vice versa. The Supreme Court having said that the original action was based upon an unconditional promise to pay, and that the letters contain only conditional promises to pay, it follows, necessarily, from such ruling, that the causes of action stated in the amended complaint are new and different from the cause of action originally pleaded. The causes of action stated in the amended complaint having accrued more than five years prior to the filing of said complaint, they were barred by the statute of limitations, and the finding to the contrary is, therefore, not sustained by the evidence.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

PEOPLE v. MOLLARD. (Court of Appeal, Second District, California. August 3, 1905.) Appeal from Superior Court, San Diego County; E. S. Torrance, Judge. Thomas A. Mollard was convicted of seduction, and appeals. Reversed. E. E. Capps and G. H. P. Shaw, for appellant. U. S. Webb, Atty. Gen., J. C. Daly, Deputy Atty. Gen., Cassius Carter, Dist. Atty., and W. R. Andrews, Asst. Dist. Atty., for the People.

SMITH, J. The defendant was convicted in the lower court of the crime of seduction under promise of marriage. He appeals from the judgment and from an order denying his motion for a new trial. Several objections to the introduction of testimony appear in the transcript, which, it is confessed by the Attorney General, are well taken; and in this we agree. The judgment and order appealed from are reversed.

We concur: GRAY, P. J.; ALLEN, J.